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Avoid the crowd. Do your own thinking independently.
Be the chess player, not the chess piece.

—Ralph Charell

Introduction: Japanese Corporate Law and Its Reform

This Article aims to assess the claim that three countries – Italy, Japan and Portugal – present a tripartite,[1] Latin, classic,[2] and hybrid,[3] model of corporate governance.

In general, Japanese law seems an "exotic variation of Roman-Germanic models," affected by United States legal models transplanted after World War II, while at the same time, presenting original features related to the history, evolution, and economic and social legacy of both Buddhist and Confucian philosophies.[4]

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1. This model can be renamed as "tripartite", since it is characterized by (1) the general shareholders' meeting, (2) the board of directors, (3) and the board of auditors. It is also defined as traditional or Latin although these adjectives are less effective, as observed in Giuseppe Benedetto Portale, *La Corporate Governance delle Società Bancarie* [*The Corporate Governance of Banking Companies*], 61 Rivista Delle Società 48, 48–63 (2016) (It.)

2. Paolo Ferro-Luzzi, *L'esercizio D'impresa tra Amministrazione e Controllo* [*The Exercise of Company Management and Control*], 12 Analisi Giuridica dell'Economia 231, 241 (2007) (It.).

3. The empirical analysis, based on the sample of OECD countries, as well as Argentina, Brazil, China, Hong Kong, Saudi Arabia, and Singapore, is mentioned both in Simone Alvaro et al., *Modelli di amministrazione e controllo nelle società quotate: Aspetti comparatistici e linee evolutive* [*Corporate Governance Alternative Systems in Italian Listed Companies: Comparative Aspects and Trends*] 86 (May 9, 2015), http://papers.ssrn.com/abstract=2630561 (It.) and Guido Ferrarini, Professore Ordinario di Diritto Commerciale, Università degli Studi di Genova, Quali modelli di amministrazione e controllo per le aziende italiane? [Which are the best Management and Control Models for Italian Companies?] at the European House Ambrosetti L'Osservatorio sull'eccellenza dei Sistemi di Governo in Italia - Workshop: Le aree di fontiera della corporate governance (Nov. 17, 2015) (It.)).

4. Andrea Ortolani, *Giappone (Diritto Moderno)* [*Japan (Modern Law)*], *in* Digesto delle Discipline Privatistiche Sezione Civile [Digest of Private Law Disciplines Civil Divi-

In 1899, the Commercial Code was drafted and extensively drew from the *Allgemeines Deutsches Handelsgesetzbuch* – drafted in 1861. Then, following World War II,[5] numerous scandals, frauds, tensions, and problems casted doubt on Japanese corporate governance and, thus, led to several reforms in the Japanese economy in recent years.[6] Important reform were influenced[7] by Anglo-Saxon techniques, especially in 2002-2003, 2004 (regarding the Code of Corporate Governance), 2006 (the year in which the Corporate Law Reform was elaborated)[8] and, recently,[9] in the 2014-2015 periods.[10]

SION] 435 (R. Sacco ed., 4th ed. 2011) (It.); Charles R. Stevens, *Japanese Law and the Japanese Legal System: Perspectives for the American Business Lawyer*, 27 BUS. L.1259 (1972).

5. Takaya Seki & Thomas Clarke, *The Evolution of Corporate Governance in Japan: The Continuing Relevance of Berle and Means*, 37 SEATTLE U. L. REV. 717, 722 (2014).

6. Mark D. West, *Why Shareholders Sue: The Evidence from Japan*, 30 J. LEGAL STUD. 351–82 (2001).

Since the burst of the economic "bubble" in the early 1990s, the situation in Japan has been changing. The influence of main banks in corporate finance has declined, and sparked substantial unwinding of stable cross-shareholdings since the mid-1990s. Gregory Jackson, *Toward a Comparative Perspective on Corporate Governance and Labour Management: Enterprise Coalitions and National Trajectories* 5, 18 (Research Inst. of Econ., Trade & Indus., RIETI Policy Discussion Paper Series, Paper No. 04-E-023, 2005), http://www.rieti.go.jp/jp/publications/dp/04e023.pdf. Cross-border mergers and acquisitions have also risen. Japan reformed corporate governance rules several times and promoted the role of outside directors and company auditors, so that its corporate governance gradually became more shareholder-oriented, notwithstanding the fact that such changes provoked conflicts with employees. Julen Esteban-Pretel et al., *Changes in Japan's Labor Market Flows due to the Lost Decade* 12 (Research Inst. of Econ., Trade & Indus., RIETI Policy Discussion Paper Series, Paper No. 11-E-039, 2011), http://www.rieti.go.jp/jp/publications/dp/11e039.pdf; Jackson, *supra* note 6, at 19.

7. "The lack of universal solutions for management problems does not mean that countries cannot learn from each other. Looking over de borders is one of the most effective ways of getting ideas for management. But their application calls for prudence and judgment." Willem J. L. Calkoen, The One-Tier Board in the Changing and Converging World of Corporate Governance: A Comparative Study of Boards in the UK, the US and the Netherlands 14 (Oct. 10, 2011) (unpublished doctoral thesis, Erasmus Universiteit Rotterdam) (on file with Erasmus Universiteit Rotterdam).

8. See mainly as to shareholder protections and national security concerns, *Further Revision of M&A Legislation is Needed*, NIPPON KEIDANREN [JAPAN BUSINESS FEDERATION] (Dec. 12, 2006), https://www.keidanren.or.jp/english/policy/2006/085.html; *Reasonable Defense Measures against Takeovers Detrimental to Corporate Value Are Needed*, NIPPON KEIDANREN [JAPAN BUSINESS FEDERATION] (Nov. 16, 2004), https://www.keidanren.or.jp/english/policy/2004/085.html; Kenichi Osugi, *Transplanting Poison Pills in Foreign Soil: Japan's Experiment*, *in* TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA 36 (Hideki Kanada et al. eds., 2008); Esteban-Pretel et al., *supra* note 6, at 51; Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171 (2005).

9. In the meantime, in May 2012, the Research Institute of Economy Trade and Industry, one of the leading Japanese policy think tanks, conducted comprehensive "questionnaire research regarding corporate governance of Japanese companies." *Questionnaire on Corporate Governance of Japanese Companies*, Research Inst. of Econ., Trade & Indus. (RIETI), http://www.rieti.go.jp/jp/projects/research_activity/governance/data/survey_results.pdf (last visited Feb. 5, 2017). The results indicated the reality of the weak aspects of governance, including the compensation of directors, the personnel affairs of representative directors, and the role of outside director. *Id.*

Beginning in 2003, corporations could opt for different structures:[11] (i) *Gomei Gaisha* (general partnerships); (ii) *Goshi Gaisha* (limited partnerships); (iii) *Yugen Gaisha* (limited liability companies, according to the model of the German *GmbH*, with more than 50 stakeholders and minimum registered capital of 3 million Yen, divided into stocks, managed by a Board of Directors (even if composed by sole director) and with auditors); and (iv) *Kabushiki Gaisha* (joint-stock companies, with a minimum share capital of 10 million Yen). Japanese corporate law experienced a far-reaching, substantial change, intended to allow companies to opt for a system of governance "with committees."[12] However, more than ten years after its introduction, such models have not offer the desired results, as seen among one-tier and two-tier models, such as in the Italian context.

The following year, conforming to international best practices,[13] the Tokyo Stock Exchange (TSE) introduced "Principles of Corporate Governance for Listed Companies," revised in 2009, and again in 2015. For corporations listed in the first and second segments of the TSE, they are required to explain their decision not to apply these principles. For corporations listed in the JASDAQ Securities Ex-

10. In November 2013, the reform bill of the Japanese Companies Act was finally approved in a Cabinet meeting and submitted to the ordinary Diet Session, therefore satisfying the requests by institutional investors, who often criticized the weakness of corporate governance of listed Japanese companies in relation to the fact that the number of outside directors is quite small compared to listed companies in other developed countries. *See ACGA Statement on Corporate Governance Reform in Japan*, ASIAN CORP. GOVERNANCE ASS'N (2009), http://www.acga-asia.org/public/files/ACGA_Japan_Statement_2009_Dec15_English.pdf.

11. It is the first time for Japanese corporate law to permit companies to choose their governance system. The major reasons for reluctance of Japanese companies in choosing the new model are (i) the resistance against independent directors' strong power on the appointment of directors under the new model; (ii) the lack of resources of independent directors.

12. Ronald J. Gilson & Curtis J. Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance*, 53 AM. J. COMPANY L. 343 (2005). Any committee aims to enhance the expertise of directors in a certain area and "to focus the responsibility for decisions in those areas on a smaller number of people." MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 82 (1995). Regulatory authorities required companies to introduce them. For instance, since 1978, the New York Stock Exchange required audit committees with a majority of outside directors for listed companies. Audit committees are responsible to assist board oversight on the integrity of financial statements, the compliance of the corporation with both legal and regulatory requirements, and the independent auditor's qualification and independence.

13. External influences are also evident in the Japanese system, in SIMON LEARMOUNT, CORPORATE GOVERNANCE: WHAT CAN BE LEARNED FROM JAPAN?; (2002); LUKE NOTTAGE ET AL., CORPORATE GOVERNANCE IN THE 21ST CENTURY: JAPAN'S GRADUAL TRANSFORMATION [IS THIS A JOURNAL PUBLICATION? (2008); Christina L. Ahmadjian, *Changing Japanese Corporate Governance*, 28 JAPANESE ECON. 59 (2000); Takaya Seki, *Legal Reform and Shareholder Activism by Institutional Investors in Japan*, 13 CORP. GOVERNANCE INT'L REV. 377 (2005).

change, they are only required to provide reasons for not applying the general principles contained therein.

In 2006, after multiple updates, the overall reform of the Companies Act (Law 26 July 2005, No. 86)[14] took effect. The Act was aimed at substantially increasing competitiveness of Japanese companies in terms of governance, compared to competitors,[15] with particular attention to groups of companies.[16] While the first two structures remain unaffected, the *Yugen Kaisha* (similar to the *GmbH*) was replaced by limited liability companies, similar to American limited liability companies.[17] The goal was to solve eventual problems between owners and directors of the business (*Godo-Kaisha*), and by joint-stock companies, whose minimum share capital amounts to 1 Yen, either open or closed, due to the eventual transferability of shares (*Kabushiki Kaisha*).

In 2007,[18] new comprehensive reform developed in the field of mergers, acquisitions, public offerings, and insider trading, mainly through the *Financial Instruments and Exchange Law*; however, this analysis does not fall within the present Article. Still, in short, it consolidates the regulation of the financial market.

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14. Tomotaka Fujita, *Modernising Japanese Corporate Law: Ongoing Corporate Law Reform in Japan*, 16 SING. ACAD. L. J. 321 (2004); Eiji Takahashi & Madoka Shimizu, *The Future of Japanese Corporate Governance: The 2005 Reform*, 19 J. JAPANESE L. 35 (2005).

15. Takanobu Takehara & Takafumi Nihei, *Corporate Governance Enters a New Era*, 25 INT'L FIN. L. REV. 44 (2006) (Takanobu Takehara and Takafumi Nihei of Nishimura & Partners outline how corporate governance will change when the Corporate Law comes into force.).

16. Eiji Takahashi, *Japanese Corporate Groups under the New Legislation*, 3 EUR. COMPANY FIN. L. REV. 287 (2006); Gen Goto, *The Outline for the Companies Act Reform in Japan and its Implications*, 35 J. JAPANESE L. 13 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2348554. Even if not considered by the reform the groups of companies doctrine and the responsibility issues connected to them are, however, still a matter of debate, as proved by E. Takahashi & T. Sakamoto, *Japanese Corporate Law: Important Cases in 2010,* 31 J. JAPANESE L. 249, 251 n.38 (2011).

17. Several authors address the topic of "Americanization" of Japanese company law. *See*, *e.g.*, Hiroshi Oda, *The "Americanisation" of Japanese Corporate Law?–American Freedom, Japanese Discipline*, 69 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 47 (2005); R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese law*, 23 U. PA. J. INT'L ECON. L. 269 (2002). Some Authors claim that "[f]ull-scale 'Americanisation of Japanese law' seems equally, if not more, implausible. Indeed, aspects of Japanese private law may be undergoing a new round of 'Europeanisation' and more idiosyncratic globalization." NOTTAGE ET AL., *supra* note 13. Other authors compare the *modus cogitandi* between the two contexts. *See*, *e.g.*, Walter Gellhorn, *Impressions of Japanese Legal Training*, 58 COLUM. L. REV. 1239 (1958). Whereas different authors, instead, analyze the degree of convergence between the Japanese and Western legal systems, Dan W. Puchniak, *The Japanization of American Corporate Governance? Evidence of the Never-Ending History for Corporate Law*, 9 ASIAN-PACIFIC L. & POL'Y J. 7 (2007).

18. Robert Eberhart, *Corporate Governance Systems and Firm Value: Empirical Evidence from Japan's Natural Experiment*, 6 J. ASIA BUS. STUD. 176 (2012).

In 2011, two major scandals with significant governance implications occurred in Japan. First, firms were criticized for not having boards capable of ferreting out and preventing unlawful behavior by their top executives. The *Daio Paper* scandal (*Daioseishi Kabushiki Gaisha*) involved controlling shareholder looting, in which conflicts of interest existed between minority shareholders and controlling shareholders who were founding family members and, at the same time, engaged in management.[19] In contrast, the *Olympus* case is a "hybrid" management cover-up scandal, in which conflicts of interest existed between dispersed shareholders and managers who do not have block shareholding.[20]

In May 2015, the Companies Act, Law 27 June 2014, No. 90, elaborated within the Japan Revitalization Strategy, entered into force.[21] Once again, it attested the attention of the legislator for corporate governance issues, namely: (i) the need to appoint outside directors,[22]

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19. The basic information of Daio Paper is available at Kelemen & Sibbitt, *supra* note 17. *See also* Hideaki Miyajima, Faculty Fellow, Research Inst. of Econ., Trade & Indus. (REITI), Speech at the RIETI Brown Bag Lunch Seminar: *Orinpasu Daio Seishi jiken kara nihon no kigyo tochi no shorai o kangaeru* [*Considering the Future of Corporate Governance in Japan: From the Olympus and Daio Paper Scandals*] 12 (Jan. 28, 2012) (the speaker underlines that this case suggests the following issues: audit firm did not work; the absence of outside directors might create governance issues of prime importance; monitoring subsidiary's management by parent company's shareholders is essential).

20. *See* Miyajima, *supra* note 19, at 16. This case suggests the following issues: the practice of appointing managers is widespread; independence and ability/specialty of outside directors are essential; the function of audit firm is out of dispute and the role of capital market as a gate keeper is extremely important. Disclosure of alleged M&A transactions were insufficient and, therefore, market monitoring did not work.

21. It worth noting that political forces, such as the relative power of left versus right, account for the differences in choice of corporate governance models among advanced industrial countries. Where social democracy is strong, shareholder rights are weak and shareholder diffusion is low. Social democracy gives voice to claims on the firm in addition to those of the shareholders: employee job security, income distribution, social welfare, social stability, and nationalism. To counter these competing claims, block holders resist the diffusion of shares in order to maintain leverage in the boardroom and investors shy away from a system in which they lack protection or dominance. According to this, Japanese corporate governance and ownership fit in with the way post-war Japan settled social conflicts. *See* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT 93, 165 (2006).

22. In the sphere of company law, after the 2014 reform, a director is defined as "outside director" if he neither now is and, in the previous ten years, was an executive officer (*gyomushikko-torishimariyaku*), a manager or an employee of the company (or any of its subsidiaries), nor their spouses and relatives within the second degrees of affinity. Ex-bank directors, as well as corporate executives and government officials often are a source of outside directors of Japanese firms. On the one hand, ex-bank directors do not dominate corporate governance, especially if the firm has fewer mortgageable assets and when it is in the services and finance industry. On the other hand, corporate executives are mainly used then firms have a dominant shareholder. *Cf.* Yoshiro Miwa & J. Mark Ramseyer, *The Value of Prominent Directors: Corporate Governance and Bank Access in Transitional Japan*, 31 J. LEGAL STUD. 273 (2002); Steven N. Kaplan & Bernadette A. Minton, *Appointments of Outsiders to Japanese Boards: Determi-*

(ii) the promotion of board diversity, and therefore, the appointment of women to hold managerial and executive positions, (iii) the introduction of a joint-stock companies with audit committees, on which this Article will focus.

"The role of law in Japan, which was largely overlooked in the traditional view of Japanese society, [gradually assumed] far greater importance due to significant changes. . . [occurred, as] the Meiji restoration in the 19th century and the immediate post-World War II era. . . . Nevertheless, the change is real."[23]

In February 2014, the Japanese Financial Services Agency (FSA) published the final version of the Stewardship Code, in order to improve the average yield on long-term investments for customers and beneficiaries.[24]

In June 2015, a major revision of the Code of Corporate Governance for Japanese companies occurred,[25] which attempted to create a sustainable governance development and increasing of the corporate

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nants and Implications for Managers, 36 J. FIN. ECON. 225, 232 (1994). As to government officials, to some extent, they often obtain such position in the industry that their previous agencies regulate, in order to informally influence such industry and to have informal connections with their regulators, even if, as a matter of fact, they normally play a role only in the construction or banking industry; to some other extent, they represent a form of collusion between the regulator and banks that endangers the safety net mechanism in Japan. *See id.* at 226; Akiyoshi Horiuchi & Katsutoshi Shimizu, *Did Amakudari Undermine the Effectiveness of Regulator Monitoring in Japan?*, 25 J. BANKING & FIN. 573 (2001). Needless to say, the restriction introduced by the reform bill, increasing the standards for outside directors are expected to enhance the independence of outside directors.

23. Bruce E. Aronson, *Reconsidering the Importance of Law in Japanese Corporate Governance: Evidence from the Daiwa Bank Shareholder Derivative Case*, 36 CORNELL INT'L L. J. 11, 56–57 (2003). For example, "it would surely be difficult today to find a Japanese executive who felt comfortable focusing only on informal relationships and with his main bank, keiretsu, and government ministry, while ignoring the formal legal duties of board members, derivative suits, D&O insurance, lawyers, and compliance with law." *Id.* at 57

24. *See Principles for Responsible Institutional Investors: 'Japan's Stewardship Code'*, FIN. SERVS. AGENCY, THE JAPANESE GOV'T, http://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf (last visited Feb. 5, 2017).

25. TOKYO STOCK EXCH., JAPAN EXCH. GRP., JAPAN'S CORPORATE GOVERNANCE: SEEKING SUSTAINABLE CORPORATE GROWTH AND INCREASED CORPORATE VALUE OVER THE MID- TO LONG-TERM (2015), http://www.ecgi.org/codes/documents/japan_cg_code_1jun15_en.pdf; *see also* Press Release, Assonime, *Circolare n. 31, Le novità del Codice di autodisciplina 2015 per la* governance *delle società quotate* [*Circular No. 31: The Novelties in the 2015 Corporate Governance Code for Governance of Listed Companies*] (Nov. 6, 2015) (It.), http://www.assonime.it/AssonimeWeb2/dettaglio.jsp?id=262032&idTipologiaDettaglio=451 (The next version of the document is expected to be published in July 2017, then, every two years.); Piergaetano Marchetti, Professor Emeritus, Bocconi Univ., Speech at the European House – Ambrosetti Workshop: Le Aree di Frontiera della Corporate Governance L'Osservatorio sull'Eccellenza dei Sistemi di Governo in Italia [The Border Areas of Corporate Governance. Observatory on Excellence in Systems of Government in Italy] (Nov. 17, 2015) (It.) (Speech is titled *Alcune novità introdotte nell'ultima revisione del Codice di Autodisciplina* [Some New Features Introduced in the Latest Revision of the Code: the Whistleblowing and Succession Plans]).

value in the long run. This revision is perfectly integrated in the articulated renewal of the entire discipline. The Code intended to: (i) affect the gradual decision-making process of companies, (ii) stimulate entrepreneurship,[26] (iii) promote sustainable growth, (iv) focus on the rights of shareholders and on the equal treatment among them, and (v) enhance proper cooperation amongst stakeholders through transparency in communications, responsibilities within the Board and engagement of shareholders.

As to governance, articulated in Principle 4 of the Code of Corporate Governance, it worth noting that the Code does not express opinions or preferences on the use of one specific governance model. On the contrary, it formulates the basic governance elements in the broadest and most inclusive way.

The board appoints and removes the management, sets fees, decides business strategies, evaluates the adequacy of the risks assumed by the senior management, verifies and effectively supervises the decisions of the management body, takes an outside perspective in terms of social information, also with regard to non-financial information. Under Principle 4.8, the Code hopes that listed companies appoint at least two independent directors and that, optionally, at least one third of the directors are independent, and under Principle 4.9, it also hopes that compliance with Principle 4.8 is in harmony with the standards of independence set by the National Stock Exchange; the aim is that both outside and independent directors are efficiently used[27] and de-

26. Horiuchi & Shimizu, *supra* note 22.

27. TOKYO STOCK EXCH., *supra* note 25, at 21-22. Notwithstanding the fact that there is no established definition of "independent directors" and "the definition of independent varies somewhat depending on who is advocating this reform" *Id.*, a director is considered to be "independent" if there is no evidence of conflict of interest, of material, financial or relationship of any kind with the company, with its executives, with other members of the Board of Directors, with shareholders holding at least 10% of the voting capital, or with main banks. Moreover, in case of cross-shareholdings, affiliated parties to such agreements will also be considered "non independent."The Tokyo Stock Exchange (TSE) Securities Listing Regulation now requires issuers to appoint at least one independent director and to report on his/her status, revealing if: (i) he/she is (or ever was) an executive of the parent company or subsidiary; (ii) he/she receives substantial monetary benefits from the company for his/her professional services, in addition to remuneration for the position in the board of directors; (iii) it holds significant stakes in the company; or (iv) it is bound by personal relationships to executives, affiliates, major shareholders or professional service providers. *See* Securities Listing Regulation, Reg. No. 1 – 826 of 2016 (Japan), http://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/securities_listing_regulations_(r1-r826)_20161104.pdf. According to the regulation, the directors who possess such a relationship may still be qualified as independent members by the company, in case the corporation provides explanations on their independence and objectivity.Japan certainly registered a significant delay in the appointment of independent directors, which is partly due to the corporate culture that characterizes it and partly due to the absence of proxy fights, at least for a long period of time. Chien-Chung Lin, *The Japanese Independent Director Mechanism*

rive considerable benefits from their roles and responsibilities, as assessments of appointment and removal of senior management, conflicts of interest and minority shareholders.

A REFORM WITHIN A REFORM: OUTSIDE DIRECTORS IN JAPAN

There has been growing pressure, both domestically and internationally, on Japanese companies to introduce the outside directors.[28] As for criticism from abroad, foreign institutional investors, such investment trusts and pension funds, propose the implementation of an outside director system and cast ballots against appointing directors who are not dependent on management of the company.[29] In 2008, the Asian Corporate Governance Association (ACGA) stated that:

Revisited: The Corporate Law Settings, Current Status, and Its Explanations, 24 TEMPLE INT'L & COMP. L. J. 65, 100 (2010). In 2010, only 48.2% of companies listed in the first section of the Tokyo Stock Exchange presented outside directors, but, according to the evaluations conducted by the Tokyo-based Japan Association of Corporate Directors (JACD), in 2014, the number rose to 74.4%. *Survey on Corporate Governance of Listed Corporations 2014*, JAPAN ASSOC. OF CORP. DIRS. 4, http://www.jacd.jp/en/resources/cgreport_e.pdf (last visited Feb. 5, 2017).comparing the Japanese and Italian situation, the importance of independence requirements appears a matter of prime interest in both systems: under Art. 148, section 4-*ter*, of the Consolidated Law on Finance, the criteria of independence required by Art. 148, section 3, are only applied to committee members, showing a sharp difference from art. 2399 of the Italian Civil Code. L. 28 December 2005, n. 262/2005 (It.); *cf.* CODE CIVIL [C.c.] art. 2399 (It.). In addition, Art. 154 of the Consolidated Law on Finance provides that the members of the Committee shall not apply Art. 2399, which may continue to be relevant to the notion of an "independent", but not of "independent eligible to be a member of the Committee", to which the requirements mentioned in Art. 148, section 3, of the Consolidated Law on Finance are essential. D.Lgs. 6 February 2004, n. 37/2004 (It.). As to the independence requirements, rules are consistent with the ones related to the board of auditors. TOMMASO DI MARCELLO, SISTEMA MONISTICO E ORGANIZZAZIONE DELLE SOCIETÀ DI CAPITALI [ONE-TIER SYSTEM AND ORGANIZATION OF LIMITED LIABILITY COMPANIES] 241 (2013) (It.).The complex issue of determining the concept of independence, given its diverse definitions, however, could be simplified by eliminating the regulations of that requirement contained in the Civil Code, thus, restoring a system in which the independence is regulated by corporate governance codes only, as suggested by Massimo Belcredi & Lorenzo Caprio, *Amministratori di minoranza e amministratori indipendenti: stato dell'arte e proposte evolutive* [*Directors Appointed by Minority Shareholders and Independent Directors: State of the Art and Evolutionary Perspectives*], *in* ATTI DEI SEMINARI CELEBRATIVI PER I 40 ANNI DALL'ISTITUZIONE DELLA COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA [ACTS OF CELEBRATORY SEMINARS FOR 40 YEARS BY THE INSTITUTION OF THE NATIONAL COMMISSION FOR COMPANIES AND STOCK EXCHANGE] 19, 47, 49 chart 2 (G. Mollo ed. 2015), http://www.consob.it/documents/11973/201676/qg9.pdf/89cb69a2-8e15-40c7-8fc6-168eeb012a5b.

28. *See* TOKYO STOCK EXCH., JAPAN EXCH. GRP., TOSHO JOJOGAISHA NO KOPORETO GABANANSU NIKANSURU TOSHIKAMUKE IKENBOSHU NITAISHITE YOSERARETA IKEN NO GAIYB NITSUITE [OPINION SUMMARIES RECEIVED FROM INVESTORS IN RESPONSE TO LISTED COMPANY CORPORATE GOVERNANCE QUESTIONNAIRE FOR INVESTOR] (2008), http://www.jpx.co.jp/english/equities/improvements/general/tvdivq0000004iib-att/opinions_summary.pdf.

29. Shinya Miwa, *Nihon Kigyb no Shagai Torishimariyaku to Kigyo Gyoseki no Kankei Ni Kansuru Jissho Bunseki* [*An Empirical Analysis of the Relationship between Outside Directors and Japanese Firms 'Long-Term Performance*], 25 Nihon Keiei Gakkaishi [Journal of Business

> [t]here should be a transparent process of independent, external supervision of management on behalf of all shareholders. We recommend that all companies, even those with traditional board structures, make a commitment to appoint a minimum of three independent external directors as soon as practicable. Over the medium term, such directors should ideally comprise a third of the board. Over the longer term, we recommend that they comprise one half of the board. These ratios are based upon practical experience in other developed markets regarding the minimum number of independent directors required for the effective functioning of boards.[30]

Urged by the both domestic and international pressure, a study on independent directors and auditors was conduced in 2009.[31] The movement pushed for the TSE to amend its rules in December 2009. In 2011, the Ministry of Justice issued the following three proposals regarding obligations to appoint outside directors: (a) Companies with a Board of Auditors, limited to Public Companies that are also Large Companies, are obligated to appoint one or more outside directors; (b) Companies that are required to submit annual securities reports pursuant to the provisions of Article 24(1) of the Financial Instruments and Exchange Act are obligated to appoint one or more outside directors; (c) no changes will be made to the rules under current law.[32] It is still unclear whether the Ministry of Justice wished to formally require all firms to appoint outside directors.

Many agreed with the second proposal, companies required to submit securities reports have outside directors, including: the ACGA, TSE, Japan Corporate Auditors Association, the Japan Institute of Certified Public Accountants, the Japan Corporate Governance Network, the Japan Association of Corporate Directors, the Japan Federation of Bar Associations, and the American Chamber of Commerce in Japan.[33] However, the Japan Association of Corporate Executives and the Japan Business Federation agreed with the third proposal that

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Management] [N.K.G.] 15 (2010), http://ci.nii.ac.jp/els/110007618882.pdf?id=ART0009436547&type=pdf&lang=en&host=cinii&order_no=&ppv_type=0&lang_sw=&no=1483243671&cp=.

30. *White Paper on Corporate Governance in Japan*, ASIAN CORP. GOVERNANCE ASS'N HONG KONG (2008), http://www.acga-asia.org/public/files/Japan%20WP_%20May2008.pdf.

31. Corporate Governance Study Group, *The Corporate Governance Study Group Report*, MINISTRY OF ECON., TRADE & IND., http://www.meti.go.jp/english/report/downloadfiles/200906cgst.pdf (last visited Feb. 5, 2017); Financial System Council's Study Group, *Report by the Financial System Council's Study Group on the Internationalization of Japanese Financial and Capital Markets: Toward Stronger Corporate Governance of Publicly Listed Companies*, FIN. SERVICES AGENCY, http://www.fsa.go.jp/en/news/2009/20090618-1/01.pdf (last visited Feb. 5, 2017).

32. *See generally*, Goto, *supra* note 16.

33. *See id.*

no changes be made.[34] Industry players remain cautious about the change, on the grounds that such systems might erode management autonomy.

Regarding requirements for outside directors and outside company auditors, two proposals were suggested: (a) additional requirements for outside directors and outside company auditors, such as they may not be a director or executive officer, employee of a parent company, spouse, relative of a director, or other employee of the company; and (b) no changes will be made to the rules under current law.[35] The ACGA, TSE, Japan Corporate Auditors Association, the Japan Institute of Certified Public Accountants, the Japan Corporate Governance Network, the Japan Association of Corporate Directors, the Japan Federation of Bar Associations, and the American Chamber of Commerce in Japan agree with the first proposal, while the Japan Association of Corporate Executives and the Japan Business Federation thought that no changes should be made. The standoff continues between proponents and opponents of mandatory outside directors.

Proponents of mandatory outside directors argued both the company's specific background and Japan's corporate culture and corporate governance system caused the two scandals, while opponents of mandatory outside directors insist that the current corporate governance rule in Japan is operating sufficiently.[36]

It appears that both sides have extreme views, so it is necessary to consider the issue in a well-balanced manner, which this Article will address.

> [T]o promote effective measures by focusing on not only formality but also substance to enhance corporate governance. In fact, some companies are substantively working to improve governance by means of their own unique measured, beyond the regulatory requirements. . . . To impose formalistic rules mandating even such companies to have outside directors in a uniform manner would have the contrary effect of hampering the formation of the most appropriate governance structure, even from the viewpoint of minority shareholders and investors.[37]

It is essential to point out that many investors criticized the fact that companies with a board of directors are not required to appoint outside directors. While outlining and examining the Reform Bill, in a short period of time, outside directors were mandatory. Instead the Japan Business Federation strongly opposed such, and preferred the

34. *See id.*
35. *See id.*
36. *See id.*
37. Corporate Governance Study Group, *supra* note 31.

"comply-or-explain" approach, borrowed from the principles contained in the Codes of Corporate Governance.[38]

In addition, it worth noting that, in 2013, Institutional Shareholder Services (ISS) generally recommended against voting in favor of the appointment of representative of directors, whose company does not have any outside director, or nominees, at an annual shareholder meeting.[39]

CORPORATE GOVERNANCE

As previously mentioned, among the types of joint-stock companies (*Kabushiki-Kaisha, KK*), three main structures are particularly relevant, depending on the specific model of governance used.

The Tripartite Model

The "tripartite" model (*kansayaku-kai setchi kisha*, Art. 2, tenth paragraph, of the Companies Act), is formed by the Board of Directors. It is a monitoring body similar to the Board of Auditors: the auditing firm/external auditor.[40] The admirable trait of evolution that this model showed is reducing the large number of directors that made up the board only a few decades ago.[41] It decreased from an average of 30 - 40 directors to an average of 7.5 directors.[42] Moreover, while it

38. Goto, *supra* note 16, at 22.

39. *2013 Japan Proxy Voting Summary Guidelines*, INSTITUTIONAL S'HOLDER SERVICES, INC. 9 https://www.issgovernance.com/file/2013-policies/2013ISSJapanGuidelinesSummaryRev0131 2013.pdf (last visited Feb. 5, 2017).

40. See the definition contained in the Huìshè fǎ [Companies Act], Law No. 86 of 2005, art. 2, para. x, http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=02 (Japan) ("'Company with Board of Auditors' means any Stock Company which has a Board of Auditors, or any Stock Company which is required to have a Board of Auditors under the provisions of this Act.").

41. TOKYO STOCK EXCH., JAPAN EXCH. GRP., TSE-LISTED COMPANIES WHITE PAPER ON CORPORATE GOVERNANCE 19 (2015), http://www.jpx.co.jp/english/news/1020/20150625-01.html.

42. *Id.* Such a dimension is consistent with the argument that the position of director works as an incentive for employees because it is better to have more seats in order to provide employees with incentives. *See* Michael Gibson, *"Big Bang" Deregulation and Japanese Corporate Governance: A Survey of the Issues*, (Bd. of Governors of the Fed. Res. Sys., Paper No. 624, 1998), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=133552. However, it would be difficult to have efficient discussion in the boardroom among such a wide number of directors. Since the typical Japanese large-sized board inhibits effective discussion, Sir Walter Puckey, writing on board size, tells that, in his experience, "the most effective size for first-class participation and decision making is between six and eight excluding the chairman and the secretary . . . .Too many board meetings display verbosity among a few and almost complete silence from the rest." ADRIAN CADBURY, CORPORATE GOVERNANCE AND CHAIRMANSHIP: A PERSONAL VIEW 51–52 (2002). Similarly, Lipton and Lorsch believe the maximum size shall not exceed ten directors. Martin Lipton & Jay Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 BUS. L. 59, 67–68 (1992). In large listed companies, board meetings are often caricaturized as a ceremony where no substantial discussion is held. Instead, there are more substantial – even though

is not necessary directors are classified as outside directors, at least half of the auditors should be defined as outside corporate auditors (Art. 335, third paragraph, of the Companies Act). Despite the fact that the expression *kansayaku-kai* represents the perfect translation of the German *Aufsichtsrat*,[43] the auditors have no function of the appointment or removal of directors, as the latter are elected and appointed by a majority of shareholders at the general meeting (Art. 329 and 339). The auditors are elected at the general shareholders' meeting, so they are similar to a traditional supervisory board.[44] Auditors participating in Board meetings without voting rights (Art. 383, first paragraph) are also in charge of monitoring the tasks of directors, not just limited to accounting issues (Art. 381, first paragraph).

The Quasi One-Tier Model

The "quasi one-tier model" (*i'in-kai setchi kaisha*, Art. 2, twelfth paragraph, of the Companies Act),[45] is formed by the Board and consists of three committees – nomination, remuneration and audit[46] – with functions indicated under Art. 404, paragraphs one, two, and three, respectively. The members must be mainly outside directors and independent auditors, according to Art. 400, paragraphs one and three.[47] The peculiarities of such a system consist in the fact that directors are not involved, or, at least not exclusively involved, as stated in

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informal – meetings, often called "*Jomu-kai*" or "*Keiei-iinnkai*", which refers to a council consisting of only part of the members of the entire board of directors who have the real power to decide, held before a board official meeting in order to discuss agendas to be proposed to the board meeting itself. On the one hand, they have a positive impact, since it is practically difficult to hold a board meeting in order to decide urgent cases; on the other hand, their existence makes the legal requirements (as keeping records) of formal meetings relatively meaningless.

43. Goto, *supra* note 16, at 18.

44. Chien-Chung Lin, *The Japanese Independent Director Mechanism Revisited: The Corporate Law Settings, Current Status, and Its Explanations*, 24 Temple Int'l & Comp. L. J. 65, 87 chart 87 (2010).

45. *See* Huìshè fǎ [Companies Act], Law No. 86 of 2005, art. 2, para. xii, http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=02 ("'Company with Committees' means any Stock Company which has a nominating committee, an audit committee and a compensation committee (hereinafter referred to as 'Committees').).

46. In Japan, the remuneration essentially consists of a fixed amount, while in some infrequent cases only a proportionate remuneration to performances is preferred. Listed companies must indicate both the total remuneration of their directors and its division. If directors are granted stock options, the company must communicate a description of their terms and conditions, as well as the number of directors to whom such stocks are attributed. Should outside directors exist, such communications should be separated and differentiated among directors directly and indirectly involved in the management and the amount of remuneration for each director should be detailed by type of payment – salary, bonus, stock options, etc. – if his/her salary annually exceeds ¥ 100 million.

47. Although Japanese laws and regulations do not require a defined number of independent directors, the most influential proxy advisors, Glass, Lewis & Co., LLC, believe that corpora-

Art. 402, paragraph six, in the current management,[48] led by managers who identify themselves *shikkô-yaku*. The audit committee performs tasks of control, related to the ones carried out by the supervisory board in the traditional model, such as preparing reports and proposing decisions on the appointment and removal of auditors to be presented at the general shareholders' meeting.[49]

The Newest Model

The newest model was recently introduced model under Law 27 June 2014, No. 90. This model established a board of directors and an audit committee. The audit committee replaces the supervisory board, which is mainly composed of outside directors.[50] Their functions include control and business supervision and overseeing the auditing firm/external auditor.

THE TRADITIONAL MODEL

Among the companies listed on the TSE, the vast majority, 2756 out of 3515 companies, or 78.41%,[51] adopted the "tripartite" model, with *kansayaku-kai*. This trend appears to be decreasing since first edition of the Report on Corporate Governance, issued in 2007.

A closer look at the concentration of the traditional model leads us to consider the *Shiseido* example. It is expected that at the shareholders' meeting, there will integration between the board of directors, the board of auditors, and the auditing company/external auditor.

The general shareholders meeting takes place at least once in the first three months of each year. A meeting may also convene in a special session, if necessary, by the legal representative (*Daihyoutorishimariyaku*), who assumes the role of the President in that case. Key documents related to shareholders' decisions are disclosed via the

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tions that adopted the model with three committees and with the audit committee shall present at least one third of independent directors within their Boards

48. Huìshè fǎ [Companies Act], Law No. 86 of 2005, art. 415, http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=02 ("'Directors of a Company with Committees may not execute the operations of the Company with Committees unless otherwise provided in this act or any order under this Act.").

49. Lin, *supra* note 44, at 91 chart 3.

50. *Id.*

51. Search for Corporate Governance Information, JAPAN EXCH.GRP., http://www2.tse.or.jp/tseHpFront/CGK020010Action.do?Show=Show (Under the "Organization Structure / Capital Structure" heading, click on organization type drop down menu and select "Company with a corporate auditor system." Then scroll down and click the button "Number of hits.").

Internet, together with the financial statements with the report of the auditing firm, carried out by external and statutory auditors.[52]

The majority of the present shareholders entitled to vote, unless particularly high *quorum* are required,[53] may decide if: (i) at least one third of the voting shareholders are entitled to vote, or (ii) at least two-thirds of the voting shareholders present. Proxy voting rights is allowed and the announcement of the final vote is required.

Under *Shiseido's* corporate documents, the board of directors, composed by no more than twelve members, according to the bylaws, is appointed by the shareholders' meeting, with the favorable vote of more than one third of shareholders voting rights, without using the list voting mechanism, thus injecting an element of proportionality in the election of directors, allowing "minority" shareholders to appoint some of them.[54]

The term of each director is twelve months long, ending when the ordinary general meeting of shareholders is called to approve the financial statements of the term year.[55] Practically speaking, the board is far less nourished than bylaws dictate: it consists of six members, half of whom are independent.[56] The Board is responsible for deciding on matters which are relevant to the life of the company, such as the acquisition of major assets, intake of large debts, appointment or dismissal of employees of relief, establishment of branches and subunits, as well as, articulation of the internal control systems.[57] The remuneration of directors must be determined by resolution of shareholders at the general meeting, not the Board.[58]

The Supervisory Board, composed of at least three members, half of whom must be outsiders, is elected by the majority of shareholders, with the favorable vote of more than one third of the entire share capital possessing voting rights.[59] The Supervisory Board is appointed for a four-year term,[60] with a substitution mechanism, whereby the members who replace retired auditors must continue their tasks until

52. Statutory auditors check the legality of the judgment or performance of directors, not their appropriateness, which should be settled ultimately as a form of personnel affair.

53. Huìshè fǎ [Companies Act], Law No. 86 of 2005, art. 309, http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=02.

54. *See generally* Corporate Governance, Shiseido Grp., http://www.shiseidogroup.com/company/governance/ (last visited Feb. 7, 2017).

55. *See generally id.*

56. *See id.*

57. *See id.*

58. *See id.*

59. *See id.*

60. Closed corporations can, however, extend the duration of their terms, for a maximum period of ten years.

the expiry of their original term of office.[61] The remuneration of auditors shall be determined by shareholder resolution at the general meeting.[62]

The majority of the companies follows the traditional system, where the system of checks and balances is guaranteed by: (i) an effective separation of the duties of supervision and management; (ii) the presence of at least one independent director, capable of promoting a more effective management control; and (iii) a reduction of the period in which directors are in charge of a specific role.

Following the adoption of the Corporate Governance Code, companies that do not have outside directors are required to explain the reasons why they preferred such a solution.[63] This model does not fully meet the needs of businesses, in the following ways: the lack of business knowledge of independent directors; evidence of a preference for a system of governance based on checks and balances among directors; declaring that the appointment of individuals with former working experiences in financial institutions do not meet the criteria that distinguish outside directors. The company is still able to take an outside perspective into account. The absence of outside directors might be justified by external advisory bodies - committees composed by third parties - capable of expressing opinions on remuneration and compliance issues.

THE THREE COMMITTEES MODEL

The model "with committees" represents a compromise proposal.[64] It takes into consideration the original intentions of the Ministry, which sought to replace the Board of Auditors with committees within the Board of Directors, while requiring the presence of at least one outside director, and on the one hand, the needs of system operators,[65] which expressed themselves in a different way.

This model, widespread among blue chip corporations, is utilized by foreign institutional investors,[66] such as Sony[67] and Nomura. This

61. *See* Corporate Governance, *supra* note 54.

62. *See id.*

63. TOKYO STOCK EXCH., *supra* note 25, at 31 (Summarizing and implementing national legislation on the topic of corporate governance).

64. K. EGASHIRA, KETSUGO KIGYO HO NO RIPPO TO KAISHAKU [LEGISLATION AND INTERPRETATION OF THE CONGLOMERATE LAW] 197 (1995).

65. Gilson & Milhaupt, *supra* note 12, at 353-54.

66. The dynamism that these institutional investors require corresponds to one of the major reasons that led to the development of the governance of the country. *See* Michael A. Witt, Japan Coordinated Capitalism between Institutional Change and Structural Inertia (INSEAD, Paper No. 2012/105/EPS, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2171236;

model was adopted by 62 companies between April and October 2003,[68] the number continued to increased so that, in October 2014, 5.6% of Japanese listed corporations used that that model,[69] which clearly separates supervision and operative business.

A major example of this model is *Sony Corporation*,[70] a company governed by a board of directors elected at the annual meeting of shareholders, organized into three committees – nomination, remuneration and audit – each of them consisting of three or more directors, the majority of whom are outside directors.

Under this model, the Board, composed of ten to twenty members, determines the basic management policies, oversees key operations, appoints and dismisses the members of the committees, as well as the CEO who supervises management within the limits of his powers. Sony's bylaws: (i) provides for the separation of the role of President of the Board and the CEO;[71] (ii) temporally circumscribes the roles of

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Michiyo Nakamoto & Kate Burgess, *Dividends to Reap: Shareholder Activists Begin to Make Their Mark in Japan*, FIN. TIMES (July 2, 2008), https://www.ft.com/content/be842ae4-4863-11dd-a851-000077b07658.

67. In order to separate monitoring and operational functions of the Board, in 1997, Sony introduced a system of non-statutory executive officers (*shikko-yakuin*) and nearly half of Japanese companies listed on the Tokyo Stock Exchange followed it. Directors responsible for divisional operation stepped down from the Board and got the new title of "shikko-yakmn", while the remaining directors focused on business strategies and monitoring roles. The number of directors began to be reduced simultaneously. Seki, *supra* note 13, at 380. As for the United States firms, a smaller board is related to better firm performance, see David Yermack, *Higher Market Valuation of Companies with a Small Board of Directors*, 40 J. FIN. ECON. 185, 209 (1996).

68. In May 2003, thirty-two companies (nineteen of them belong to the Hitachi group) announced their intention to move to the newly-created system, in the same year, as reported in Hiroyuki Yanai, 009: *The Systematization of Ethical Virtue - The Position of Japan's "Companies with Committees" System*, RESEARCH INST. OF ECON., TRADE & INDUS. (REITI) (June 6 2003), http://www.rieti.go.jp/en/projects/cgj/columns/009.html.

69. Goto, *supra* note 16, at 18. However, despite not many companies adopting such model, its introduction resulted in positive findings in multiple aspects: the increase in the number of outside directors among the companies characterized by the traditional model, and in the number of independent directors having no conflicts of interest with investors pursuant to Rules 22, fourth paragraph, fifth point, 436-2 and 445-4 of the TSE Securities Listing Regulation, according to which the company is required to set out the reasons why it intended to appoint them. These trends are also confirmed in the latest version of the TOKYO STOCK EXCH., Japan Exch. Grp. TSE-Listed Companies White Paper on Corporate Governance 21 charts 26, 27, & 28 (2015), http://www.jpx.co.jp/english/news/1020/20150625-01.html.

70. For a historical-quantitative analysis of the corporation, a pioneer in the field of institutional change, see Toru Yoshikawa et al., *Corporate Governance Reform as Institutional Innovation: The Case of Japan*, 18 ORG. SCI. 973 (2007) and, as to *Sony*, see Luke R. Nottage & Leon T. Wolff, Corporate Governance and Law Reform in Japan: From the Lost Decade to the End of History? 13-14 (Comparative Research in Law and Political Economy, Paper. No. 3/2005, 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=830005.

71. *See generally* Corporate Governance, SONY CORP., https://www.sony.net/SonyInfo/csr_report/governance/ (last visited Feb. 7, 2017). For what concerns the "with committees" model, the *Companies Act* explicitly requires, pursuant to art. 402 and 420, that at least one of them is

outside directors; (iii) nominates one of them as the President of each committee; (iv) announces the experience of directors in order to eliminate eventual conflicts of interest and to ensure independence in decision-making; (v) requires that at least one member of the nomination audit committees be a CEO; (vi) discourages the participation of members of the audit committee in multiple committees; and (vii) prohibits the CEO of the group to participate in the compensation committee.

The Nomination Committee proposes the appointment and removal of directors to be approved at the general meeting of shareholders, and evaluates the plans of management turnover.

The Remuneration Committee focuses its attention on individual compensation of directors, CEOs, and executive directors.

The Audit Committee monitors the performance of directors; it oversees and evaluates the work conducted by the auditing company as to the appointment, removal, approval, or non-confirmation of the fee; evaluates the adequacy of the internal audit in relation to the results and financial reporting.

Overall, in the fiscal year that ended on March 31, 2015, the Board of Directors met ten times, with all directors participated at each session, with one only exception.[72] The Nomination Committee met five times, while the Remuneration Committee met nine times. All committee members took part in each session.

Compared to the traditional model, the committee system makes decisions in a more expeditious way, with greater transparency in the management. Companies adopting it took advantage of the effective separation that this system allows between oversight and business execution, due to the flexible delegating methods and to the strengthened controlling functions that it implements.

Nevertheless, empirical studies[73] show that the effectiveness of such a model markedly depends on outside directors. In other words,

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nominated as *executive officer* (*shikkoyaku*) and one of them as a legal representative. Huìshè fǎ [Companies Act], Law No. 86 of 2005, art. 402, art. 420, http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=02.

72. *See* Sony, *supra* note 71.

73. Peter Lawley, *Panacea or Placebo? An Empirical Analysis of the Effect of the Japanese Committee System Corporate Governance Law Reform*, 9 ASIAN-PACIFIC L. & POL'Y J. 105, 139 (2007)

There is also no strong evidence that the committee system provides companies with the capabilities to perform well in specific industries, or that the committee system's positive image contributes to higher market valuation. The solution, however, is not further reform of the committee system law. . . . The committee system is not a panacea for all corporate governance and corporate performance woes. That much is evident from the many poor-performing companies that have adopted the committee system. The committee system does, however, resemble a placebo.

greater efficiency may be achieved by pointing out the distinguishing features of the role of outsiders and preventing them from covering multiple executive positions, rather than through additional legislative reforms.[74]

After the 2014 Reform and the introduction of the model "with the audit committee," the model "with committees" suffered a marked decline of -3.7%. Currently this model utilized by only 69 listed companies out of 3515 or 1.96%.[75] This structure was used in a minor number of corporations, since there is a widespread custom whereby employees tend to think that their final goal is to become a director through internal promotion, and thus, accordingly, most of the board members are inside directors.[76]

The Audit Committee Model

The most recent reform, affecting the above-outlined concept of outside directors[77] and linking the content of the Companies Act and the British Combined Code, created a variation from the previous model. In this sense, the legislator implemented the model with an "audit and supervisory" committee, composed of at least two outside directors, is already known in the United States. This model enables the company to make decisions quickly, and it enables outside directors to concentrate on fulfilling their originally expected roles. Thus, the newly introduced option eliminates the burden of employing outside statutory auditors and two committees, in exchange for requiring outside directors.

From a formal perspective, it should be noted that its functioning is specified in the bylaws, whereas, in the British system, the details re-

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It is perceived to be a stronger and more transparent corporate governance system, even though the empirical data suggests that in practice it is generally neither stronger nor more transparent than the statutory auditor system.

74. *See id*.

75. Search for Corporate Governance Information, Japan Exch.Grp., http://www2.tse.or.jp/tseHpFront/CGK020010Action.do?Show=Show (Under the "Organization Structure / Capital Structure" heading, click on organization type drop down menu and select "Company with three committees." Then scroll down and click the button "Number of hits.").

76. Japan is often considered an employee-oriented or "the company community"-oriented country. *See* Zenichi Shishido, *Reform in Japanese Corporate Law and Corporate Governance: Current Changes in Historical Perspective*, 49 Am. J. Company Law 653, 654, 659 (2001).

77. Lawley, *supra* note 73, at 114, 117; Goto, *supra* note 16, at 21 n.52 (A prominent company, Toyota, whose governance has always been a reference model for all Japanese companies, acknowledges the significance of that role.).

lated to it are contained in the *Terms of Reference*, as provided under Article C.3.2 of the latest version of the Combined Code.[78]

This model was adopted by *Yahoo Japan Corporation,* as well as, 691 out of 3515 other listed companies, or 19.63%.[79] It aims at strengthening the corporate governance by reinforcing the monitoring role of the board. Yahoo proposed a transition towards the model "with audit committee" that is asked to issue opinions regarding the appointment, removal, replacement, remuneration of directors during the meetings, thus, partially replacing the nomination committee.

Art. 4 (Organizations) of the bylaws states the existence of the Audit and Supervisory Committee, substituting the combination Corporate Auditors - Board of Corporate Auditors: it advises the Board of Directors, primarily in charge of audit and CEO evaluation, and the auditing company/external auditor.

The board of directors is now composed by no more than fifteen members, including a maximum of five members, who may be also part of the audit committee.

A distinction is made between the ones who belong to the Committee and the ones who are not part of it. As to the appointment, the members of the audit committee are elected by proposal of the Board, and assessed by their contribution in terms of corporate governance and audit. The audit committee serves a two-year term, while the other board members only serve for one year,[80] as to the mechanisms of substitution[81] and as to the remuneration.[82]

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78. FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 18 (Apr. 2016), https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-April-2016.pdf; *see generally* Management Policy: Corporate Governance, YAHOO JAPAN CORP., http://ir.yahoo.co.jp/en/policy/governance.html (last visited Feb. 7, 2017).

79. Search for Corporate Governance Information, JAPAN EXCH.GRP., http://www2.tse.or.jp/tseHpFront/CGK020010Action.do?Show=Show (Under the "Organization Structure / Capital Structure" heading, click on organization type drop down menu and select "Company with audit etc. committee" Then scroll down and click the button "Number of hits.").

80. It can be criticized that, unlike statutory auditors appointed for four years, term of office of members of an audit committee is only one year is an ineffective guarantee of status, which could cause them to have difficulty in pointing out the problems at their companies. *See generally* Management Policy: Corporate Governance, *supra* note 78.

81. YAHOO JAPAN CORP., NOTIFICATION OF PARTIAL REVISION TO THE ARTICLES OF INCORPORATION 3 (2015), https://s.yimg.jp/images/docs/ir/release/2015/en20150521_4.pdf. In the event that a director should be substituted because of his/her retirement, the number of directors should be increased within the statutory limits, the substitute will replace him/her until all directors remain in office (Art. 21, third paragraph); if such director is, instead, a member of the Committee, the substitute will replace him/her for the remaining time in which the substituted should have operated (Art. 21. fourth paragraph)

82. Japanese Companies Act prescribes that a fee for the remuneration of the members of the Board who are not part of the audit committee is approved by the general shareholders' meeting, a portion of which is assigned to outside directors, as well as a fee for the remuneration of

The board of directors may appoint, among its members, excluding the ones who also are part of the audit committee, a CEO (*Shacho*) and, if necessary, a Chairman (*Kaicho*).[83] The latter is often a founder of the company, which, notwithstanding the fact that he retired and that he does not possess formal powers, continues to exert significant influence within the corporation itself. The Company might delegate certain decisions concerning the execution of significant transactions to a selected director, excluding those mentioned in the fifth paragraph of the abovementioned article (Art. 25).[84]

The audit committee devotes its attention to specific tasks, with the aim of strengthening the functions of monitoring and supervising the activities of the board. It is composed of a minimum of three members, mostly outside directors, appointed during the shareholders' meeting,[85] according to the suggestion of the auditing company/external auditor.

A recent analysis regarding the relationship between the presence of independent outside directors, which corresponds to an outside director who is designated as an independent executive at the TSE, and

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members of the audit committee only. *See* Companies Act, Law No. 86 of 2005, art. 361, http://www.japaneselawtranslation.go.jp/law/detail/?id=2035&vm=04&re=02 (Japan).

83. YAHOO JAPAN CORP., *supra* note 81, at 4.

84. *Id.*

85. In the Italian context, in accordance with Article 2409-*octiesdecies*, CODICE CIVILE [C.C.] [CIVIL CODE], http://www.altalex.com/documents/news/2014/12/05/societa-per-azioni (It.), the Committee is appointed by the Board, but the statutory autonomy is allowed to provide for a different solution. For example, "indirect" appointment allows members to choose those who are part of the Committee, with the result that the composition of the Committee is - albeit indirectly – an enactment of the shareholders' meeting. *See* 53 GIANLUCA RIOLFO, TRATTATO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL'ECONOMIA: IL SISTEMA MONISTICO NELLE SOCIETÀ DI CAPITALI E COOPERATIVE [TREATISE ON BUSINESS LAW AND PUBLIC LAW OF ECONOMY: THE ONE-TIER SYSTEM IN THE COMPANY'S CAPITAL AND COOPERATIVE] 100 (2010) and Vincenzo Salafia, *Il sistema monistico nell'amministrazione e controllo della s.p.a.* [*The One-Tier System in the Management and Control of Corporations*], 12 LE SOCIETÀ 1463 (2004) where the author talks about a "substantial appointment" by the general shareholders' meeting.
The appointing authority may, however, vary according to the bylaws, that can opt for a direct appointment by the shareholders. In this regard, concerns are expressed both by Giorgio Oppo, *In tema di "libertà e responsabilità" nelle società di capitali riformate* [*On the "Freedom and Responsibility" in the Reformed Corporations*], 50 RIVISTA DI DIRITTO CIVILE 861 (2004) and by BANCA D'ITALIA [BANK OF ITALY], DISPOSIZIONI DI VIGILANZA IN MATERIA DI ORGANIZZAZIONE E GOVERNO SOCIETARIO DELLE BANCHE. RELAZIONE SULL'ANALISI D'IMPATTO [REGULATORY PROVISIONS ON THE ORGANIZATION AND CORPORATE GOVERNANCE OF BANKS. REPORT ON IMPACT ANALYSIS] (Apr. 2014), https://www.bancaditalia.it/compiti/vigilanza/normativa/consultazioni/2014/disp-vig-organizz-gov-societario-070214/AIR_Governance.pdf, equating, at a formal level, the source of appointment of the Committee and the Board of Auditors, as well as, introducing a communication between shareholders and directors, thus, loosening the dependence between the Committee and the Board of Directors. Finally, it is evident that, whoever is the authority that has to appoint the Committee, this aspect does not affect the powers of the Committee.

the return on equity (ROE) of listed companies was conducted with the intention to, at least, indicate the possible positive effects of outside directors on corporate performance.[86] It is true – even without considering relevant points, as to which the industry each company belongs or the peculiar shareholder composition – that the appointment of outside directors and an increase in the proportion of independent outside directors to total directors *may* contribute to the increase of the ROE.[87]

Furthermore, a study regarding the relationship between the *ratio* of independent outside directors and Tobin's Q[88] showed a possibility that the two mentioned values are positively related.[89] Moreover, if outside directors could easily get information about the business of their company, having outside directors positively impact corporate performance, whereas, if companies have a high *ratio* of R&D or intangible assets whose information is difficult to obtain by outside directors, their presence does not necessarily lead to the improvement of corporate performance.[90]

Lastly, when listed companies previously did not opt for appointing any outside directors, according to some studies, the increase in Tobin's Q was significant.[91] A different result was obtained comparing the ROA changes of listed companies that had no outside director with that of listed companies with newly appointed outside directors: a positive improvement of ROA derived from their appointment was only observable after one, two, and three year increments, since the

86. *See* Koji Watanabe, *Dokuritu Syagai Torisimariyaku no Sennin to ROE tono Kankei* [*Relation Between Independent Outside Directors and ROE*], JUNKAN SHÔJI HÔMU, 2013, at 55.

87. *Id.* at 55-57.

88. Katsumi Takeda, Dokuritsu-Shagai Torisimariyaku Wariai to Zokusei ni Kansuru Kenkyû [Study on Proportion of Independent Outside Directors and Their Background] (Aug. 18, 2012) (unpublished professional degree dissertation, Kobe University Graduate School of Business Administration), http://mba.kobe-u.ac.jp/life/thesis/workingpaper/2012/wp2012-3b.pdf (last visited Feb. 5, 2017). Unfortunately, the study could not take into account manufacturing industries. Unfortunately, the study could not take into account manufacturing industries.

89. *Id.* at 10, 19-21.

90. Masashi Miya & Ryo Ogawa, *Nihon kigyô no torishimariyakkai kôsei no henka o ikani rikai suru ka?: Torishimariyakkai kôsei no kettei yôin to shagai torishimariyaku no dônyû kôka* [*How to Understand the Change in the Composition of the Boards of Directors of Japanese Companies?: Decision Factors of the Composition of the Board of Directors and the Effect of Introducing Outside Directors*] 6 (Research Inst. of Econ., Trade & Indus. RIETI Policy Discussion Paper Series, Paper No. 12-P-013, 2012), http://www.rieti.go.jp/jp/publications/pdp/12p013.pdf. In the light of the fact that some companies in the manufacturing industry have a high ratio of R&D or intangible assets, this study and Katsumi*, supra* note 88, are consistent.

91. Konari Uchida, *Does Corporate Board Downsizing Increase Shareholder Value? Evidence from Japan*, 20 INT'L REV. ECON. & FIN. 562, 563 (2011) (An overview on the recent reform is expressed by Tobin's Q); s*ee also Q ratio (Tobin's Q)*, A DICTIONARY OF ACCOUNTING (4th ed. 2010).

effects of a dummy variable regarding the appointment of outside directors had positive significance at the 10% level in each term.[92]

CONCLUDING REMARKS: COMPARING PERSPECTIVES

The companies considered above also endorsed the Code of Corporate Governance and, thus, the best practices of corporations.

First, it is clear that the role of the outside directors represents the distinguishing feature: the most common, appreciated, and therefore, most implemented feature.[93] Their appointment is the best way to control business, as well as to provide management with opinions and advice.

It is also clear how the two-tier model, marked by the presence of a supervisory board, which assumes the functions of a professional body,[94] shows neglect of the system of governance which emerged,[95] even by public companies, without the presence of stable nucleus of shareholders-entrepreneurs, to which it was initially addressed.[96] In spite of the widely held belief that Japan and Germany should belong to the same taxonomic group in terms of corporate governance,[97] the similarities are too weak to sustain this belief. Actually, in their operational contexts and jurisdictions, analogies among Japanese companies linked by cross-shareholdings (*keiretsu*)[98] and the strong correlation among German companies, insurance groups and banks,[99] the attention to social policies and the tendency to secure permanent

92. Takuji Saito, *Determinants of Director Board and Auditor Board Composition: Evidence from Japan*, 11 PUB. POL'Y REV. 395, 408 (2015).

93. *See generally,* Choong Tze Chua et al., *Corporate Valuation Around the World: The Effects of Governance, Growth, and Openness*, 31 J. BANKING & FIN. 35 (2007).

94. La riforma del diritto societario: Riforma organica della disciplina delle società di capitali e società cooperative, in attuazione della legge 3 ottobre 2001, n. 366 [The Company Law Reform: A Comprehensive Reform of the Corporate Law Discipline, Implementing the Law Approved on October 3, 2001, n. 366], TUTTOCAMERE.IT 14 (2003), http://www.tuttocamere.it/files/dirsoc/RDS_RELAZIONE_Cod_Civ.pdf.

95. Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 891 (2003).

96. 2 GIAN FRANCO CAMPOBASSO, DIRITTO COMMERCIALE: DIRITTO DELLE SOCIETÀ [2 COMMERCIAL LAW: COMPANY LAW] 421 (9th ed. 2015).

97. Some structural similarities are analyzed in Mitsuhiro Hirata, *Compliance and Governance in Large Japanese Companies*, 62 MGMT. REV. BUS. ADMIN. 29, 33 (2004) (Japan), https://www.toyo.ac.jp/uploaded/attachment/2875.pdf.

98. *See*, *e.g.*, Ronald J. Gilson & Mark J. Roe, *Understanding the Japanese Keiretsu: Overlaps Between Corporate Governance and Industrial Organization*, 102 YALE L.J. 871 (1993).

99. Yoshiro Miwa & J. Mark Ramseyer, *The Myth of the Main Bank: Japan and Comparative Corporate Governance*, 27 L. & SOC. INQUIRY 401 (2002).

work[100] represent too weak elements, if compared to the intricacies of the two corporate governance models.[101] The abolition of *Yugen Gaisha*, as well as the erosion of the Japanese banking model[102] led Japanese corporate governance to differentiate from the Teutonic model, from it was initially inspired.[103] Even in refraining from specifically standardized issues, such as the appointment of auditors elected by the workers,[104] Japan proved to prefer a different evolution,[105]

100. See "human centrism," a theory defined by Hiroyuki Itami, in HIROO TAKAHASHI, THE CHALLENGE FOR JAPANESE MULTINATIONALS: STRATEGIC ISSUES FOR GLOBAL MANAGEMENT 64-65 (2013).

101. *See generally* Ronald Dore, *Deviant or Different? Corporate Governance in Japan and Germany*, 13 CORP. GOVERNANCE INT'L REV. 437 (2005).

102. On one hand, according to some scholars, the main features of the Japanese governance environment include, "(1) the main banking system, in which banks voluntarily restructure loans to some distressed borrowers, (2) a social distaste for hostile takeovers, (3) implicit promises of employment stability, and (4) belief systems about the proper role and structure of the board of directors." Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 UNIV. PA. L. REV. 2083, 2083 (2001) (for a wider analysis of Japanese governance's structures, see Yoshiro Miwa & J. Mark Ramseyer, *Who Appoints Them, What Do They Do? Evidence on Outside Directors from Japan*, 14 J. ECON. MGMT. STRATEGY 299 (2005); Miwa & Ramseyer, *supra* note 99; T. E. Cooke & Etsuo Sawa, *Corporate Governance Structure in Japan – Form and Reality*, 6 CORP. GOVERNANCE INT'L REV. 217 (1998); MASAHIKO AOKI ET AL., THE JAPANESE MAIN BANK SYSTEM: AN INTRODUCTORY OVERVIEW (1993); Ronald J. Gilson & Mark J. Roe, *supra* note 98; Stephen D. Prowse, *The Structure of Corporate Ownership in Japan*, 47 J. FINANCE 1121 (1992); Takeo Hoshi et al., *Corporate Structure, Liquidity, and Investment: Evidence from Japanese Industrial Groups*, 106 Q.J. ECON. 33 (1991); Masahiko Aoki, *Toward an Economic Model of the Japanese Firm*, 28 J. ECON. LITERATURE 1 (1990); Paul Sheard, *The Main Bank System and Corporate Monitoring and Control in Japan*, 11 J. ECON. BEHAV. ORG. 399 (1989)). On the other hand, it must be recognized that Japanese governance focuses on commitment and stability while the U.S. one focuses on mechanisms of adaptive efficiency.

103. *See* DAVID F. LARCKER & BRIAN TAYAN, CORPORATE GOVERNANCE MATTERS: A CLOSER LOOK AT ORGANIZATIONAL CHOICES AND THEIR CONSEQUENCES 41 & 52 n.51 (2nd ed. 2016); Seki & Clarke, *supra* note 5, at 739–743, 743 n.74 (citing Randall Morck & Bernard Yeung, *Japanese Economic Success and the Curious Characteristics of Japanese Stock Prices* (Hitotsubashi Univ. Inst. of Econ. Research Ctr. For Econ. Insts. Working Paper Series, Paper No. 2001-19, 2001)); Marco Giorgi, *Dal Giappone l'epitaffio del sistema dualistico* [*From Japan, the Epitaph of the Two-Tier Model*], FIN. COMMUNITY HUB (Mar. 13, 2015), http://fchub.it/articoli-fchub/dal-giappone-l-epitaffio-del-sistema-dualistico (last visited Feb. 5, 2017).

104. The topic, also following the progress of the reform and the simultaneous evolution of factual events, did not lead to the realization of the desired co-determination, a theory of German origin, in the Japanese system. *See* Goto, *supra* note 16, at 30; *see generally* Ryuichi Yamakawa, *Labor Law Reform in Japan: A Response to Recent Socio-Economic Changes*, 49 AM. J. COMP. L. 627 (2001). *See also* MARCO BIASI, IL NODO DELLA PARTECIPAZIONE DEI LAVORATORI IN ITALIA: EVOLUZIONE E PROSPETTIVE NEL CONFRONTO CON IL MODELLO TEDESCO ED EUROPEO [THE KNOT WORKERS' PARTICIPATION IN ITALY: TRENDS AND PROSPECTS COMPARING THE GERMAN AND EUROPEAN MODELS] (2013) (illustrating a German perspective on co-determination).

105. Considering the "change" or the "continuity" within the context, it is worth to recall that "Change" suggests evolution to something identifiable; "continuity" suggests adhering to an existing state of affairs. Although notionally opposites, "change" and "continuity" have something in common — they both suggest some form of predictability and coher-

striving to follow the intentions of markets and institutional investors:[106] a clear evolution towards United States models,[107] that shows an opposite view on the adoption of the two-tier models, of which there is now clear regression.[108]

The discipline exposed so far can only lead to a further comparison to what happens in the Italian corporate system, although national context[109] and geographical area will need to be taken into account.[110]

> ence in regulatory reform. . . . Japanese corporate governance reform or, indeed, law reform more generally in Japan, is context-specific, multi-layered (with different dimensions not necessarily pulling all in the same direction – for example, in relations with key outside suppliers), and therefore more random or "chaotic."

Nottage & Wolff, *supra* note 70, at iv.

106. The consideration about the role of foreign shareholders is highlighted in TAKAHASHI, *supra* note 100, at 65 and Geoffrey Owen, *When US Investors Took on Japan's Executives: "Hedge Fund Activism in Japan" Tells the Story of an Extraordinary Battle Between Steel Partners and Bull-Dog Sauce*, FIN. TIMES (June 27, 2012) (book review), https://www.ft.com/content/871df304-bed0-11e1-8ccd-00144feabdc0. The consideration has a clear reflection, in the Italian context, as reflected in the speeches of Sergio Erede, Founder and Senior Partner, Studio Legale Bonelli Erede, Una nuova prospettiva per il sistema monistico [A New Perspective for the One-Tier System] at the European House Ambrosetti L'Osservatorio sull'Eccellenza dei Sistemi di Governo in Italia - Workshop: Le aree di frontiera della Corporate Governance (Nov. 17, 2015) and Stefano Preda, Full Professors of Financial Law, Polytechnic University of Milan, Scelte di investimento, modelli di gestione e controllo e qualità del sistema di governo: il punto di vista degli investitori e delle istituzioni [Investment Decisions, Management and Control Models and Quality of Corporate Governance Systems: The Point of View of Investors and Institutions] at the European House Ambrosetti - L'Osservatorio sull'Eccellenza dei Sistemi di Governo in Italia - Workshop: Le aree di frontiera della Corporate Governance (Nov. 17, 2015)

107. Masao Nakamura, *Japanese Corporate Governance Practices in the Post-Bubble Era: Implications of Institutional and Legal Reforms in the 1990s and Early 2000s*, 3 INT'L J. DISCLOSURE & GOVERNANCE 233, 254 (2006). In May 2003, for example, Toyota reduced the number of directors from 58 to 27. However, it did not intend to fully embrace a U.S. model of corporate governance since because "shareholders are important, but what comes first are the employees who work here and the people who obtain the patents are the employees." TAKAHASHI, *supra* note 100, at 65-66 (quoting Chairman Mitarai of Canon). The idea of the "best adaptation to the specific operational needs of the social enterprise" is also confirmed in CAMPOBASSO, *supra* note 96, at 354, where reference is expressly made also to the Code of Corporate Governance. *See also* Leaders, Corporate Governance in Japan: Olympian Depths, ECONOMIST (Nov. 3, 2012), http://www.economist.com/news/leaders/21565626-want-invest-underperforming-companies-no-outside-directors-go-japan-olympian; Sanford M. Jacoby, *Foreign Investors and Corporate Governance in Japan*, *in* CORPORATE GOVERNANCE AND MANAGERIAL REFORM IN JAPAN 93 (D. Hugh Whittaker & Simon Deakin eds. 2009).

108. *See* DEUTSCHE CORPORATE GOVERNANCE KODEX [DCGK] [GERMAN CORPORATE GOVERNANCE CODE], as amended, art. 3, *translation at* http://www.dcgk.de//files/dcgk/usercontent/en/download/code/2015-05-05_Corporate_Governance_Code_EN.pdf; Portale, *supra* note 1 (discussing a case of the Portuguese bank Millennium bcp).

109. One commentator described harmonization of governance systems as follows:

> [G]overnance systems cannot be completely standardized because their design depends on the setting. For example, governance systems differ depending on whether you take a shareholder perspective or a stakeholder perspective of the firm, as well as the efficiency of local capital markets, quality of the legal system, and labor markets. They also differ depending on your view of the prevalence of self-interest among executives.

The direction towards which the entire Japanese company law has moved, and is still moving, follows the same direction according to which the Italian legislator moved, both in the predominance of the traditional model and in the recent attention to the one-tier systems,[111] which is the most unexpected amongst the amendments of management of corporations.[112]

The Japanese Stock Companies customarily adopt the traditional model due to the fact that Japan's corporate governance is identified

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. . . .

> The extent to which you believe this is the norm in society will have a direct impact on the extent to which you believe control mechanisms should be in place to prevent the occurrence of self-interested behavior and the rigor of those controls. Nevertheless, in the end, a balance must be struck. . . . .
>
> . . . [C]ontext is critical to design an effective corporate governance system.

LARCKER & TAYAN, *supra* note 103, at 417–18.

110. As shown by the analysis conducted with respect to Singapore, China, and Japan by Hui Yun Corinne Tan, *The One-Tier and Two-Tier Board Structures and Hybrids in Asia - Convergence and What Really Matters for Corporate Governance*, SSRN 3-5 (Sept. 1, 2011), http://papers.ssrn.com/abstract=2140345 (last visited Feb. 5, 2017) and Robert Mcgee, *Corporate Governance in Asia: An Eight-Country Comparative Study*, 5 CORP. OWNERSHIP & CONTROL 186 (2008).

111. See some suggestions proposed in COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA [CONSOB] [IT. SEC. AND EXCH. COMM'N], MODIFICHE AL REGOLAMENTO N. 11971 IN MATERIA DI EMITTENTI E AL REGOLAMENTO N. 16191 IN MATERIA DI MERCATI: PRIMI ESITI DEGLI APPROFONDIMENTI CONDOTTI NELL'AMBITO DEI TAVOLI DI LAVORO "CONCORRENZA FRA SISTEMI DI REGOLE E VIGILANZA" E "SEMPLIFICAZIONE REGOLAMENTARE DEL MERCATO FINANZIARIO ITALIANO" (DOCUMENTO DI CONSULTAZIONE) [MODIFICATIONS TO REGULATION N. 11971 ON ISSUERS AND REGULATION N. 16191 ON MARKETS: FIRST RESULTS OF THE STUDIES CONDUCTED IN THE CONTEXT OF THE ROUNDTABLES REGARDING "COMPETITION BETWEEN SYSTEMS OF RULES AND SUPERVISION" AND "SIMPLIFICATION OF REGULATIONS IN THE ITALIAN FINANCIAL MARKET" (CONSULTATION DOCUMENT)] 24-25 (July 25, 2011), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=0ahUKEwjqzLKOjeHRAhVq64MKHRXUB2UQFggcMAA&url=http%3A%2F%2Fwww.consob.it%2Fdocumenti%2FRegolamentazione%2Flavori_preparatori%2Fconsultazione_emittenti_mercati_20110725.pdf&usg=AFQjCNGhUpMpyZKeBnEDzzgtyomizUY4mQ (last visited Feb. 5, 2017) where provisions dedicated to alternative systems of governance, and in particular to the one-tier one, emerge for the constant reference to the traditional system in their drafting. The lack of an independent regulatory framework, combined with the difficulty of adapting institutions formulated for the traditional system to alternative models, might be one of the factors undermining the adoption of the latter among listed companies. Therefore, it was proposed to create an autonomous body of norms, in order to ensure certainty in the application of such models, proposing a proper set of rules for them through a rewriting of both articles contained in the Italian Civil Code and Consolidated Law on Finance.

112. Chiara Mosca, *I principî di funzionamento del modello monistico. I poteri del comitato di controllo* [*The Operating Principles of One-Tier Model. The Powers of the Audit Committee*], *in* PIETRO ABBADESSA ET AL., IL NUOVO NUOVO DIRITTO DIRITTO DELLE SOCIETÀ: LIBER AMICORUM GIAN FRANCO CAMPOBASSO [THE NEW COMPANY LAW: LIBER AMICORUM GIAN FRANCO CAMPOBASSO] 736 (Pietro Abbadessa ed. 2006). Such wonder is, however, mitigated in the practice, now consolidated in the sense of importing solutions or guidelines from the Anglo-American experience, *id.* at 737 & n.8, whose functioning is developed in Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 BUS. LAW. 1271 (1993).

as "stakeholder" one, with bank finance and monitoring, the absence of hostile takeovers, moderate executive pay, management cultures based on consensus, emphasis on product quality and long-term strategy rather than financial returns, and so on. "Patient" owners and long-term management was thought to be supportive of long-term employment, since short-term returns are sacrificed to build stable relationships.[113]

In the Italian context, despite the fact that the doctrine revealed keen interest in these issues, the non-traditional models did not meet the favor of listed companies: only three of them currently adopt the two-tier structure (*UBI Banca, Popolare of Milano* and *SS Lazio*), only three of them currently opt for the one-tier structure (*CHL Engineering* and *Intesa Sanpaolo*, that recently moved to this model[114]);[115] five of them preferred to go back to the traditional system, once they accomplished the two-tier experience (*Mediobanca*, *Banco Popolare*, *A2A*, *Management & Capitali* and *Mid Industry Capital*); only a few of them (as *Ducati Motor Holding* and *Buongiorno*) were delisted.[116]

The success of one-tier models resonated more in in Japan[117] than in Italy,[118] thanks to the greater flexibility of the legislation, not pro-

113. Jackson, *supra* note 6, at 17.

114. Piergaetano Marchetti, *Tanto tuonò che piovve. Intesa Sanpaolo e il monistico* [*The Rain Thundered Down so heavily that It Finally Rained. Intesa Sanpaolo and the One-Tier model*], 1 Analisi Giuridica dell'Economia 9 (2016).

115. Despite its Anglo-Saxon origins, Calkoen, *supra* note 7, at 46–48, the Italian connotations of the document are evident, as shown in Salvatore Providenti, Il sistema monistico di amministrazione e controllo [The One-Tier System of Management and Control], *in* LE SOCIETÀ COMMERCIALI: ORGANIZZAZIONE, RESPONSABILITÀ E CONTROLLI [CORPORATIONS: ORGANIZATION, RESPONSIBILITIES AND CONTROL] 420, n.5 (Michele Vietti ed., 2014). *See also* Laura Schiuma, *Il sistema monistico: il consiglio di amministrazione ed il comitato per il controllo sulla gestione* [*The One-Tier System: The Board of Directors and the Audit Committee*], *in* LA GOVERNANCE NELLE SOCIETÀ DI CAPITALI. A DIECI ANNI DALLA RIFORMA [GOVERNANCE IN CORPORATIONS. TEN YEARS AFTER THE REFORM] 465 (Piergaetano Marchetti & Daniele U. Santosuosso eds., 2013); CARLO ANGELICI, LA RIFORMA DELLE SOCIETÀ DI CAPITALI. LEZIONI DI DIRITTO COMMERCIALE [THE REFORM OF LIMITED LIABILITY COMPANIES: BUSINESS LAW CLASSES] 156 (2nd ed. 2006).

116. *See* Companies Delisted from January 1995 to 30 April 2015, BORSA ITALIANA, http://www.borsaitaliana.it/borsaitaliana/ufficio-stampa/dati-storici/revocheapr.en.pdf (last visited Feb. 7, 2017).

117. *See generally* TOMMASO DI MARCELLO, SISTEMA MONISTICO E AUTONOMIA ORGANIZZATIVA [ONE-TIER SYSTEM AND AUTONOMY IN ORGANIZATION] (2012); Vincenzo Calandra Buonaura, *I modelli di amministrazione e controllo nella riforma del diritto societario* [*Management and Control Models in the Company Law Reform*], 30 GIURISPRUDENZA COMMER. 535, 556 (2003).

118. Francesco Vella, *Sistemi alternativi del governo societario: ci vuole un incentivo* [*Alternative Systems of Corporate Governance: Incentives Needed*], LAVOCE.INFO (2015), http://www.lavoce.info/archives/37176/sistemi-alternativi-del-governo-societario-ci-vuole-un-incentivo (last visited Feb. 5, 2017). Standards are almost exclusively aimed at listed companies, not only because they are the major candidates to exploit the potential of the one-tier boards, but also for

viding rigid mechanisms of list voting,[119] but rather pluralism and diversity in the composition of the board.

Adopting minor models, whose details are not generally known, does not correspond, however, to a recognition of their superiority, or of the obsolescence of traditional ones. In fact, in absence of a clear superiority of one of model, it is empirically[120] preferable to move from the substantial functional equivalence,[121] to the effectiveness of all models.[122]

Is there an increasing convergence "*llamada a dulcificar y relativizar el debate sobre la contraposición de sistemas de administración*?"[123] ["Call to soften and relativize the debate on the comparison among models of corporate governance"]

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the presence of self-regulation that can render any application easier. There is, of course, no certainty about the effects of this experiment, but the regulator must have the courage to embark on new paths to evolve.

119. The 28.6% of respondents to a survey on governance mechanisms would welcome a change in the current governance system and three-quarters of them emphasize that this change would only be relevant for widely held companies with shareholders not concentrated. More generally, with regard to boards of directors, see Guido Ferrarini et al., *Corporate Boards in Italy*, *in* CORPORATE BOARDS IN LAW AND PRACTICE: A COMPARATIVE ANALYSIS IN EUROPE 367 (Paul Davies et al. eds., 2013), as well as the empirical analysis, at national level, presented in the report, MATTEO EREDE & FEDERICO GHEZZI, LA COMPOSIZIONE DEL CONSIGLIO DI AMMINISTRAZIONE NELLE SOCIETÀ QUOTATE [THE COMPOSITION OF BOARDS OF DIRECTORS IN LISTED COMPANIES] (2015), at the meeting of Rivista delle Società, held in Venice on November 13 – 14, 2015.

120. The functional equivalence of the models is not undisputed, as proved by the different opinions shown with regard to the "Banca Intesa experiment." *See* Salvatore Bragantini, *Dal duale al monistico: nell'interesse di chi?* [*From Two-Tier to One-Tier Boards: in Whose Interests?*] LAVOCE.INFO (2015), http://www.lavoce.info/archives/38167/dal-duale-al-monistico-nellinteresse-di-chi/ (last visited Feb. 5, 2017).

121. The true meaning of the concepts is detailed in Mosca, *supra* note 112.

122. Mario Libertini, *Scelte fondamentali di politica legislativa e indicazioni di principio nella riforma del diritto societario del 2003. Appunti per un corso di diritto commerciale* [*Fundamental Choices of Legislative Policy and Gudelines in the 2003 Reform of Company Law. Notes for a Course in Business Law*], 3 RIVISTA DI DIRITTO SOCIETARIO 198 (2008). These considerations – as observed in Portale, *supra* note 1 – are markedly related to the theories already stated in Paolo Ferro-Luzzi, *Riflessioni in tema di controllo* [*Reflections on Corporate Control*], *in* LUIGI ARTURO BIANCHI ET AL., DIRITTO, MERCATO ED ETICA. DOPO LA CRISI. OMAGGIO A PIERGAETANO MARCHETTI [LAW, MARKET AND ETHICS. AFTER THE CRISIS. TRIBUTE TO PIERGAETANO MARCHETTI] 309 (2010).

123. The expression was originally formulated in Gaudencio Esteban Velasco, *Administración y control. Disposiciones comunes a ambos sistemas de administración y control (I)* [*Management and Control. Provisions Common to Both Management and Control Systems (I)*], *in* LUIS FERNÁNDEZ DEL POZO & GAUDENCIO ESTEBAN VELASCO, LA SOCIEDAD ANÓNIMA EUROPEA : R. . .GIMEN JURÍDICO SOCIETARIO, LABORAL Y FISCAL [EUROPEAN PUBLIC LIMITED LIABILITY COMPANY: CORPORATE, LABOR AND TAX LAW] 637 (2004) (Spain).

Is there "a virtuous competition among governance systems or a Babel where anything is possible?"[124]

This awkward question, already addressed at the end of a Symposium on two-tier models, is still leading, also with respect to one-tier ones.[125] Well, in such (uncertain) context, the flexible and efficient one-tier model[126] might[127] turn out to be successful, because it achieves a balance within the Board that, on the one hand, guarantees a streamlined decision-making process for those who are in charge of this task, and, on the other hand, is open to inspection and supervision.[128] The newly introduced model could turn out to be successful, even in a strengthened way, since it represents a practical response to the intentions of the legislator to create a common corporate regulation,[129] a major step towards a standardization, or at least a strong coordination, of national plans, where executive and non-executive directors promote a vigorous debate on - a synergy,[130] if not an osmo-

124. Piergaetano Marchetti, Sistema dualistico [The Two-Tier System] at the Meeting I sistemi alternativi di amministrazione e controllo. Un primo bilancio. [Alternative Management and Control Systems. An Initial Assessment] (Mar. 2008).

125. Marchetti, *supra* note 25.

126. Erede, *supra* note 106. The author, starting from the fact that there are no overlaps and duplications between the tasks of the Board of Directors, Audit and Risk Committee, Executive Director responsible for overseeing internal control, the Board of Auditors, Body supervision pursuant to Law 231/2001, and Independent Auditors, in tasks such as the evaluation of the adequacy of the organizational and internal control system and risk management or fairness in the use of accounting principles for annual financial statements and request checks to internal audit, believes it can be a viable alternative for corporate governance. These considerations, empirically proved, Preda, *supra* note 106, can offer new insights, in favor of a model that represents a leverage to simplify corporate governance and attract foreign institutional investors.

127. A global judgment, though not unconditionally positive, is expressed by Mosca, *supra* note 112 at 762 and Bragantini, *supra* note 120.

128. However, problematic issues are analyzed, in an extremely critical way, Bragantini, *supra* note 120, even if leaving to the market a valuation on the results to which the "Banca Intesa experiment" will conduce. Internationally, a discussion of the legal-empirical results to which alternative models led is exposed in Carsten Jungmann, *The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems: Evidence from the UK and Germany*, 3 EUR. COMPANY & FIN. L. REV. 426 (2006).

129. *See* Marco Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition*, 40 TEX. INT'L L.J. 113, 118 (2004).

130. Paolo Montalenti, *Amministrazione e controllo nella società per azioni: riflessioni sistematiche e proposte di riforma* [*Management and Control in Corporations: Systematic Reflections and Reform Proposals*], 58 RIVISTA DELLE SOCIETÀ 42, 75 (2013).

sis[131] - of a quasi-two-tier model within the one-tier board of directors.[132]

131. Niccolò Abriani, *Verso una riforma della disciplina sui controlli interni* [*Towards a Reform of the Internal Controls Rules*], *in* ATTI DEI SEMINARI CELEBRATIVI PER I 40 ANNI DALL'ISTITUZIONE DELLA COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA [CELEBRATORY SEMINARS FOR THE 40 YEARS FROM THE ESTABLISHMENT OF THE NATIONAL COMMISSION FOR COMPANIES AND THE STOCK EXCHANGE] 97 (G. Mollo ed. 2015), http://www.consob.it/documents/11973/201676/qg9.pdf/89cb69a2-8e15-40c7-8fc6-168eeb012a5b.

132. *See generally* Peter Böckli, *Konvergenz: Annäherung des monistischen und des dualistischen Führungs- und Aufsichtssystems* [*Convergence: Convergence of the Monistic and Dualistic Leadership and Supervisory Systems*], *in* HANDBUCH CORPORATE GOVERNANCE: LEITUNG UND ÜBERWACHUNG BÖRSENNOTIERTER UNTERNEHMEN IN DER RECHTS- UND WIRTSCHAFTSPRAXIS [MANUAL ON CORPORATE GOVERNANCE: MANAGEMENT AND SUPERVISION OF LISTED COMPANIES IN THE LEGAL AND ECONOMIC PRACTICE] (Peter Hommelhoff et al. eds., 2nd ed. 2009).