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CORPORATE GOVERNANCE INSTEAD OF BUSINESS MANAGEMENT? AN OBJECTION

Prof. Dr. Wolfgang Bernhardt

*Lecture held at The International Conference
of the Fundación Iberdrola
"Enterprise and Civil Society: Mutual Challenges of the Future"
on 9th October, 2003 in Madrid*



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DIRECTOR : Prof. Dr. SANTIAGO GARCIA ECHEVARRIA**



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Alcalá de Henares, Marzo 2004

Author: *Prof. Dr. Wolfgang Bernhardt*

Abstracts:

In this working paper of Prof. Bernhardt is taken back a clear position about all the aspects that conform the Business Government. This contribution allows the critical analysis of the topical debate with a deep consideration of the European juridical tradition and a long and deep trajectory of the European Business Culture. The anchorage of the Business Government in the European Culture and it's valuation from this perspective of european codes provides a great vision of the current state of business situation in Europe. The juridical, economic, financial and management multidimensional gives a great value to this contribution.

It ends with a brief but compact observation about models and trends in business consultancy.

Classification: Jel M10, M20

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I.D.O.E.

Instituto de Dirección y Organización de Empresas

© Prof. Dr. Dr. Santiago García Echevarría

Dirección del I.D.O.E. : Plaza de la Victoria, 3
28802 - Alcalá de Henares.
Teléfono : 91. 885.42.00
Fax : 91. 885.51.57
Contacto: Miguel Martínez Arribas
Mónica Jiménez Baldazo

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e-mail: digital.2000@wanadoo.es

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Introduction / Prologue

In a completely different context the German President, Johannes Rau, was recently reported to have said, "Everything has been said, but not everyone has had his say yet". This could just as easily apply to the question of corporate governance. All manner of opinions, lectures, dissertations, government papers and diverse codes fill rows of shelves and it is becoming difficult to distinguish one from the other at a glance. Corporate Governance is in fashion! I therefore hesitated for some time before accepting today's invitation. I do not wish to im-pose upon your time with repetitions of things you have already heard. Further-more, it was with great interest that I read the report titled "The governance of listed companies" dated 26 February, 1998 prepared by the Special Commission to Consider a code of Ethics for Companies' Boards of Directors with its "Code of Good Governance" (Olivencia Code)¹ and the "Report by the Special Commission to Foster Transparency and Security in the Markets and in Listed Companies" dated 8 January, 2003 with its recommendations (Aldama Report)².

These are very clever papers and recommendations which could well be exemplary, at least in places where the same basic legal rules apply (management by a single management body as opposed to a two-tier model of company management).

But, of course, I am a bad "referee" in Spanish questions and the (inner-) German discussion will only partially interest you because you have so little grounds for comparison. So what is the best thing to do? The glut of material available provides the odd advantage, but also many disadvantages. The total picture gets lost and it becomes increasingly difficult to decide what are in fact the most important points. There is a danger that one "cannot see the wood for the trees" as the saying goes. Perhaps it would therefore be a good idea to go back and remember the initial questions and to find a standard measure for the answers insofar as they relate to the key issues in the discussion. - I want to try.

¹ See under www.ecgi.org/codes/country-pages/codes-spain.html.

² See under www.ecgi.org/codes/country-pages/codes-spain.html.

1. Globalisation: with no historical examples and experience?

"Globalisation" is held up as the guideline, as if world-wide markets and a - more or less - free world market including different parts of the earth and their diverse business cultures had not existed in earlier times³.

- 1.1 But globalisation is nothing new and nothing unique, as some of its supporters believe or would have us believe - partially for obvious reasons of self-interest. Both supporters and critics of globalisation think, as a rule, of the internet which spans the world, of transactions made at breath-taking speed on the money and capital markets, of the importance of international companies which have grown to gigantic proportions, closing factories here while opening new ones there.

If one understands the term globalisation to mean a rapidly increasing integration of economies which were previously geographically separated, what we are experiencing today is not new. And not even multinational or international companies are new, nor are the revolutionary changes to transport and communications systems. Capital was also moved around the world in the past. Even global debts and currency crises have a long history.

And the biggest jump forward in global communications traffic took place in the 19th century. When the first telegraph cable under the Atlantic started to work in 1866 the transmission speed of urgent messages between Europe and America increased ten thousand-fold. And only a short time later all stock exchanges of the world were inter-connected by telegraph. News of events which affected the prices on the stock exchanges travelled around the globe within minutes.

³ For details see Borchardt, Handelsblatt No.112 dated 13.06.2001, P. 7 ("Die Globalisierung ist nicht unumkehrbar"), whom I owe thanks for the following.

It is significant that the greater financial crises in the 19th century were of a world-wide nature, beginning in 1825 with a debt crisis in the states of Central and South America which had just won their independence. This in turn caused panic on the European stock exchanges and led to the Prussian authorities prohibiting trade in South American stocks for a period of time.

And how mobile people were! In the years from 1820 to 1914 a total of almost 60 million people emigrated from Europe to destinations overseas - the United States, South or Central America, South Africa, Australia, New Zealand, during the years between 1900 and 1914 they numbered 1.3 million per year. During the same period millions of people were also moving around within Europe.

Something which could be described as a "world economy" was not new in the 19th century, it already existed in ancient times and in the middle ages; long-distance economic ties which spanned the world as it was then known to man. Connections between Eastern and Central Asia on the one hand and the Orient, Africa and Europe on the other were obviously closer than portrayed by our history books which tend to focus more on Europe.

But the webs which were spun were torn apart again and again.

It is true that a new "world system" was created when first Portugal and Spain and then Holland and England and - finally - France reached out overseas. But free - or even multilateral - trade zones did not emerge; instead a relationship, normally of a monopolistic nature and organised by the "rulers", was created between the centre and the periphery.

Is it really so different today - Americanisation in the guise of globalisation?

- 1.2 Globalisation was not an on-going process. All earlier forms of globalisation came to an end - with a more or less sudden downfall. This could lead us to assume that the present globalisation process is not irreversible. That would be going too far in today's discussion, although it is worth consideration.
- 1.3 Without doubt, caution is necessary if reference is made to globalisation and its - supposedly inevitable - consequences. This is illustrated by one German-American example:

DaimlerChrysler AG, resulting from the merger between Daimler Benz AG and Chrysler Corp., is regarded as the showpiece of globalisation. Jürgen Schrempp, Chairman of DaimlerChrysler AG's Management Board, refers to it as the "World AG". In reality DaimlerChrysler AG is an enterprise which could not possibly be more German, even if it has a - legally dependent - Chrysler division in the United States.

- Large numbers of American Chrysler shareholders got rid of their DaimlerChrysler shares very quickly after the merger with Daimler Benz AG; today only 15 % of DaimlerChrysler AG's shareholders are American as compared with 44 % directly following the merger.⁴
- As of 2004 the Management Board of DaimlerChrysler AG will be made up of 11 members, all of whom, with the exception of one American (currently two), are German nationals⁵;
- after the merger the Management Board of DaimlerChrysler AG was originally made up of 8 Americans and 10 Germans⁶.

⁴ See with ref. to 1999 Wall Street Journal dated 24.03.1999 ("DaimlerChrysler Frets Over Loss of U.S. Shareholders") and for 2003 data under www.daimlerchrysler.com (under Investor Relations, Basic Information, Shareholder Structure).

⁵ See DaimlerChrysler Annual Report 2002, P. 6 / 7.

⁶ See DaimlerChrysler Annual Report 1999, P. 8 / 9.

- German Daimler-employees lead and dominate the foreign di-visions (and subsidiaries); in the case of Chrysler and Mitsubishi they are in place and act as a "corps of helpers".
- DaimlerChrysler is headquartered - with heart and soul - in Stuttgart.

Only the remuneration of the - German - DaimlerChrysler Management Board is not German, it is American, from the fixed income to the various forms of stock options (shares and phantom stocks)⁷. Until now, however, DaimlerChrysler has behaved in a "German" manner with regard to its (non-) information and (non-) disclosure of the Board remuneration by individual, taking advantage of the privi-lege granted to it by the Securities and Exchange Commission (SEC) in Form 20 F: individual disclosure is unnecessary in cases where it is not required in the company's home country and is not otherwise publicly disclosed by the company⁸.

2. Traditions and legal organisation(s): firmly anchored or interchangeable at will?

- 2.1 A closer look shows that we are dealing not so much with internationalisation, but with the superimposition of US American (legal) structures and corporate by-laws onto existing European conditions.

But the varying traditions and differences in legal cultures are such that they cannot simply be stamped out by superimposing an Anglo Saxon Code of Corporate Governance, - whereby it is no coincidence that the European debate about a code of corporate governance arose (boiled up) in connec-tion with the wave of mergers

⁷ See DaimlerChrysler Annual Report 2002, P. 120-122 + 142.

⁸ See SEC Form 20-F, Item 6 Abs. B under www.sec.gov/smbus/forms/20f.htm.

and the stock exchange boom which were seen in the years from 1998 to 2000.

Law and legal understanding in Continental Europe - also in Spain and Germany - vary in fundamental aspects from those in America: on the one hand we see legislative law with strong Roman influence and on the other hand we have contract law based on individuals' needs (and case law). Over the years and centuries this has led to different legal cultures which in turn influence corporate behaviour (whereby the law firms in the United States exercise great influence). Contrary to the countries in Continental Europe, the Anglo Saxon countries must avail themselves of instruments such as codes when they need a binding ruling.

At the same time two entirely different models of organisation and leadership meet head-on: the board system with the Chief Executive Officer in the U.S. and the two-tier model in Germany with a Management Board and a Supervisory Board, whereby the Management Board is a body of equal colleagues (with employee representation in the Supervisory Board). You do not have these structural differences between Spain and the United States.

Any convergence of the systems does nothing to alter the basic differences which exist⁹.

- 2.2 As far as the question of management remuneration is concerned, it is necessary to see and to recognise the historic differences and the - partially religious - variances in the origins which play a role on both sides of the Atlantic (or anywhere else). In the United States competition and success have always had their own special meaning and value, from the time the first - for the most part protestant - immigrants began settling the American continent; work and success as an expression

⁹ See Witt, ZfB Zeitschrift für Betriebswirtschaft-Ergänzungsheft 4/2001, Theorie der Unternehmung, P. 73-97 ("Konsistenz und Wandlungsfähigkeit von Corporate Governance-Systemen).

of the endless freedom in the struggle for survival, with strong religious elements stemming from the Calvinists' belief in predestination; origins and core elements which are still valid today as unchanged religious components or at least as a "religion for the people".

Such origins and / or traditions do not exist in Europe and the - frequently Catholic - countries of central Europe. Success stands alone as success which in turn has nothing to do with other religious or quasi-religious points of view; success in the form of "remuneration" is a personal matter and is therefore not to be made public; remuneration is just one part of the interests and considerations that need to be weighed up, whereby the "rightness" and the - also social - balance play an important role, at least they did until the 90's. This holds true for public companies as well as for private enterprise, usually family businesses with their - either much ad-mired or much abused - patriarchy. The German language also includes the word "Fürsorge", meaning welfare (the literal translation being "caring for"), in the business sector, an attitude which has always distinguished the great German companies and entrepreneurs. As an example one can look back on Firma Fried. Krupp in Essen with its clinics, coops, employee apartments or on the voluntary pension schemes which exist from one end of the country to the other¹⁰.

Is that all part of yesterday and passé because it doesn't pay in dollars and cents, at least not immediately? Hopefully not.

Generally the time parameters in Europe have always been drawn up differently than in the United States when measuring success: not short-term, measured quarterly and semi-annually, but mid and long-term in annual or perennial periods. This is also evident in the duration of the employment contracts for management (executives): fixed long-term contracts with well-balanced remuneration here, short-term termination / redundancy possibilities

¹⁰ See Beitz, Else (1994), "Das wird gewaltig ziehen und Früchte tragen!": Industripädagogik in den Großbetrieben des 19. Jahrhunderts bis zum Ersten Weltkrieg, dargestellt am Beispiel der Firma Fried.Krupp, Klartext-Verlag, Essen.

there with a correspondingly higher, in some cases extraordinary, remuneration - but only - for the successful (contracts originally without "golden hand-shakes" or "parachutes").

2.3 In the - global - conflict between principals and agents, which has been increasingly decided in favour of the agents in listed public companies, the agents are concerned with securing the best of both worlds for themselves: long-term contracts on the one hand (with redundancy provisions if the contract is terminated prematurely) and variable compensation packages (stock options) on the other, which are completely beyond any acceptable limits and which have nothing - but their formal criteria - to do with success; at least they define success differently for the agents than for the principals. Lawyers, auditors and other consultants are always available to "accommodate" the expectations and interests of the management. We'll go into this in more detail later.

3. Origin(s) of the Code: misunderstandings or conflict of aims?

A look at the German discussion on the code, which started in 1999 and continued till the end of 2001, and the development of the German Corporate Governance Code dated 26 February, 2002 "confirm" the differing starting points¹¹.

3.1 Initially there was a misunderstanding on the part of the analysts and (institutional) investors, most of whom have an Anglo Saxon bias. They did not understand - or chose to ignore - that all the salient points of German corporate governance are, both in general and in detail, anchored in and provided for by legislation and that only - very - little room remains for further rules and regulations, quite the opposite to Anglo Saxon legal tradition. And for this reason the purpose of a - any - German code of corporate governance is first and foremost that of communication,

¹¹ See Bernhardt, DER BETRIEB, H. 36 dated 06.09.2002, P. 1841-1846 ("Der Deutsche Corporate Governance Kodex: Zuwahl (comply) oder Abwahl (explain)?" - P. 1841).

not regulation. This is no mean feat, and something completely different to "German Code of Corporate Governance" which was being called for. There remains (only) a little leeway for such recommendations as help translate the "letter of the law" into actions or those which make best use of the - existing - possibilities. It is a matter of experience, of "best practice" as it is frequently called (and not of a codex in the Roman legal sense).

- 3.2 Both of the German government commissions on corporate governance (Baums and Cromme) were well aware of this of course and they placed themselves at the "head of the movement" where they were best positioned to reduce any demands made by a code which might be too far-reaching. For this reason Germany had to have one uniform code instead of letting the marketplace reach its own decision - although it was well-known that in the United States there are a number of (company) codes, all of which co-exist quite peacefully. The "Deutschland AG" representing the network within German industry wanted to avoid any such competition between codes in order to retain control over the events surrounding corporate governance. Ut aliquid fiat, was the motto¹².

As a consequence the German Corporate Governance Code contains nothing, or very little, which could not be signed without even a cursory glance, quite apart from the fact that much of it is merely a repetition of legal requirements. Much more meaningful are the omissions; things which ought to have been included in the code if "best practice" is the aim. And many people who had expected the code to "make a mark"¹³ are very disappointed - and quite rightly so.

¹² See Bernhardt, DER BETRIEB, H. 36 dated 06.09.2002, P. 1841 ff. ("Der Deutsche Corporate Governance Kodex: Zuwahl (comply) oder Abwahl (explain)?" - P. 1841).

¹³ WIRTSCHAFTSWOCHE No. 6 dated 31.01.2002, P. 66 ("Der große Bluff"); Handelsblatt No. 41 dated 27.02.2002, P. 8 ("Der große Bruder aus Amerika lässt grüßen"); Frankfurter Allgemeine Zeitung No. 49 dated 27.02.2002, P. 15 ("Schwammige Gebote" und "Fünfzig Regeln für Vorstände und Aufsichtsräte"); Frankfurter Allgemeine Zeitung No. 52 dated 02.03.2002, P. 23 (Die Kodex-Kommission hat eine Chance verpaßt"); Handelsblatt No. 47 dated 07.03.2002, P. 31 (Aktionärsschützer kritisieren Corporate Governance-Kodex"); Frankfurter

The Spanish Aldama-Code is much cleverer because it contains far-reaching recommendations and at the same time considers company codes or codes for a given branch of industry to be possible or even advisable¹⁴.

3.3 Observance of the German Corporate Governance Code - it is not (legally) binding - is based on "interplay" between legal norm and private code.

On May 17, 2002 the German parliament passed a law further reforming the Stock Corporation Act with the inclusion of the Transparency and Disclosure Act. One part of this law is a "declaration of conformity with the Corporate Governance Code". This refers to the so-called declaration of compliance with § 161 of the Stock Corporation Act in the new version (n.V.)

"Management Board and Supervisory Board of a listed company declare annually that the recommendations made by the "Government Commission on the German Corporate Governance Code" which are published by the Ministry of Justice in the official part of the electronic "Federal Gazette " were and are complied with or which recommendations were or are not observed. The declaration will be made available to the shareholders."¹⁵

The Transparency and Disclosure Act (TransPuG) has its origins in the report made by the "Government Commission on Corporate Governance" (Baums) in the year 2001¹⁶ and makes provisions for some of the report's recommendations; at the same time § 161 of the Stock

Allgemeine Zeitung No. 93 dated 22.04.2002, P. 18 ("Kodex wirkt nur bei Verhaltensänderung").

¹⁴ See Section VI No. 1 ("Self-regulation principle").

¹⁵ Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz), Bundesgesetzblatt (2002) Teil I No. 50, dated 25.07.2002.

¹⁶ Baums (Hrsg.), Report of the Government Commission Corporate Governance, Verlag Dr. Otto Schmidt, Köln (2001).

Corporation Act n.V. provides a basis for the rules of behaviour which were developed by the "Government Commission on German Corporate Governance Code" (Cromme) in 2001/2002¹⁷. The declaration of conformity with the Corporate Governance Code (comply or explain) refers to the "German Corporate Governance Code", developed by the commission, whereby its "stipulations" vary from legally binding rules ("must stipulations"), to strong recommendations ("ought to stipulations") and mere suggestions ("should or can stipulations"), - which does not serve to simplify matters, particularly for an outsider (function of communication).

According to § 161 Stock Corporation Act n.V. listed companies are required to consider whether they have conformed - completely or partially - with the Code. The decision not to comply with sections of the code requires no explanation (contrary to the misleading expression "declaration of conformity" or "explain"). An announcement by the listed company in question that the "German Corporate Governance Code" has not been adopted - as a whole or partially -, or that the company forgoes any code or that the company prefers its own "code of best practice" to the "uniform codes" suffices¹⁸. This also applies to the "corrections" to the code which were made in 2003 (in the amended version dated 21 May, 2003)¹⁹.

¹⁷ Government Commission Deutscher Corporate Governance Kodex, Deutscher Corporate Governance Kodex (DCG-Kodex), See under <http://www.corporate-governance-code.de>.

¹⁸ See Bernhardt, DER BETRIEB, H. 17 dated 25.04.2003, P. I ("Entsprechenserklärungen mit Lücken und Tücken").

¹⁹ See under www.corporate-governance-code.de. Tightening up the code by altering the ruling on disclosure of Management Board remuneration from a "can" into an "ought to" stipulation is helpful, but was "due" anyway. Whoever wants to make use of American remuneration models and standards must also accept the drawbacks and, if they are not going to be asked in advance, at least inform the shareholders.

4. Business Culture and Leadership Structure deeply rooted or incidental?

- 4.1 Law, the interpretation of law and the reality of law leave their mark. The same applies to the different systems of organisation and management. The system of management by a single body with the Chairman and Chief Executive Officer "works" differently to the two-tier system of Management Board and Supervisory Board with the collective leadership / responsibility - and the Chairman of the Board (only) as "first among equals"²⁰. Employee representation in a German Supervisory Board serves to make the differences greater.
- 4.2 More important: the public company, whether listed or not, possesses as a legal entity its own "weight" and "value"; German legal tradition has developed the expression "the company as such". The public company is more than just an "extension" of the shareholders or a mirror-image of the shareholders; to an even lesser extent may a public company be identified with its "leaders" such as management and Supervisory Board, who lead and represent, but do not personify the company. German public companies therefore "live" differently than comparable companies in the United States; this was at least true until a few years ago.

As already mentioned, the Anglo Saxon timeframes also vary. Put-ting the focus on - fast - profit and the - so-called - shareholder value detracts from the fact that:

- a company - to the European and German way of thinking - is more than the sum of figures - of short-term validity - and stock prices;
- a company comprises shareholders, employees, suppliers, customers, creditors and its "environment";

²⁰ Bernhardt / Witt, ZfB Zeitschrift für Betriebswirtschaft 69. Jg. (1999), H. 8, P. 825 - 845 ("Unternehmensleitung im Spannungsfeld zwischen Ressortverteilung und Gesamtverantwortung").

- a company is set up with the long term in mind and therefore has an inherent value (which is not limited to the daily stock prices);
- so-called stock exchange-orientated measures (such as out-sourcing or the buying back of the company's own shares²¹) may have a short-term positive influence on the share price causing it to rise, but (can) sooner or later cause - lasting - damage to the company.

In the course of the falsely understood and abbreviated search for "value finding" or "value orientation" which are - at face value - limited to shareholder value, the "hard facts" as well as the - quite wrongly mocked - "soft points" are all too frequently overlooked. In European understanding companies are more than just a framework for figures, an employee is more than just a "counter". It is not purely by chance that many mergers fail, one of the causes of the Corporate Governance debate (and of the "value creation"), either very quickly or over a period of time, no matter how successful they appear to be at the beginning; the blossoms (synergetic effects) turn out to be nothing but artificial flowers²².

"All that counts is the company's capability in the future. And one can only ensure a good future if employees and management, as well as the shareholders, are enthusiastic in their approach to a mutual goal. Those who make shareholder value the guideline for their actions cannot ensure a good future", the Chief Executive of Dr. Ing. h.c. F. Porsche, Wiedeking, said - quite rightly²³.

4.3 Employee representation is an integral part of the German form of corporate leadership. Employee representation /

²¹ See F.A.Z. No. 91 dated 17.04.2003, P. 20 ("Marktwert-Märchen").

²² Bernhardt, (2000), Corporate Governance, An International Review, Vol. 8, No. 4, P. 327 ff. (Acquisitions, Mergers and Cancellations in Germany - in the white water of shareholder value").

²³ Börsen-Zeitung No. 15 dated 23.01.1999, P. 6. ("Shareholder Value nicht alles").

co-determination takes place locally in the plant via the works council and co-determination at company / leadership level takes place in the Management Board (the director for employee relations) and in the Supervisory Board where the employees and the shareholders are represented in equal numbers, where, however, the chairman of the Supervisory Board has a second - deciding - vote to resolve stalemate situations. Co-determination on enterprise-level originated as law of the occupying power applicable in the iron and steel works in the British zone after 1945, a stipulation which was later carried over to companies in the coal mining industry. The mining industry had a special status, which - albeit with many restrictions - was extended in 1975 to comprise all limited companies with more than 2,000 employees²⁴.

Opinions on the advantages or disadvantages vary - also in Germany - depending on one's own interests, and that not only between industry and trade unions, on-stage or behind the scenes. In connection with the merger of Daimler and Chrysler Jürgen Schrempp, the chairman of the Management Board of the company then known as Daimler Benz AG, for example, referred to co-determination as an advantage for Germany as an industrial location²⁵- whatever his reason may have been. An expertise prepared by the Bertelsmann Trust in 1998 also argues in this direction²⁶. Others on the other hand regard co-determination at enterprise level as a disadvantage to industry and demand its abolition or limitation (without the slightest chance of success in German parliament, no matter which party is in power)²⁷.

²⁴ See co-determination laws under www.bundesregierung.de/Gesetze.

²⁵ See Handelsblatt No. 116 dated 22.06.1998, P. 21 ("Bei der Managementvergütung sollen neue Wege gegangen werden").

²⁶ Bertelsmann Stiftung Hans-Böckler-Stiftung (Hrsg.) Bericht der Kommission Mitbestimmung, ("Mitbestimmung und neue Unternehmenskulturen - Bilanz und Perspektiven") Verlag Bertelsmann Stiftung, Gütersloh 1998.

²⁷ Henzler, Süddeutsche Zeitung No. 218 dated 19.09.2000, P. 27 ("Das marktgetriebene Führungsmodell hat Zukunft", Kopper, DIE ZEIT No. 18 dated 26.04.2001, P. 21 ("Das sind absurde Zustände"), Ulmer, ZHR 166 (2002), P. 271 - 277 ("Paritätische Arbeitnehmermitbestimmung im Aufsichtsrat von Großunternehmen - noch zeitgemäß?"), Baums, Frankfurter Allgemeine

Contrary to the intentions of the British, co-determination did not prevent the revival of the mining industry after the second world war. In the same way Germany's return to former economic strength from the miserable state in which we find ourselves at present will not be prevented by co-determination, no matter how much of a hindrance it may frequently be. Management Boards in Germany have the least cause for complaint - as far as their own affairs are concerned. The - for the most part unacceptable - transfer of American remuneration schemes to Germany in the years since 1997, both in absolute amounts and content (stock options) could only be attained with the agreement of the Supervisory Boards (or their sub-committees for questions of remuneration), in which parity rules - whatever reasoning the unions may have had (this point has become particularly clear in the Mannesmann / Vodafone affair which made the headlines at home and abroad)²⁸.

It is, however, a procedure particular to Germany, which finds neither understanding nor support beyond our borders, whether in Europe or elsewhere and which will therefore not be spread further within the framework of European corporate governance²⁹. But co-determination influences the articles of German corporations (and it would not go hand in hand with the board system of management).

Sonntagszeitung No. 18 dated 04.05.2003, P. 29 ("Die Aufsichtsräte sind zu groß"), Neubürger, Börsen-Zeitung No. 184 dated 24.09.2003, P. 5 ("Plädoyer für Reform der Mitbestimmung"); see also Handelsblatt No. 172 dated 06.09.2001, P.25 ("Breuer fordert Reform der Mitbestimmung") und Frankfurter Allgemeine Zeitung No. 250 dated 27.10.2001, P. 16 ("Breuer kritisiert deutsche Mitbestimmung"), Frankfurter Allgemeine Zeitung No. 146 dated 27.06.2003, P. 11 ("Die Mitbestimmung der Arbeitnehmer am Pranger") und Handelsblatt No. 121 dated 27./28. 06.2003; P. 14 ("Mitbestimmung bleibt Reizthema").

²⁸ Dunsch, Frankfurter Allgemeine Zeitung No. 220 dated 22.09.2003, P. 1 ("Das Millionenspiel bei Mannesmann").

²⁹ Jeske, Frankfurter Allgemeine Zeitung No. 169 dated 24.07.2001, P. 15 ("Das Tabu der Mitbestimmung"), Bohl, Frankfurter Allgemeine Zeitung No. 219 dated 20.09.03, P. 14 ("Die Mitbestimmung irritiert die ausländischen Investoren").

5. Remuneration / Remuneraton guidelines (Management Board and Supervisory Board): payment for services rendered or self-service?

Corporate governance also encompasses the question of remuneration of the Management Board and the Supervisory Board or - in the case of the board model - the remuneration of the CEO and the directors.

- 5.1 German Management Boards (and Supervisory Boards), or at least a good many of their members in prominent positions, have shown a twofold interest in the American "example" since the end of the 90's
- they are interested in the unique all-encompassing power of the CEO as a management form; the chairman of the Management Board as the "managing director" instead of a "first among equals" (Primus inter Pares)³⁰ and
 - they are interested in the - until then unthinkable - amounts paid to American executives, with their extensive compensation packages, particularly their - often enough horrendous - stock options with their frequently risk-free "pre-requisites" which must be fulfilled before the options can be exercised.

The wave of mergers, the development on the stock exchanges which were rising steeply (till 2000) and the corporate governance discussion offered a welcome opportunity, to alter the European remuneration structures

³⁰ See Bernhardt, Frankfurter Allgemeine Zeitung No. 45, P. W1 ("Das Kollegialprinzip im Vorstand gegen den Ansturm starker Männer schützen"), Bernhardt, Frankfurter Allgemeine Zeitung No. 24 dated 29.01.2002, P. 18 ("Eine Rückkehr zum Generaldirektor ist nicht wünschenswert"), v. Hein, ZHR 166 (2002), P. 464-502 ("Vom Vorstandsvorsitzenden zum CEO?"), Hoffman-Becking, Neue Zeitschrift für Gesellschaftsrecht 16/2003 dated 15.08.2003, P. 745 - 792 (Vorstandsvorsitzender oder CEO?). See also auch zur derzeitigen Diskussion in USA Börsen-Zeitung No. 6 dated 10.01.2003, P. 1 ("US-Experten verlangen Trennung der Posten von Chairman und CEO"), Handelsblatt No. 7 dated 10. / 11. Januar 2003, P. 11 ("Allmächtige US-Firmenchefs sollen an die kurze Leine"), Frankfurter Allgemeine Zeitung No. 38 dated 14.02.2003, P. 11 ("Weniger Macht für den CEO").

and - in many companies - "to turn every-thing upside down". The beginning was made by two German "showpieces", Deutsche Bank AG and Daimler Benz AG, with their stock option plans in 1996. This was obviously the most important part of the corporate governance debate and reason enough to keep the debate going³¹, German leadership structures and German business culture forgotten.

Numerous were and are the reasons and excuses. Supposedly it is the only way to attract experienced and highly qualified men (or women) to posts on the Management Boards or Supervisory Boards of German companies. A false argument, particularly as members of the Management Board are typically chosen "from within" - for good reasons: they know the company best of all and because "2nd level" Management must also have a chance to "make their way" to the top³². And for its Supervisory Boards the "Deutschland AG" chooses its "own". And thus very little has changed in the boardrooms in the last years despite all new forms of remuneration. Also the comparisons with prominent sport or show celebrities seem strangely forced and unfitting (without going into great detail).

"Everything gets dearer, only the excuses get cheaper"; I read somewhere recently.

5.2 In the meantime the remuneration of the Management Boards of numerous - not all! - German DAX companies has reached heights and proportions which have earned harsh criticism because, even with the best will in the world, it is not possible to reasonably justify such dimensions,- and particularly not in years when banks and industry alike are making thousands and thousands of

³¹ See Bernhardt, Corporate Governance - An International Review, Vol. 7, No. 2, P. 123-135, Frankfurter Allgemeine Zeitung No. 110 dated 12.05.2001, P. 24 ("Deutsche Bank plant weitere Anreize für Führungskräfte" und "Vollversorger"), Bernhardt, FINANZ BETRIEB, H. 7/8 2001, P. 427 ff.

³² See Handelsblatt No. 179 dated 17.09.2003, P. 15 ("Mercedes-Chef will internen Nachfolger").

employees redundant in order to adjust their costs in answer to the changing markets.

Not only public opinion but also prominent voices from the side of the industrialists such as the President of the Federal Association of German Industry (Bundesverbands der Deutschen Industrie) have spoken of frightening examples, of scandals, of a self-service mentality and of the "greed" of many a Management Board member³³.

Bad examples spoil good habits (and can quickly destroy the basic understanding which prevails in an industrial society).

- 5.3 There was talk recently both in the United States and in Germany about the possibility of stock options being given up, but they will probably not be given up, being altered instead to become less obvious and - as far as the developments on the stock exchanges are concerned - less risky³⁴.

Whoever wishes to have unlimited (height) and / or unrestricted (time) earnings, must become an entrepreneur; he will then have all possible chances, but must also bear the risks, he will then be owner-

³³ Rogowski, M., in Berliner Zeitung No. 114 dated 17. / 18.03.2003, P. 28 ("Bei einigen gab es Exzesse") und in Süddeutsche Zeitung No. 149 dated 02.07.2003, P. 17 (Industrie-Präsident kritisiert Manager"), see also Quandt, J. in Frankfurter Allgemeine Zeitung No. 143 dated 24.06.2003, P. 9 (Traumgehälter schaffen keine Kultur des Anstands"), manager magazin No. 8/01, P. 46 ff. ("Die maßlose Elite"), Handelsblatt No. 84 dated 02.05.2002, P. 13 ("US-Manager sahen kräftig ab"), RHEINISCHE POST No. 108 dated 11.05.2002 ("Absahnen in der Krise"), Süddeutsche Zeitung No. 174 dated 31.07.2003, P. 18 ("Bonus für die Chefetage").

³⁴ See Frankfurter Allgemeine Zeitung No. 145 dated 26.06.2003, P. 20, Frankfurter Allgemeine Zeitung No. 156 dated 09.07.2003, P. 15 ("Wir überlegen, ob wir mit den Aktienoptionen so weitermachen wie bisher"), Börsen-Zeitung No. 130 dated 10.07.2003, P. 1 ("Ende der Stock-Options-Ära") und P. 9 ("Microsoft gibt keine Stock Options mehr aus"), FINANCIAL TIMES DEUTSCHLAND dated 10.07.2003, P. 27 ("Optionen haben ausgedient"), Handelsblatt No. 130 dated 10.07.2003, P. 14 ("Die Aktienoption 'pur' wird immer mehr zum Auslaufmodell"), Süddeutsche Zeitung No. 156 dated 10.07.2003, P. 17 ("Manager müssen auf Aktienoptionen verzichten"), Börsenzeitung No. 149 dated 06.08.2003, P. 1 (Optionen werden entsorgt"), Neubürger, H.-J. in Börsen-Zeitung No. 184 dated 24.09.2003, P. B7 ("Aktionsoptionsprogramme werden an Bedeutung verlieren").

entrepreneur, i.e. principal and agent in one. Whoever, on the other hand, shies away from taking on the entire risk, must be more "modest" and be satisfied with a balanced relationship between services rendered and payment for those services ("not let things get out of proportion", as Cromme, the Chairman of the Code Commission, said recently).

To avoid misunderstandings: the issue is not or not only the law (§ 87 AktG), it is a matter of fairness and decency, in other words what is right and fitting. Moderation instead of extravagance; remuneration instead of making oneself unjustifiably rich.

Management Boards must be - or ought to be - the living example of what they expect from their employees at all levels, showing that performance and reward, work and payment balance.

6. Market and Economic / Business Ethics: opposing or synonymous?

- 6.1 In the discussions on the subject of "value", which for many does not extend beyond the - alleged - shareholder value and - first and foremost - management value and stock options, another aspect is disappearing more and more from sight: the question of the extent to which moral values (still) have (or are allowed to have) any meaning for business dealings - or the extent to which they are compromised for the sake of success (although this would never be said with such clarity). A business "ethic" is the issue, - a point which is referred to several times in the Aldama Report³⁵.

Otto Wolff von Amerongen, one of our great entrepreneurs of the last half century, spoke of a "basic moral order for the globalised world" and pointed out, "a

³⁵ See Section III No. 3 ("The ethical framework of corporate governance").

free economy ... cannot survive without individual morals"³⁶.

However, public discussion frequently follows a completely different course or the "moral" requirements are "watered down" so long and to such an extent that very little remains to be demanded or followed up on. Along with the laws and regulations which govern business dealings the central issue is purely and simply what used to be self-evident natural rules of human behaviour, of leadership, of reliability and trust, of observing a gentlemen's agreement and of keeping one's word; rules which ought to apply in a business environment - as they do anywhere else. But even mentioning such criteria frequently does not fit in with today's expectations, which measure everything in terms of (market) success alone and all too often ignore the fact that the market is not something omnipotent which takes care of and replaces everything else in life. "If some-one believes in the market (only), he is superstitious", wrote Hans Küng 20 years ago. His words still holds true today: "Neither the state nor the market may be exalted to the position of a false deity Market values are not at issue, but the value of life; not the standard of living, but the quality of life, not a consumer society, but a cultural society"³⁷.

Otto Wolff von Amerongen said something similar in 1998³⁸. "The market economy does not provide a space devoid of moral standards, nor can it forgo individual morals." Others speak of a certain basic moral understanding, "without which business dealings are (would be) marked by distrust and uncertainty", adding, however, that in the long term the market alone can successfully bundle and balance interests" (Breuer)³⁹ - thus indeed a "market-based religion"?

³⁶ Handelsblatt dated 23.12.98, P. 42 ("Marktwirtschaft kommt ohne individuelle Moral nicht aus").

³⁷ Hans Küng, Ökonomie und Gottesfrage, Reutlinger Reden, Heft 5 (1980) - P. 6 + 7.

³⁸ See footnote 36.

³⁹ Frankfurter Allgemeine Zeitung No. 2 dated 04.01.1999. P. 8 ("Offene Bürgergesellschaft in der globalisierten Weltwirtschaft").

6.2 Here is neither the time nor the place to summarise or even attempt to summarise - no matter how briefly - today's understanding of economic and business ethics. A short version would (or could) easily lead to misunderstandings, a lengthy balanced summary would go too far here.

Furthermore, many publications are available which sum up the situation - all worth-while reading - and at the same time present and go into the details of the varying opinions. (Karen Ilse Horn⁴⁰, Brigitte Herrmann⁴¹, Karl Homann / Franz Blome-Drees⁴², Peter Ulrich⁴³, Horst Steinmann⁴⁴ and recently Karl Homann⁴⁵ and Josef Wieland⁴⁶ to name just a few.)

The definition of the terms economic ethics (Wirtschaftsethik) and business ethics (Unternehmensethik) are meaningful (whereby - unfortunately - a clear differentiation is frequently missing from the discussion and / or the actual differences are not made sufficiently clear)⁴⁷.

Economic ethics have to do with structures, business ethics have to do with behaviour. Economic ethics deal with the general conditions which prevail and with

⁴⁰ Karen Ilse Horn „Moral und Wirtschaft“, J.C.B. Mohr (Paul Siebeck) 1996

⁴¹ Brigitte Herrmann, "Unternehmensethik, Konzepte - Grenzen - Perspektiven", ZfB, Ergänzungsheft 1/92 / P. 1 ff. ("Wirtschaftsethik - Stand der Forschung").

⁴² Karl Homann und Franz Blome-Drees: Wirtschafts- und Unternehmensethik, UTB für Wissenschaft, Vandenhoeck, 1992

⁴³ Peter Ulrich: Integrative Wirtschaftsethik, Haupt Verlag, 1997.

⁴⁴ Horst Steinmann und Albert Lohr: Grundlagen der Unternehmensethik, Poeschel Verlag, 1991.

⁴⁵ Karl Homann, Governanceethik und philosophische Ethik mit ökonomischer Methode - Versuch einer Verhältnisbestimmung, zfwu Zeitschrift für Wirtschafts- und Unternehmensethik, Jahrgang 2 / Heft 1 (2001) / P. 34 ff.

⁴⁶ Josef Wieland, Eine Theorie der Governanceethik, zfwu Zeitschrift für Wirtschafts- und Unternehmensethik, Jahrgang 2 / Heft 1 (2001) / P. 8 ff.

⁴⁷ See Karen Ilse Horn, Frankfurter Allgemeine Zeitung dated 31.05.01, P. 21 („Nur solche Geschäfte machen, dass man nachts ruhig schlafen kann“); Karl Homann / Franz Blome-Drees, Unternehmensethik - Managementethik, DBW 55 (1995) P. 95 ff.

conducting business, business ethics concern themselves with the way in which things are done and with behaviour in daily business (whereby it remains unclear whether in business ethics reference is made to the business or the businessman, to the company or the management) ⁴⁸.

In either case the relationship is addressed between market and morals, economics and ethics. Arguments and counter-arguments are:

Antagonism (Kant) or (merely) "different aspects of one and the same behaviour pattern which must be seen in varying contexts simultaneously"⁴⁹, philosophic ethics in terms of economics⁵⁰, "economics as ethics by different means" ⁵¹.

Are we dealing with utilitarian ethics, the economy of moralism⁵² or, more or less, with an ethically disguised utilitarianism⁵³?

"Increase profit with ethical behaviour"⁵⁴ may well be an attractive goal, but it cannot always be achieved, frequently the opposite will hold true (or be closer to the truth). What then? "Ethics are also economically worthwhile", says Krelle⁵⁵. And if not?

With the definition of economic ethics as being a structural issue the - necessary - framework has been addressed, but the frame-work as such is not defined (accepted or not).

⁴⁸ See dazu u.a. Karl Homann / Franz Bloeme-Drees, Wirtschafts- und Unternehmensethik, a.a.O / P. 25.

⁴⁹ Karl Homann / Franz Blome-Drees in DBW 55 / P. 111).

⁵⁰ Karl Homann zfwu a.a.O / P. 38).

⁵¹ Karl Homann in Süddeutsche Zeitung dated 12. März 2001 / S, 24 ("Ethik mit besseren Mitteln").

⁵² Hans Willgerodt, Frankfurter Allgemeine Zeitung dated 16.12.00 / P. 15 ("Privates Glück und öffentliche Wohltat").

⁵³ siehe dazu auch die kritische Arbeit von Olaf J. Schumann (2000): Wirtschaftsethik und Radikaler Konstruktivismus, Hampp Verlag, 2000.

⁵⁴ See Frankfurter Allgemeine Zeitung dated 20.10.01 / P. 20.

⁵⁵ Wilhelm Krelle, "Unternehmensethik, Konzepte – Grenzen – Perspektiven", ZfB-Ergänzungsheft 1/92 / P. 35 ff ("Ethik lohnt sich auch ökonomisch").

Are there guidelines and limits? And if so, where do they come from and who defines them? In more concrete terms: what are the rules of play in a free market and in a - social - market economy? What are the main criteria of a competitive society and of an (ordo) liberal programme for the economy? And what about the guarantee of freedom and (social) justice - as a part of human dignity?

Does the market - success or failure - decide anything and everything, or do predetermined, overriding values exist which escape the influence of the market?

- 6.3 The economy has - more and more as time goes on - become independent to a great extent and determines what happens. At the same time a "consensus on values" is lacking in society - contrary to earlier times. Under these circumstances there is wide scope for economic ethics which analyse the criteria and limitations of business dealings and do not avoid conflict⁵⁶. Adapting does not suffice; it is inadequate, "to make morals supple, suitable for the market, which in everyday life means that ethics are reduced to economics," were Konrad Adam's critical remarks on economic ethics⁵⁷.

Just because ethics is written on the outside does not mean that the contents are ethics.

A general reference to an ethical compass in borderline questions - also - in connection with corporate governance is therefore insufficient.

⁵⁶ „Strategische Nächstenliebe“ aus Sorge um „Global Reputation“ mag nützlich sein, reicht aber als Messlatte für Wirtschafts- und Unternehmensethik nicht aus (See dazu Hans Caspar von der Crone, Neue Züricher Zeitung dated 27./28.01.01, P. 29 – „Corporate Governance und Reputation“ - und Thomas Fischermann, DIE ZEIT dated 31.05.01, P. 21 – „Strategische Nächstenliebe“). Es geht um mehr als "Greenwash" und „Weichmacher“.

⁵⁷ Konrad Adam in FAZ dated 01.04.00, Beilage Bilder und Zeiten / P. I. ("Die Dienstleistungsgesellschaft - Ein vorsorglicher Abgesang").

- 6.4 In the end it comes down to the honourable merchant⁵⁸ (königlicher Kaufmann) as he used to be called, a term which is frequently being used again today, who recognises moderation and goal and knows how to balance the "jus bonum et aequum", quite independent of all legislative rulings (or loopholes). It is a question of what is "right and good".

Exemplary people are needed - not would-be legends of shareholder value such as Jack Welch who, first and foremost, took care of himself - far beyond the call of duty⁵⁹.

In his speech held in St. Gallen on May 15, 1972 ("The total Responsibility of the Corporation"), which was reprinted on the occasion of his 85th birthday on January 24, 1999, Joachim Zahn, who used to be the Chairman of the Management Board of Daimler Benz AG pointed out the following: "With freedom comes responsibility, on the other hand responsibility is not possible without freedom. So if this freedom is to correspond to the responsibility, there must be a corresponding economic moral code. ... Most important are those who set examples by the way in which they live and act."

The German President, Johannes Rau said something similar recently: "Everyone is looking for someone to look up to. People search for them and people need them."⁶⁰

⁵⁸ See Frankfurter Allgemeine Sonntagszeitung No. 12 dated 10.08.2003, P. 36 ("Der ehrbare Kaufmann"), Börsen-Zeitung No. 164 dated 27.08.2003, P. 8 ("Auf Kaufmannsehre").

⁵⁹ See Handelsblatt No. 181 dated 19.09.2003, P. 18 ("Das Bild vom gierigen Millionär").

⁶⁰ See Frankfurter Allgemeine Sonntagszeitung No. 14 dated 24.08.2003, P. 4 ("Nicht weniger Alte, sondern mehr Junge").

7. Criteria / Standards of European Codes: made to measure or off the peg?

7.1 The Anglo Saxon example, from the board model to the power of the Chief Executive Officers, has lost much of its splendour in the past years. All the scandals in the American industrial and banking sectors since Enron are not - serious - "accidents" or unbelievable negligence on the part of the governing bodies and auditors, they stem from serious flaws in the corporate governance system there, which have now become (only too) obvious; including "disenchantment" with the auditors and accounting in accordance with US GAAP and the New York Stock Exchange (Grasso)⁶¹. The answer has come in the form of the Sarbanes-Oxley-Law and a series of court cases against companies, banks, first and foremost the investment banks, auditors and their leading representatives⁶².

Any self-satisfaction or malicious glee on the part of the Europeans would be out of place.

On the other hand, there is no reason whatsoever to accept American corporate governance structures and codes which have failed in more than just the odd case here and there. And in particular there is no good reason to allow our legal and business cultures which have grown over the centuries to founder and sink in a sea of - imaginary - globalisation. A little more self-confidence would be in place.

Good business leadership is needed, not new-fashioned corporate governance.

⁶¹ See Frankfurter Allgemeine Zeitung No. 212 dated 12.09.2003, P. 21 ("Wer ist der gierigste Mann in New York?") und Frankfurter Allgemeine Zeitung No. 218 dated 19.09.2003, P. 23 ("Schlußglocke für Richard Grasso").

⁶² See Frankfurter Allgemeine Zeitung No. 209 dated 06.09.2003, P. 28 ("Dumme Michkühe").

7.2 It would appear that the board model, which was held up as a shining example for a long time, and was supposedly superior to the German two-tier system, has lost much of its attraction anyway; although the "separation" of Management and Supervisory Boards is still in demand where on the one hand the - supposed - CEO is concerned and on the other hand the so-called Chairman. In Germany that probably has to do with the fact that many protagonists of the board model have moved on from the Management Board, where they were not seldom chairman, to the Supervisory Board⁶³. "Location alters the point of view" as the saying goes.

What does all this mean for the standards and the core issues in the continuation of the European corporate governance debate?

There will be many different answers varying from country to country, from company to company as well as consensus in many basic points. Here I can only show the Germany picture. The "criteria" are:

A. Clear separation of law and code

This is a basic point which surprisingly enough sometimes seems to slip people's minds: the Stock Corporation Act, the Act on Companies with Limited Liability, or the Commercial Code, with all their stipulations applying to corporate governance, are one thing, codes of good governance are voluntary and thus something quite different. It is important to withstand all attempts and all ideas / desires - obvious or otherwise - to blur or confuse the two. It is the general understanding - also internationally - that a "Code of Corporate Governance" is not a law, nor is it a directive, it is instead a collection of suggestions and "instructions for use" with regard

⁶³ See Schmidt, A. / HypoVereinsbank in WELT am SONNTAG No. 18 dated 04.05.2003, P. 27 ("Warum haben Sie nicht Nein gesagt?"), Handelsblatt dated 08.05.2003, P. 10 ("Der Club der alten Herren"), Süddeutsche Zeitung dated 15.05.2003, P. 21 ("Die Deutschland AG lebt").

to how legal stipulations may best be put into practice, how the alternatives which are allowed by law may be used to the full advantage. It is, in fact, a matter of experience, "best practice" as it is frequently called (Code of Best Practice), to avoid the use of the word "recipe".

The expression "soft law" which is heard from time to time is misleading. It is a contraction in terms and demonstrates the general confusion of expressions. The "mixture" of law and corporate governance code in the form of § 161 AktG is a blunder.

B. Made to measure instead of off the peg

A clear definition facilitates competition for the best "code of good governance" or at least it could do so; for competition can, indeed it must exist - instead of regulation or standardisation, which is what many desire who otherwise talk of nothing but "de-regulation"⁶⁴.

No mention is made of the corporate identity which makes things non-interchangeable. This shows how quickly fashions change.

Why should there not be different attempts and suggestions for a code of corporate governance, which must earn and keep their place in the competition / clash, with different criteria or core issues? What good is to be gained from one uniform code?

The Spanish Aldama Report with its corresponding passages is on the right track⁶⁵.

⁶⁴ Recently articles have been appearing about "regulation hysteresis" or "over-regulation"; see Kley in *Börsen-Zeitung* No. 51 dated 14.03.2003, P. 8 (Schluss mit der Regulierungshysterie) and von Rosen in *Frankfurter Allgemeine Zeitung* No. 187 dated 14.08.2003, P. 18 ("Die Überregulierung behindert den Kapitalmarkt").

⁶⁵ See Section VI No. 1 "Self-regulation principle".

Around us - not least of all in the United States, which are al-ways held up as an example - there are several different codes. And it is better to let the market - that is in this case the companies and the big investors - decide what they think is desirable rather than trusting semi-official regulations.

C. No "Round Tables" and no "Alliance Politics"

Caution is necessary when dealing with commissions in general and with German government commissions in particular, especially when they are made up in such a way as to be as "friendly to the interests of industry" as they are in this case (Baums and Cromme). In Germany we suffer from "commis-sionitis".

Trying to reach a pre-agreement in non-political surroundings, but with a permanent link to the Chancellor's office or the Ministry of Justice, an agreement which will later be used to bring pressure to bear in parliament, is not a desirable way to go about preparing legislative procedure (or a behaviour code), nor is it "politically correct".

Industrial guilds, social classes and the corresponding class "rights" are things of the past. Round tables and corporatism are not the way to start looking for solutions in a parliamentary democracy.

8. Tasks of the Legislative Body: norms instead of "soft law"

The Corporate Governance debate has many aspects. The shareholders ought to - and must - be the centre of attention. However, that does not hold true in most cases. The centre is already occupied by the Management Board and the Supervisory Board and their (very) own interests. A change would do good - but such change is not to be

expected from commissions in which Management Board members and Advisory Board members set the pace. ("if you want to dry out a pool, don't ask the frogs", as the saying goes). As the situation stands nothing will be achieved without the legislative body. The following are some of the points at issue:

- conflict of interests (Insider dealings and the handling thereof).

A simple "enumeration principle" may not be accepted, because the next loophole will soon be found. Instead it is necessary to make it clear and state clearly that - for the good of the company - even the faintest semblance of a conflict of interests is to be avoided. This ought really to go without saying and is not asking too much, Management Board and Supervisory Board ought to demand more from themselves than from their employees in order to prevent the company becoming involved in any kind of speculative gossip.

- the basic outlines of fixed income and the limits on variable remuneration (Management Board and Supervisory Board)⁶⁶.
- the criteria of performance-related stock option programmes with limits (cap) to prevent unreasonable "self-service" on the part of Management Boards (and Supervisory Boards) to the detriment of the shareholders, whereby Supervisory Boards because of

⁶⁶ See e.g. DIE WELT dated 8. Mai 2003, P. 16 ("Neue Offenheit als Anfang"), FINANCIAL TIMES DEUTSCHLAND dated 14. Mai 2003, P. 29 ("Kreative Rechner in eigener Sache"), Handelsblatt dated 12. Mai 2003, P. 13 ("Der Druck auf die Cromme-Kommission wächst"), Frankfurter Allgemeine Zeitung dated 10. Mai 2003, P. 11 ("300 000 Euro für den Vorsitz im Aufsichtsrat") und P. 15 ("Kräftige Aufschläge für viele deutsche Aufsichtsräte"), Frankfurter Allgemeine Zeitung dated 19. Mai 2003, P.20 ("Rogowski: Raffgier bei Topmanagern"), Börsen-Zeitung dated 22. Mai 2003, P. 1 ("Kodex-Kommission für gläserne Taschen - Obergrenze bei Aktienoptionen"), FINANCIAL TIMES DEUTSCHLAND dated 15. Mai 2003, P. 34 ("Keine Geheimnisse"), Der Spiegel dated 19. Mai 2003, P. 86 ff. ("Transparenz für fette Katzen"), FINANCIAL TIMES DEUTSCHLAND dated 22. Mai 2003, P. 17 ("Selbstbedienung der Vorstände hat ein Ende"), Zypries in Börsen-Zeitung dated 15. Mai 2003, P. B 7 ("Mehr Anlegerschutz und Transparenz").

the nature of their duties should be excluded from such share programmes⁶⁷.

- D&O liability insurance policies which include a sizeable / reasonable excess (deductible) for Management Board and Supervisory Board⁶⁸.
- tightening up the liability standards, whereby the means to measure liability is not the issue. The obstacles which have been introduced to impede action in cases of liability must be removed, or at least lowered noticeably (if necessary with the help of court injunction). In September 2001 an annual meeting of legal experts ("Juristentag") said all that needed to be said on the subject⁶⁹ (and the Baums Commission agreed)⁷⁰.

9. Accounting Methods and Year-End Audits: more haste less speed?

9.1 The same applies to accounting methods and year-end audits as has been said for the governing bodies Management Board and Supervisory Board. Caution is needed in both cases whenever "internationalisation" is spoken of in connection with globalisation because what we really are seeing is nothing more than the taking over of American rules and ideas (US GAAP), which have not proved themselves during recent crises; on the contrary, they aided their development or at least made them possible. US GAAP, IAS or HGB (= German commercial regulations) should be weighed up one against the other

⁶⁷ See Deutscher Corporate Governance Kodex in the version dated 21.05.2003 under www.corporate-governance-code.de.

⁶⁸ After most of the German DAX-companies failed to follow the recommendations of the Deutschen Corporate Governance Code. See dazu Bernhardt, W., DER BETRIEB, H. 17 dated 25.04.2003, P. I ("Entsprechenserklärungen mit Lücken und Tücken") and also FINANCIAL TIMES DEUTSCHLAND dated 08.09.2003, P. 29 ("Wenn Manager ihre Pflicht verletzen").

⁶⁹ 63. Deutscher Juristentag in Leipzig (September 2000).

⁷⁰ Baums (Hrsg), Bericht der Regierungskommission Corporate Governance, 2001, Rz 73.

instead of blindly following American examples⁷¹. It is always better - in the interest of the shareholders - to have hidden reserves, than being "broke" with no reserves to fall back on. Standardisation counsellors should proceed carefully.

- The Aldama Report addresses this issue in a very competent and professional manner and warns that caution is necessary⁷².

9.2 The same also applies for the "chapter" auditors and year-end audits. Good reputations have been damaged the world over, damage that will not be repaired overnight. "Declarations of independence", "reviews" and / or "enforcement" by private or state-run institutions are inadequate⁷³. Supporting the Anglo Saxon "fast close" image, as did the German (Baums-) commission⁷⁴, provides many more questions than it does answers. Is - even more - time pressure really helpful and useful to the cause than completing things as quickly as possible, but taking the time required?

As a matter of interest: auditors are something different and some-thing more meaningful than (merely) the "assistants" of the Supervisory Board, as is frequently said

⁷¹ See Börsen-Zeitung No. 130 dated 10.07.2003, P. 5 ("Über die Bedeutung deutscher Bilanzierung gibt es große Illusionen"), Handelsblatt dated 11./12.07.2003, P. 1 ("Chirac attackiert IAS-Bilanzierungsregeln"), Zeitler, F.-C., DER BETRIEB, H. 29 dated 18.07.2003 ("Rechnungslegung und Rechtsstaat"), Frankfurter Allgemeine Zeitung No. 185 dated 12.08.2003, P. 16 ("Die EU ringt um ihre Linie im Bilanzrecht"), Frankfurter Allgemeine Zeitung No. 190 dated 18.08.2003, P. 17 ("Wenn ein konservativer Bilanzierer auf IAS umstellt").

⁷² Section II No. 1.2.

⁷³ Ludewig, Fs zum 60. Geburtstag von Jörg Baetge, IDW.-Verlag Düsseldorf, 1997 ("Unternehmensethik in der Wirtschaftsprüferpraxis"), Ludewig, Die Wirtschaftsprüfung, H. 12/2002, P. 613-615 ("Ein Appell - nicht nur an die Wirtschaftsprüfer"). See dazu auch Handelsblatt No. 119 dated 25.06.2003, P. 10 ("Wirtschaftsprüfer wehren sich gegen SEC-Kontrolle"), Frankfurter Allgemeine Zeitung No. 176 dated 01.08.2003, P. 12 ("Strengere Regeln für Wirtschaftsprüfer"), Handelsblatt No. 146 dated 01./02.08.2003, P. 4 ("Wirtschaftsprüfer sollen für falsche Testate haften"), DIE WELT dated 09.09.2003, P. 12 ("Wir sind keine Staatsanwälte").

⁷⁴ Baums (Hrsg), Bericht der Regierungskommission Corporate Governance, 2001, Rz 276.

(even if auditors do sometimes like to "hide" behind the Supervisory Board). The auditors are chosen - annually - by the Annual General Meeting, thus representing the owners / shareholders and are therefore independent and on an equal footing with the Supervisory Board.

10. Shareholders / Annual General Meeting highlight or necessary evil?

Origin of all - legislative or corporate - rules and regulations is clarification of the essential question, whose best interests are at issue when we talk of excellent business management and / or of "best practice". This is the very core of the principal-agent conflict. Therefore the answer is simple. The interests of the shareholders (principals) are of paramount importance - or at least they ought to be - and not the wishes of the Management Board or the Supervisory Board (agents). But in many cases the interests of the shareholders (principals) are not protected at all⁷⁵.

- 10.1 One case in point is the question of the physical presence of the members of the Supervisory Board at the Annual General Meeting. Whereas in the past the members were required to be present, a company's articles of association in the future may include provisions for "certain circumstances" under which participation of the members of the Supervisory Board via video or phone transmission may be acceptable (§ 118 Sec. 2 AktG n.V.), one of the "fruits" of the Baums Commission⁷⁶. The members of the Supervisory Board (on the owners' side) are the representatives of the shareholders; is it really asking too much to expect them to "show themselves" once a year (!) and with their presence demonstrate some interest in

⁷⁵ See Börsen-Zeitung No. 229 dated 27.11.2002, P. 1 ("Der lästige Aktionär"), Frankfurter Allgemeine Zeitung No. 91 dated 17.04.2003, P. 11 ("Aktionäre in verordneter Unmündigkeit"), Frankfurter Allgemeine Zeitung No. 117 dated 21.05.2003, P. 11 ("Aktionäre bremsen Gehaltsexzesse") und P. 15 ("Der Charme des Aktionärsvotums"), Frankfurter Allgemeine Zeitung No. 123 dated 28.05.03 ("Dem Aktionär das Wort"), Handelsblatt No. 111 dated 12.06.2003, P. 9 ("Der forsche Aktionär").

⁷⁶ Baums (Hrsg), Bericht der Regierungskommission Corporate Governance, 2001, Rz 125.

the questions, worries and remarks "their" shareholders may have? Etiquette would require this at least.

That importance is attached to the wrong points is demonstrated more clearly by another part of the report submitted by the Baums Commission: In the future a company's articles or the provisions for procedure at general meetings may include a limit on the length of time shareholders may speak or request information as well as restrictions to the list of speakers⁷⁷.

And as if that were not enough, the number of questions asked by the shareholders during the general meeting may be limited (to five questions) per shareholder and item on the agenda⁷⁸.

The reasoning behind this is a form protection against so-called unpopular or predatory shareholders. But an experienced Chairman does not need such "barriers".

This recommendation by the commission was not taken into consideration in the law governing transparency and disclosure - not yet?

- 10.2 There is still sufficient cause for concern as prominent members of both government commissions (Baums und Cromme) have stated clearly in various interviews that they attach great importance to a limitation on the number of questions admitted and to restrictions on information. Ideally a general meeting should be shortened to two to three hours (Kopper⁷⁹, former Chairman of the Supervisory Board of the Deutsche Bank AG and of DaimlerChrysler AG, and Breuer⁸⁰, former

⁷⁷ Baums (Hrsg), Bericht der Regierungskommission Corporate Governance, 2001, Rz 113.

⁷⁸ Baums (Hrsg), Bericht der Regierungskommission Corporate Governance, 2001, Rz 106.

⁷⁹ Die ZEIT No. 18 dated 26.04.2001, P. 22 ("Das sind absurde Zustände". Ein Gespräch mit Hilmar Kopper).

⁸⁰ Frankfurter Allgemeine Zeitung No. 207 dated 06.09.2001, P. 14 ("Breuer für rigoroseres Vorgehen auf Hauptversammlungen"), Börsen-Zeitung No. 229 dated 27.11.2002, P. 1 ("Breuer fordert straffere Hauptversammlungen") und P. 6

member and Chairman of the Management Board and now Chairman of the Supervisory Board of the Deutsche Bank AG). Others, such as Max Dietrich Kley, President of the "Deutsche Aktieninstitut" (German Share Institute) warn against "turning the Annual General Meeting into a schoolroom"⁸¹.

Remaining "consistent" Breuer also finds it superfluous that the Annual General Meeting be required to ratify the actions of the Management Board and the Supervisory Board⁸².

"One must pick the right shareholders", as Breuer said recently, may well be a desirable solution from management's point of view⁸³. But this "dream" which is really management's vision of a company run by the management for the management and dressed up as a public corporation, will not always be fulfilled. In all other cases the Supervisory Board and - with it - the Management Board will have to remain content with being "chosen" by the shareholders and their Annual General Meeting⁸⁴.

(Time-) proven business management instead of newfangled Corporate Governance.

("Breuer mahnt Reform der Hauptversammlung an"), Frankfurter Allgemeine Zeitung No. 276 dated 27.11.2002, P. 15 ("Breuer fordert kürzere Hauptversammlungen").

⁸¹ See Börsen-Zeitung No. 51 dated 14.03.2003, P. 8 ("Schluss mit der Regulierungshysterie").

⁸² See Börsen-Zeitung No. 184 dated 24.09.2003, P. B 4 ("Die Hauptversammlung in ihrer derzeitigen Form ist überholt").

⁸³ Breuer in Frankfurter Allgemeine Zeitung No. 58 dated 10.03.2003, P. 21 ("Die richtigen Aktionäre aussuchen").

⁸⁴ The "relegation" of the Annual General Meeting in Germany comes at a time when the American law-makers and the SEC are putting more emphasis on shareholder rights! See dazu Frankfurter Allgemeine Zeitung No. 145 dated 26.06.2003, P. 23 ("In Amerika bekommen die Aktionäre mehr Gewicht"); Handelsblatt No. 122 dated 30.06.2003, P. 15 ("Aktionäre sollen Optionen absegnen"); FINANCIAL TIMES DEUTSCHLAND dated 02.07.2003, P. 22 ("US-Börsenaufsicht stärkt Aktionärsrechte"); FINANCIAL TIMES DEUTSCHLAND dated 16.07.2003, P. 18 ("US-Aufsicht stärkt Aktionärs Einfluss bei Vorstandswahl").

10.3 By the way: neither the shareholders (nor the companies) can expect anything from the employee co-determination, in particular from the trade union representatives, in the Supervisory Board. In the principal-agent conflict the unions stand firmly on the side of management and not with the shareholders. Apart from questions of accountability this can be seen most clearly in connection with remuneration for Management (and Supervisory) Boards. There is ample room here for "reciprocal agreements"; if it were otherwise, the "explosion" of the fixed income of numerous Management Boards and the introduction of the frequently unacceptable stock option plans could not have taken place. Furthermore, as far as the Supervisory Boards' fees are concerned the unions have their own interests to protect: the amount which is forwarded to the Hans Böckler-Foundation (an internal binding agreement), which in turn is obligated to the unions and their goals, grows with each increment in the fees⁸⁵.

⁸⁵ So it is quite "in keeping" that the Deutsche Gewerkschaftsbund (DGB) is against a general limit on the remuneration of the Board members. See Frankfurter Allgemeine Zeitung No. 158 dated 11.07.2003, P. 12 ("Gegen Obergrenze für Aufsichtsräte").

11. Corporate Governance and the Consulting Business models and fashions

"Corporate Governance" has become part of the consulting business in an economically difficult period which tends to be a consulting-impooverished time for the national and international law firms and public accountants both at home and abroad, for industrial consulting and executive search firms and for business and investment banks (stock options) The latest development is corporate governance codes for mid-sized companies, which may serve to liven up the consulting business but otherwise makes very little sense⁸⁶.

As in so many cases, recommendations - which change so rapidly within such short timeframes - are of more used to the consultants than to the companies they are supposedly advising. To emphasise the point, one just needs to think back on one or two of the "trends" we've seen over the last 10 to 15 years: take overs and mergers are followed by divestitures; going public by going private; one day holding companies are best, only to be replaced by group head office structures; one day diversification is needed, next day focus on the core business; one day outsourcing is needed, the next day its in-sourcing, one day centralisation is in, the next decentralisation. The list is almost endless.

And also the business with corporate governance will lose interest as soon as new trends become evident.

⁸⁶ Bernhardt, W., DER BETRIEB, H. 32 dated 08.08.2003, P. I ("Corporate Governance für den Mittelstand?").

Closing Remarks

And so I come to the end of my statement - or objection - and go back to the beginning. In a completely different context the German President, Johanens Rau, was recently reported to have said, "Everything has been said, but not everyone has had his say yet". I have herewith joined the long line of speakers in the corporate governance debate. Hopefully not only.

It would be nice if I haven't just repeated what all the others said before me.

Instituto de Dirección y Organización de Empresa (IDOE)

Universidad de Alcalá
Plaza de la Victoria s/n
28802 Alcalá de Henares
MADRID ESPAÑA
Teléfono: 91 885 42 00
Fax: 91 885 51 57
idoe@uah.es
www.idoe.org
<http://idoe.gioupm.com>