

Report on the Seminar Series – Current Problems of Private Commercial Law: Prof. DDr. Martin Gelter, S.J.D., Fordham University School of Law with the lecture: “Empirical Investigation of the Choice between Monistic and Dualistic Organ Structure in Europe”

On Monday, January 11, 2022, the fifth event of the seminar series “Current Problems in Private Commercial Law” (also known as “Monday Seminar”) in the winter semester 2021/2022 took place. The online event was hosted and moderated by **Univ.-Prof. Dr. Susanne Augenhofer, LL.M.** (Yale) and **Univ.-Prof. Dr. Alexander Schopper**. The lecturer **Prof. DDr. Martin Gelter, S.J.D.**, Fordham University of Law, gave a presentation on “Empirical Investigation of the Choice between Monistic and Dualistic Organ Structure in Europe”. During the lecture, the results of a study conducted by the lecturer (co-author: Prof. Dr. Mathias Siems, European University Institute, Florence) on the empirical investigation of the choice of organ structure for public limited companies within Europe were presented. In the subsequent discussion with **MMag. Dr. Christoph Diregger**, attorney at law, the latter also shed light in particular on the historical development of legislative organ structure requirements in Austria.

First of all, Prof. Gelter stated that – due to historical reasons – the monistic organ structure, according to which a unified board of directors is to be established, is still predominant in most countries. However, the dualistic organ structure already known in Austria, originating from Germany, according to which a supervisory board is to be set up as a controlling body in addition to the administrative board, which is to be separated from the latter in terms of personnel, is also gaining ground. In this context, he referred to the results of the study carried out in 2018 in the course of which 14 countries that explicitly provide for a choice between a monistic and dualistic organ structure were examined.

After a brief overview of the data sets and the scientific methods used for the study, Prof. Gelter presented examples of concrete empirical findings from the study to the participants connected online. Among the most apparent findings was that in many countries the “*traditional*” model of organ structure design, which existed before the introduction of the option, would still prevail. It was also evident that larger public limited companies tended to prefer the dualistic system, while smaller companies tended to choose the monistic system. Listed companies as well as older companies would also tend to select the dualistic system. Finally, Prof. Gelter summarized that, at

the latest since the introduction of the SE in 2004, there has been a clear trend in the EU and EEA member states towards the introduction of national options for choosing between the two organ structure models and since the introduction of such an option a decline in dualistic systems has also been observed in some countries.

In the subsequent discussion, Dr. Christoph Diregger first gave an overview of the historical development of the dualistic system existing in Austria. He pointed out that the supervisory board was first introduced in 1870 in the then German ADHGB (German General Commercial Code) in its Art. 225 as an optional choice. The creation of the dualistic system in its “*pure form*”, however, did not take place until 1937/38 in the Austrian AktG (Stock Corporation Act). Following this retrospective overview, he also stated that, in his opinion, the monistic system provided for under the SE Act is in fact merely a “*disguised*” dualistic system, since the majority of the administrative board is not allowed to consist of managing directors anyway (Section 59 (2) of the SE Act). However, according to Prof. Diregger, both organ structure systems have their merits, but the success of the chosen system would ultimately depend on how the systems are actually implemented in factual business practice.

Following these interesting presentations, the seminar participants took the opportunity to discuss the empirical findings on the two organ structure systems obtained from the study in more detail with the two speakers. This led to an interesting exchange of views, not least with regard to the country-specific differences in the choice of organ structure identified in the study.

(Julian Nigg)



The screenshot shows a Zoom meeting interface. On the left, a data table titled "Firm-level differences across countries: some mean data ..." is visible. On the right, a presentation slide titled "Rechtsentwicklung" is shown, along with a video feed of a speaker.

Country	Number of companies	Number of dualistic companies	Number of monistic companies	Foreign share (%)	Logarithmic size (log)	Share of employees (%)	Foreign share (%)	Operating income (€)	Total assets (€)
AT	3.37	62.82	2.68	12.53	75.12	28	5	7899.31	17645.58
BE	2.43	96.29	0.49	17.83	87.41	14	4	12139.22	36323.35
DE	4.81	83.29	1.79	8.81	79.33	20	5	113971.51	54212.44
DK	28.39	2287.77	24.79	9.90	42.80	9	8	889211.84	22491428.02
FR	6.42	488.51	2.53	7.87	78.26	8	3	171813.86	251048.96
IT	8.84	316.58	4.39	9.27	42.24	15	4	48365.14	28623.16
NL	8.18	127.87	1.24	14.90	88.07	19	3	23824.08	59328.45
SE	9.38	243.42	9.17	8.31	96.48	32	2	80298.32	144939.27
UK	4.29	293.90	2.22	22.90	68.87	11	3	65913.87	236985.17
EU	3.82	203.84	1.84	46.77	79.49	20	29	127799.03	191836.02
EU*	5.37	1626.86	2.11	20.43	86.70	1	8	1884206.81	488752.75
EU**	5.21	82.14	1.67	12.84	72.54	8	3	17228.29	48181.87
EU***	5.54	114.42	3.83	14.82	74.80	19	8	11819.39	19854.97
EU****	6.11	321.80	3.96	19.39	62.10	13	4	45444.39	189207.23
EU*****	6.83	182.74	3.10	12.29	71.89	18	8	78174.84	182218.28

The presentation slide "Rechtsentwicklung" (Legal Development) features the DSC logo and discusses the historical context of the supervisory board in Austria, mentioning the ADHGB of 1852 and the AktG of 1937/38. It notes that the ADHGB initially provided an optional supervisory board (AR) in Art. 225, and that in the AktG, the AR was often transformed into a management board with mixed functions.