Corporate Governance Systems in Europe

- Differences and Tendencies of Convergence

- Crafoord Lecture -

Theodor Baums, University of Osnabrück

A. Introduction

The corporate governance systems in Europe differ markedly. Economists tend to use stylized models and distinguish between the Anglo-American, the German and the Latinist model.[1] In this view, for instance, the Austrian, Dutch, German, and Swiss systems are said to be variations of one model. For lawyers the picture is of course, much more detailed as particular rules may vary even where common principles prevail. Many comparative studies on these differences have been undertaken meanwhile.[2] I do not want to add another study but to treat a different question. Are there as a consequence of growing internationalization, globalization of markets and technological change, also tendencies of convergence of our corporate governance systems?

My answer will be in two parts. As corporate governance systems are traditionally mainly shaped by legislation, the first part will analyze the influence of the economic and technological change on the rule-setting process itself. How does this process react to the fundamental environmental change? That includes a short analysis of the solution of centralized harmonizing of company law within the EU as well as the question of whether EU-wide competition between national corporate law legislators can be observed or be expected in the future. The second part will then turn to the national level. It deals with actual tendencies of convergence or, more correctly, of approach by the German corporate governance system to the Anglo-American one.

B. The impact of internationalization and technological change on the rule-setting process

I. Traditional rule-setting in corporate law

Until the nineteen seventies corporate laws in Europe and the rules relating to corporate governance were the result of individual and separate national developments. Other than in the U.S.,[3] there was no competition between state legislators which would have forced them to accelerate the production of new and more efficient rules. On the contrary, corporate law has by and large been shaped individually and separately. Driving forces were the needs of each economy at its particular stage of development. Each of these systems showed and still shows specific features reflecting institutional differences, national political decision-making and

cultural diversity.[4] As corporate law is a part of the rules relating to the organization of a nation's production and its distribution, it is of course subject to political decisions as becomes evident when we consider, for example,[5] the issue of employees' co-determination. Similarly, there is a complex interplay between legal and ethical rules and the culture in which both are embedded. For instance, in a nation where managers are accustomed to following generally laws of all kinds, the legal system may do with fewer or relatively weaker explicit constraints compared with other systems based on different cultural attitudes.[6]

Of course, there has always been a mutual exchange of information and learning by comparative studies and the like. Furthermore, company law systems on the Continent are based on civil law with its common roots. Times of common political history[7] and the degree of economic relationships are other factors which may also have contributed to the development of similar rules. In principle though, corporate laws and corporate governance systems were developed independently. Not only were the rule-setters different and independent of each other but there was also little danger of emigration to more favourable systems by those subject to the rules,[8] thereby sparking competition between national rule-setters.

II. Harmonization within the EU

Things have changed however. The organs of the EU have the power to harmonize the corporate laws of the member states as far as is necessary to achieve the aims of the Union. The EU has issued several binding directives in this respect and initiated further proposals.[9] The majority of these rules relates to the relationship between the creditors and the trading or investing public with the company rather than to its internal governance structure.[10] The Commission's (amended) "Proposal for a Fifth Directive concerning the structure of public limited companies and the powers and obligations of their organs" has been thwarted by the member states so far.[11] An earlier version of this draft proposal sought to impose on the other EU member states a two-tier company board structure and a co-determination regime resembling the Dutch and German systems. As that was deemed unacceptable by the other members the Commission decided to open an option also for the one-tier system but still with an obligatory participation of employees in the governance of the companies concerned.

Equally, German and Dutch industry opposed strictly and successfully the implementation of a takeover regulation resembling the British takeover code.[12]

The legislative activities of the EU organs in corporate law, once seen as the only way to provide for a "level playing field" for all companies within the EU and for equal protection for their investors, creditors and consumers, have increasingly been rightly questioned.[13] Let me mention only four criticisms here.

- First, the information costs savings for investors through harmonization are lost so far as the member states may diverge from the standards set by the EU.
- Second, the rule-setting process at the EU level is cumbersome. Rules based on compromises made by member states cannot be changed easily in the future when necessary. EU made law tends to "petrify" which makes adaptation difficult.
- Third, the centralization of the rule-setting process hinders the development of competing ideas and more efficient solutions at the various national levels.
- Fourth, the economic development within the EU is only part of the broader development of increasing international competition and globalization of capital and product markets. Big European companies that want to tap the American capital market will have to comply with the investor protection rules there.[14] And the international investor community - institutional investors like pension funds, investment companies and so on - expects increasingly similar rules and treatment wherever it is to invest its funds. Given this development and its pace, the question has always to be whether harmonization or standardization of rules should, where necessary, take place on the EU level or right away on a higher international level instead.[15]

Of course, that is not to say that any legislative activity of the EU in corporate or capital market law is doubtful or detrimental. The exact line need not be drawn here. But far-reaching standardization or harmonization of internal corporate governance structures "from above", on the EU level, seems neither practically feasible nor theoretically convincing. This has also been acknowledged officially through the implementation of the subsidiary principle in the EU contract (Art. 3 b). Convergence of corporate governance systems in Europe as a consequence

of harmonization activities of the EU should therefore not be expected in the foreseeable future.

III. Competition between national legislators?

A view of the situation in the U.S. with its big developed capital market seems to confirm that a corporate governance system shaped by numerous state legislators may well serve the needs of firms, investors and the public. One position in the American federalism debate on the production of corporate law even contends that this competition between various rule-setters leads to a "race to the top" rather than for the bottom and to the production of more efficient, better rules.[16] In this view, the goal of maximising revenues guides as an invisible hand the decentralized system of state corporation laws to codify the arrangements that firms and investors desire. State competition for charters in the U.S. is said to have, in balance, benefited shareholders.

If such competition between national legislators with similar wealth-increasing effects cannot be observed yet in Europe, can it at least be expected in the future as international exchange and capital flow increase? That is, in my opinion, doubtful for several reasons. Certainly, competition between legislators does exist in Europe. The most recent example is the lowering of corporate taxes on banks by the Luxembourg government as a reaction to more favourable tax environments such as that in Ireland. Similarly, large German firms tended to hold Dutch corporate finance subsidiaries rather than German ones precisely because of tax and other regulatory considerations.[17] These regulatory constraints have as a result been repealed in part by the Federal Parliament in order to make the financial location Germany more attractive.[18] However, competition between legislators for incorporations by favourable corporate governance systems is much less likely to develop[19] for several reasons:

- In respect of existing companies, it is - unlike in the US - not possible simply to choose reincorporation under the law of an other state. Except for Great Britain, the Netherlands and Switzerland,[20] European nations follow the "real seat rule" rather than the "statutory domicile rule". If a company wishes to be incorporated in an other state it must take its effective seat there. That means moving the firm's headquarters

and the relocation of human capital abroad which is, of course, costly. Furthermore, the state in which the company was incorporated so far will treat the transfer of the registered office as a liquidation which will very likely have negative tax consequences (e.g., taxation of hidden reserves).[21]

- As managements would have to ask shareholders for their consent to a change of the company's seat, they could not simply choose an environment with a less shareholder-oriented system (provided that management cannot influence shareholders' decisions as it might do in a system that allows managers to vote as proxies).

- There is much less transnational cross-border mobility of managers, employees and investors than in the homogeneous language area of the U.S.

- As corporate governance rules are only part of a whole "package" that is offered to firms - together with the rest of corporate law, labour law, tax law, social security and other regulations -, a state with unfavourable and inefficient corporate governance rules may still outrun the others if the rest of the package outweighs this disadvantage.

The result of all this is that both now and in the foreseeable future European corporate governance systems do not and probably will not converge as a consequence of centralized rule-setting or of competition between national legislators. As the following will show, convergence or, to be more precise, an approach at least by the German corporate governance system to a more market-oriented, Anglo-American type model, can be observed. But this process is, for the most part, a reaction of the traditional national rule-setting system, based on infra-state discussion and lobbying by various political and interests groups - to internationalization, the globalization of markets and technological change.

C. Towards a market-oriented corporate governance system in Germany

I. Specific features of the German corporate governance system

If one compares the German with the Anglo-American corporate governance system, five main particular features of the German system can be identified:

- the two-boards model;
- employee co-determination;
- concentration of shareholdings and a less developed stock market;
- dominance of banks and creditor- rather than shareholder-orientation;
- lack of public hostile takeover bids.

1. Two-tier structure

The two-tier structure as opposed to the widespread one board model means that in stock corporations and large limited liability companies there is a management board which actually runs the firm and a supervisory board with outside directors only. The supervisory board appoints and dismisses the management and has the task of monitoring it.[22]

2. Co-determination of employees

The presence of two separate boards is also relevant to the co-determination system. It involves members of the supervisory board who are elected by the employees or appointed by the trade unions. In firms with more than 500 employees, one third of the members of the supervisory board is elected by the employees. In companies with more than 2,000 employees, this number is increased to one half of the members of the supervisory board.[23]

3. Concentration of shareholdings and stock market

Shareholdings are concentrated in German firms. Table 1 (cf. appendix) shows that for 85% of 171 industrial German quoted companies in 1990, there is at least one large shareholder owning more than 25% of voting shares;[24] for a majority of these 171 companies there is a majority shareholder. The table also shows that other German industrial companies account for 27% of dominant shareholdings, and families for a further 20%. German institutional investors, including trusts and insurance companies, account for only 15%. Their rôle is hence a much less important one compared with that played by institutional investors in the US and the UK. Furthermore, the top companies in particular are linked to each other by capital and personal interlocks.[25] The important rôle of financial institutions in this respect will be dealt with later.

The fact that there are comparatively few true "public companies" with widely dispersed ownership corresponds with a small public stock market. In 1993, of the about 3,000 stock corporations only 664 were listed.[26] In relation to our GNP market capitalization made up for 25% only whereas in Great Britain with 1,865 listed companies market capitalization was 132% of GNP.[27] The ancillary rôle played by the German stock exchanges until recently is underlined by the fact that the market's organisation is still rather fragmented with its eight stock exchanges and, until recently, market regulation was timid, supervision weak, and enforcement rare.

4. The rôle of the banks and creditor-orientation

In the large publicly held companies especially, banks dominate the shareholders' meetings.[28] In 1992, for instance, banks cast on average more than 84% of all votes present at the meetings of the 24 largest stock corporations with widely dispersed ownership.[29] This influence rests on equity holdings, the votes cast by their subsidiary investment funds and, above all, their rôle as proxies for their clients who have deposited their shares with them. This position enables them to ensure their representatives' presence on supervisory boards.[30]

Legal protection of outside shareholders appears to be less developed in the German than in the common law systems.[31] The traditional strong creditor, rather than shareholder, orientation

of German corporate law is manifest in various areas, especially as regards the availability of information about the firm to shareholders and the investing public. There are for instance, no quarterly reports to the stock exchange or the market supervisory authority; there is no disclosure of other board memberships and no detailed disclosure of the salaries and bonuses of the top management in the annual report of the firm. Additionally it is extremely difficult and sometimes impossible for a minority shareholder in a stock corporation to obtain reliable information about the firm outside the shareholders' meeting if he wants to sell his holding. Furthermore, German insolvency law used always to be very favourable to creditors. Lastly, the accounting rules are traditionally creditor and tax rather than shareholder oriented; this factor will be dealt with later.

5. The lack of hostile public takeover bids

A further characteristic feature of the German corporate governance system is that there are virtually no hostile public takeover bids and no "market for corporate control". However, *Julian Franks* and *Colin Mayer* did find substantial evidence of sales of large stakes. Such share stake sales are related to poor performance and therefore might point to a partial substitute for the Anglo-American market for corporate control in firms with concentrated ownership.[32]

II. Determining factors of the present structure and pressures for change

a) What are the forces that formed this specific corporate governance model? As always, there is a mixture of economic, political and cultural factors which has shaped the present system. Decisions that have been taken and put through politically once and have led to further path-dependent developments will not be overturned easily again as long as other, new forces are not strong enough to bring about a change. The separation between a management and a supervisory board dates back to the nineteenth century,[33] and the first co-determination law was enacted in 1920.[34] Unlike the US and other nations, Germany did not react to the banking crisis in the early thirties with an institutional separation between commercial banking and industry. Political thought after the Second World War led to further co-determination laws, and the economic success of German industry in that period did not suggest far-reaching

reforms of corporate governance rules until recently. Let me add only two remarks on the issue of creditor orientation and the absence of a "shareholder culture". First, German tax law favours debt finance of firms more than equity finance.[35] Second, Figure 2 (appendix) shows the portfolio stucture of private households in selected countries. German households invest their funds only to a small extent in stock. Tax regulations channel retirement provisions predominantly into other forms of investment. The main pillar of pension payments, the public social security system, does not build up capital stock and invest on the capital market in any event, and pension commitments of employers to their employees are financed mainly by building up reserves within the company.[36] Hence pension money is invested only to a small extent on the capital markets.

It will be understood that it is not intended here to contribute to the discussion about how this particular corporate governance system and its special traits affects corporate performance, and whether this or other systems are superior. As to the latter it seems necessary to take the whole environment in which it has to prove successful into account, i.e. the stage of development of the economy, technology, enforcement of law, political decisions and so on. In any event, the characteristic balance of the German system created by these factors is now under increasing pressure both from without and within. In the following I will first try to describe this pressure for change. Then, in the final part, I will discuss what new temporary equilibrium might emerge from this.

b) The pressure for change is the result of various developments. Let me identify four driving factors first and then ask what their impact on our present system is or is likely to be.

- First, there is increasing pressure on German firms in product markets in which high labour and social security costs put them at a competitive disadvantage. Lower profitability increases domestic as well as transborder takeover activity. For managers in firms with controlling shareholders that means increasing pressure and the threat of dismissal.[37] Managements in widely held companies which are shielded from hostile takeover activity are increasingly publicly criticized and have started to turn their minds back to the core business of their firms and even to split up conglomerates.

- Second, managements of large publicly held companies that wish to tap the international capital markets must change their attitude regarding better investor relations and more shareholder orientation, improving in particular information provision and accounting policies, as well as implementing shareholder-value oriented business techniques.

- Third, the development of an ageing population together with increasing unemployment will render further major reforms of the pension system inevitable. Private pension savings will be increasingly necessary and will channel funds, either directly or through financial intermediaries into the national and international capital markets, which may thus be further developed. That means that existing national barriers to capital movement must be removed; there will be increased competition between foreign and domestic performance oriented asset managers, and this will in turn put pressure on managements in the portfolio companies to increase shareholder orientation.

- The fourth factor leading to reform is the apparent failure of some supervisory boards in recent cases to fulfil their rôles as monitors of management behaviour.

III. Actual developments

How will these factors influence our corporate governance system, what new equilibrium will emerge from these developments? I cannot draw a complete picture here as the discussion is still current, having only recently commenced. Furthermore, we will have to do with a moving target rather than with a new static system as international competition grows, new technologies and business and finance techniques develop, and as capital markets grow together. The following remarks should be understood with these caveats.

The German corporate governance system will generally develop into a more shareholder oriented system. That will only be a gradual process, be it by legislative action, or by change of business attitudes and practices. Let me mention the main points of the current discussion and the likely outcomes.

1. Reform of the supervisory board

To start with, nobody questions the two-tier structure with separate managing and supervisory boards. Nor is a choice between a two-tier system and a single board as in French corporate law being considered. The main reason for this is the principle of co-determination by employees, with representatives on the supervisory board, which will not be changed. On the contrary, there seems to be a slight drift by the British one-board system towards the two-tier model. The recommendations of the Cadbury Code for British companies have drawn a noticeable line between outside and managing directors and distinguish between the chairman of the board and the CEO[38] although this is certainly not thought as advocating the introduction of a two-tier system there.

The reforms that are planned by the German government and parliament have more modest aims: Information provision to the supervisory board shall be improved, conflicts of interests shall be removed, professionalization of the supervisory board's work shall be fostered and, last but not least, the board's liability, which was virtually non-existant so far shall be increased. The reform bill will probably be enacted during the current legislative period. It will not however, end the discussion of the rôle and the performance of supervisory boards. Important questions have yet to be dealt with such as, for instance, the duties of a supervisory board regarding a firm's derivative business.[39] Another open question is whether it is possible to measure the performance of the incumbent management and impose duties on the supervisory board to react to bad performance. There will be further discussion and development in this area.

Regarding the co-determination system. No politician will dare to infringe on it as employees and trade unions consider it as one of their "social assets" ("sozialer Besitzstand.") Managements have also accommodated to the system, sometimes perhaps even gratefully, as it contributes to shield companies from hostile takeovers and makes monitoring by the supervisory board more difficult. The economic arguments for and against co-determination have been discussed frequently.[40] What are now needed are more empirical and econometric

studies on the correlation between co-determination and company performance.[41] That could give rise to second thoughts in the future.

2. Proxy voting by banks

As previously mentioned, banks dominate the shareholders' meetings of companies with widely distributed ownership. This influence rests on their own equity holdings, the votes cast by their subsidiary investment funds and, above all, their rôle as proxies for those clients who have deposited shares with them. This position, which enables them to appoint their representatives to supervisory boards, has been discussed and criticized for decades, for both political, because of the considerable economic and political power they wield,[42] as well as economic reasons. As to the latter one should however, differentiate between the various sources of influence as they pose different problems.[43] Recent econometric studies show that equity holdings of banks and the banks' rôles as proxies have opposite impacts on firms' performance.[44] However, the governing conservative coalition does not intend to curb banks' influence on firms in following the far-reaching proposals of the opposing Social Democrats.[45] Equity holdings of banks will not be touched; their links with investment funds not be cut; and there will be only minimal, if any, attempts to improve proxy voting by banks. Market forces may bring about more changes in the future as the rôle of foreign and domestic bank-independent institutional investors becomes more important.

3. Accounting rules

When Daimler-Benz had its shares listed on the New York Stock Exchange in October 1993, it had to file a statement of accounts with the SEC and accept the obligation to set out the group's annual accounts according to the US-GAAP in future. The interim report of Daimler Benz of mid-1993 that was set out according to German accounting rules showed a surplus of DM 168 mil. whereas the report following the GAAP-rules showed a loss of DM 949 mil.[46] This example illustrates the enormous differences in accounting practice and principles between American and traditional Continental European accounting.[47] Accounting in Germany is essentially affected by tax accounting rules and tax law because similar rules are used to calculate both a company's taxable income and the income it reports in its public financial

statements. It is not the overriding objective of accounting and annual statements of accounts to provide a true and fair view for investors. Accounting rules are rather creditor-protective in that they follow the principle of "precaution" or of "conservatism" which means for instance, that foreseeable risks and losses will be allowed for immediately whereas profits will be disregarded until they are realized.[48] Hence huge hidden reserves may be built up which in turn may allow management to smooth out future losses. Case studies have shown the enormous discretion which current German accounting rules leave for management.[49]

Daimler-Benz was the first German company to accept the SEC's accounting demands according to the US-GAAP in order to have its shares listed on the New York Stock Exchange. Some large firms have decided to follow suit, whereas others such as Deutsche Bank, prefer the rules of the IASC. The German Federal Government is considering whether multinational firms with their seat in Germany should be allowed to set out their accounts and annual reports on the group according to internationally accepted accounting principles.

4. Takeover Code

One efficiency explanation of takeovers is that they reduce agency costs. They constitute the "market for corporate control" which is currently virtually absent in Germany, so far hostile public takeovers are concerned. There are several structural as well as statutory takeover impediments in place which make hostile takeovers of widely held companies very difficult if not impossible.[50] The EU Commission has tried unsuccessfully, by various draft proposals, to regulate a European public takeover market.[51] For Germany the proposed rules were to a great extent redundant because of the lack of public takeovers. The Commission did not attempt to remove the statutory or structural hurdles to hostile public takeovers. The main reason for the German industry's strict opposition to the EU plans was the proposed mandatory bid for all outstanding shares in a company as soon as a controlling interest has been acquired. Since the adoption of the subsidiary principle, the Commission has changed its mind and has submitted a slimmed down draft proposal.[52] This new draft proposal essentially leaves it to the member states to decide in what way they provide protection for minority shareholders in the case of a change of control. An expert commission appointed by the German Ministry of Finance has anticipated this and developed a takeover code which shall be implemented by "voluntary"

acknowledgement by the business community concerned. This voluntary code however, cannot be considered to be genuinely investor-protective.[53] As only about one third of publicly quoted companies have so far acknowledged this code, and as the opposing Social Democrats tabled a bill last year providing for a much stricter statutory regulation,[54] it is not yet clear how the future will be. It is however, clear that neither the opposition's proposal, nor the voluntary code submitted by the expert commission will remove the barriers to hostile takeovers of publicly held corporations.

Although there is certainly a development in the German corporate governance system towards more investor-orientation, its pace is slow.

[1] *I. Walter*, The Battle of the Systems: Control of Enterprises and the Gobal Economy. Kieler Vorträge n.F. 122 (Kiel 1993); *H.W. de Jong*, "The takeover market in Europe: Control stuctures and the performance of large companies compared", Review of Industrial Organization (1995), 6, 1-18; *M. Bishop*, "Corporate Governance", The Economist (1994), Jan. 29; *P.W. Moerland*, "Alternative disciplinary mechanisms in different corporate systems", Journal of Economic Behaviour and Organization (1995), 26, 17-34; *S.J. Nickell*, The performance of companies: The relationship between the external environment, management strategies and corporate performance (Oxford 1995); *G.M.M. Gelauff/C. den Broeder*, "Governance of stakeholder relationships. The German and Dutch experience", CFB Research Memorandum No. 127 (The Hague 1996).

[2] The following references provide only a small selection from the abundant literature: *J.C.F Lufkin/D. Gallagher* (eds.), International Corporate Governance (London 1990); *Oxford Analytica Ltd.*, "Board Directors and Corporate Governance. Trends in the G 7 Countries Over the Next Ten Years" (Oxford 1992); *J. McCahery/ S. Picciotto/C. Scott* (eds.), Corporate Control and Accountability (Oxford 1993); *D.D. Prentice/P.R.J. Holland* (eds.), Contemporary Issues in Corporate Governance (Oxford 1993); *T. Baums/R.M. Buxbaum/K.J. Hopt* (eds.), Institutional Investors and Corporate Governance (Berlin/New York 1994); *J.P. Charkham*, Keeping Good Company (Oxford 1994); *M. Isaksson/R. Skog* (eds.), Aspects of Corporate Governance (Stockholm 1994); *S. Prowse*, "Corporate Governance in an International Perspective: A Survey of Corporate control Mechanisms Among Large Firms in the U.S., U.K., Japan and Germany", Financial Markets, Institutions and Instruments, Vol. 4 (1995), 3 ff.; *K. Lannoo*, Corporate Governance in Europe. Centre for European Policy Studies: Working Party Report No. 12 (Brussels 1995); *Gelauff/den Broeder*, op.cit. (supra n. 1); *T. Pedersen/S. Thomsen*, European Models of Corporate Governance. Working Paper (Copenhagen 1995); *R. La Porta/ F. Lopez-de-Silanes/A. Shleifer/R.W. Vishny*, "Law and Finance" (Working Paper 1996); short overview also in *R.A.G. Monks/N. Minow*, Watching the Watchers (Cambridge, MA 1996), at p. 309 ff. - On corporate governance in the Central and Eastern European states cf. *M. Aoki/H.K. Kim* (eds.), Corporate Governance in Transitional Economies. Insider Control and the Role of Banks (Washington D.C. 1995).

[3] Cf. in more detail sub III., below.

[4] See the reports cited above (n. 2).

[5] On political decisions in American corporate law cf. *Mark Roe*, Strong Managers, Weak Owners. The Political Roots of American Corporate Finance. Princeton/ New Jersey (1994).

[6] Cf. *B. Black/R. Kraakman/J. Hay*, Corporate Law from Scratch (Harvard Law School Discussion Paper Series No. 155) Cambridge, MA (1995).

[7] Examples are the spreading of the Code Napoleon on the Continent or the All-German Commercial Code of 1861 in the German states including Austria.

[8] When the Co-determination Law of 1976 was enacted attempts were made by some smaller firms to evade it, among other means by off-shore holding companies. For larger companies, however, this was not - and not only because of the transaction costs - an eligible solution.

[9] Text collection by *K.J. Hopt/E. Wymeersch*, European Company and Financial Law, 2nd ed. Berlin/New York (1994).

[10] Overview and discussion of governance-related directives and proposals of the EU in *E. Wymeersch*, "The Corporate Governance Discussion in Some European States", in: Prentice/Holland, op.cit. (supra n. 2), 3, 12-15 with further references.

[11] Brief history with further references in *M. Lutter*, Europäisches Unternehmensrecht, 3rd ed. Berlin/New York (1991), at p. 47.

[12] On the fate of the various drafts and the criticism *T. Baums*, Zur Harmonisierung des Rechts der Unternehmensübernahmen in der EG, in: H.W. Rengeling (ed.), Europäisierung des Rechts (Köln/Berlin/Bonn/München 1996). Most recently thereto Draft proposal for a 13th Directive, Dok. EU KOM (95) 655 endg. COD 95/0341.

[13] For a thorough analysis and further references cf. *R.M. Buxbaum/K.J. Hopt*, Legal Harmonization and the Business Enterprise (Berlin/New York 1988); *R.M. Buxbaum/ G. Hertig/A. Hirsch/K.J. Hopt* (eds.), European Business Law. Legal and Economic Analyses on Integration and Harmonization (Berlin/New York 1991); *R. Romano*, The Genius of American Corporate Law (Washington, D.C. 1993), 128-140; *E. Werlauff*, From a National Company Law Towards a "Federal" Enterprise Law (Bonn 1995); on the impact of the newly enacted "subsidiary principle" on the harmonization of corporate law *T. Baums*, op.cit. (n. 12, above).

[14] Cf. *T. Baums*, Anwendungsbereich, Kollision und Abstimmung von Kapitalmarktrechten, in: Unternehmen, Recht und Wirtschaftsordnung. Festschrift für Peter Raisch (Köln/Berlin/Bonn/München 1995), 211-222 with further references.

[15] Cf., e.g., the harmonization activities of the International Accounting Standards Committee or the cooperation of the national stock exchanges and capital market supervisory authorities.

[16] Cf. *R. Romano*, op.cit. (supra n. 13), with further references.

[17] *H.G. Vogel*, Das Schuldverschreibungsgesetz. Entstehung, Inhalt und Bedeutung. Working Paper (Osnabrück 1996), at p. 27 f.

[18] Apparently with little success as far as the issuance of domestic rather than foreign bonds is concerned, cf. *Vogel*, op.cit, at p. 29 ff.

[19] There are, to my knowledge, only very few examples where national legislators eased corporate governance rules in order to attract foreign firms or keep firms from incorporating abroad. One famous example is Art. 155 of the Dutch Civil Code which mitigates the Dutch co-determination rules for companies with foreign holdings. Cf. *S.M. Bartman/A.F.M. Dorresteijn*, Van het concern (Arnheim 1991), 137.

[20] For a thorough discussion and comparative overview cf. *B. Grossfeld*, in: J. v. Staudinger's Kommentar zum Bürgerlichen Gesetzbuch. Einführungsgesetz zum Bürgerlichen Gesetzbuche. IPR. Internationales Gesellschaftsrecht. 13rd ed. (Berlin 1993).

[21] *R.M. Buxbaum* even suggests that the real seat rule was developed in the nineteenth century in order to prevent French corporations from taking advantage of the more favourable English law (*R.M. Buxbaum*, "The Origin of the American 'Internal Affairs' Rule in the Corporate Conflict of Laws", in: Festschrift für Kegel [Stuttgart 1987], 75, 85 f.).

[22] Detailed description by *A.F. Conard*, "Comparative Law: The Supervision of Corporate Managements: A Supervision of Developments in European Community and United States Law", Mich.L.Rev. 82 (1984), 1459 ff.; and *C. Meier-Schatz*, "Corporate Governance and Legal Rules: A Transnational Look at Concepts of International Management Control", Journal of Corporation Law 13 (1980), 431 ff.

[23] Cf. fig. 1 (appendix). Description and assessment by *K.J. Hopt*, "Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe", International Rev. of Law and Economics 14 (1994), 203 ff.

[24] *J. Franks/C. Mayer* (The Ownership and Control of German Corporations. LSE/Univ. of Oxford Working Paper. 1994) collected data for a similar sample of the largest 173 quoted companies in the UK in 1992 and found that only 13% of companies had one shareholder owning more than 25% of issued equity.

[25] *M. Adams*, "Die Usurpation von Aktionärsbefugnissen mittels Ringverflechtung in der 'Deutschland AG'", Die Aktiengesellschaft 1994, 148 ff.; *M. Hellwig*, Comment, in: H. Siebert (ed.), Trends in Business Organization: Do Participation and Cooperation Increase Competitiveness? (Tübingen 1995), 196 ff.; detailed study and criticism by *E. Wenger*, Institutionelle Defizite am deutschen Kapitalmarkt. Gutachten für die Monopol-Kommission. Teil III: Überkreuzverflechtungen und die Blockade des Markts für Unternehmenskontrolle. (Würzburg 1995).

[26] Table 2, appendix.

[27] *Lannoo*, op.cit. (supra n. 2), at p. 7 table 1.

[28] Especially on the banks' rôle in corporate governance *T. Baums*, "The German Banking System and its Impact on Corporate Finance and Governance", in: M. Aoki/ H. Patrick (eds.), The Japanese Main Bank System (Oxford 1994), 408, 423 ff.; *J. Edwards/K. Fischer*, Banks, finance and investment in Germany (Cambridge 1994), 178 ff.; *P.O. Mülbert*, "Empfehlen sich gesetzliche Regelungen zur Einschränkung des Einflusses der Kreditinstitute auf Aktiengesellschaften?" Gutachten E für den 61. Deutschen Juristentag (München 1996).

[29] Table 3, appendix.

[30] Cf. table 4, appendix.

[31] See *La Porta* et al., op.cit. (supra n. 2), at 18 ff.

[32] *Franks/Mayer*, op.cit. (n. 24, supra).

[33] *P. Hommelhoff*, in: W. Schubert/P. Hommelhoff (eds.) Hundert Jahre modernes Aktienrecht (Berlin/New York 1985), 91-96.

[34] On the history of employee co-determination see, e.g., *T. Raiser*, Mitbestimmungsgesetz (Berlin/New York, 2nd. ed. 1984), 30 ff. with further references.

[35] OECD, Wirtschaftsberichte 1994-1995, Deutschland (Paris 1995), p. 127 f.

[36] For a detailed description cf. *M. Hauck*, "The Equity Market in Germany and its Depending on the System of Old Age Provisions", in: Baums/Buxbaum/Hopt, op.cit. (supra n. 2), 555 ff.

[37] Cf. *Franks/Mayer*, op.cit. (n. 24).

[38] Report of the Committee on the Financial Aspects of Corporate Governance (London 1992).

[39] Cf. *P. v. Randow*, "Derivate und Corporate Governance - Eine gesellschafts- und kapitalmarktrechtliche Studie", Working Paper (Osnabrück 1996).

[40] Cf. the report and assessment by *Hopt*, op.cit. (n. 23).

[41] For an overview of the existing econometric literature and a study on the impact of co-determination on stock prizes cf. *T. Baums/B. Frick*, "Codetermination and Firm Value: The German Experience", Working Paper (Columbia University 1996).

[42] For an overview of this discussion see *Roe*, op.cit. (supra N. 5), 210 ff.

[43] On shareholdings of banks in industrial firms *T. Baums*, "Should Banks Own Industrial Firms? Remarks from the German Perspective", Rev. de la Banque/Bank-en Financiewezen (Belgium) 56 (1992), 249 ff.; on proxy voting by banks *T. Baums/ P. v. Randow*, "Shareholder Voting and Corporate Governance: The German Experience and a New Approach", in: Aoki/Kim, op.cit. (supra n. 2), 435 ff.; on banks and investment fund subsidiaries *T. Baums*, "Universal Banks and Investment Companies in Germany", in: A. Saunders/I. Walter (eds.), Universal Banking. Financial System Design Reconsidered (Chicago/London/Singapore 1996), 124 ff.; most recently *Mülbert*, op.cit. (supra n. 28).

[44] Cf. the report on these studies by *T. Baums*, "Vollmachtstimmrecht der Banken - Ja oder Nein?", Die Aktiengesellschaft 1996, 11, 24-26.

[45] See Deutscher Bundestag, Drucksache 13/367 (30.01.1995).

[46] *C. Fraune*, "Börsennotierung deutscher Aktiengesellschaften in den USA", Recht der Internationalen Wirtschaft 1994, 126, 131 footn. 75.

[47] Digests of accounting rules internationally are provided in *F.D.S. Choi* (ed.), Handbook of International Accounting (New York 1991); *F.D.S. Choi/G.G. Mueller*, International Accounting (Englewood Cliffs, N.Y. 1992); see also Miller's European Accounting Guide (New York 1995); Deutsche Bank Research (ed.), US vs. German accounting methods (Special Equity Report, Frankfurt 1993).

[48] § 252 (1) Nr. 4 German Commercial Code.

[49] *K.H. Küting*, "Die Talfahrt der Daimler-Benz AG. Neun Jahre Bilanzpolitik des Technologiekonzerns auf dem Prüfstand", Blick durch die Wirtschaft, April 12, 1996, p. 9.

[50] See *M. Lutter/B. Lammers*, "Hostile Takeovers: Possibilities and Limitations according to German law, in: J.M.M. Maeijer/G. Geens (eds.), Defensive Measures against Hostile Takeovers in the Common Market (Dordrecht/Boston/London 1990), 113 ff.; *T. Baums*, in: Prentice/Holland, op.cit. (supra n. 2), 151, 154-157. Things look, however, different in companies with large controlling blocks of shares; cf. *Franks/Mayer*, op.cit. (supra n. 24).

[51] History and critical assessment in *K.J. Hopt*, "European Takeover Regulation: Barriers to and Problems of Harmonizing Takeover Law in the EC", in: K.J. Hopt/E. Wymeersch (eds.), European Takeovers. Law and Practice (London et. al. 1992), 165 ff.

[52] Kommission der Europäischen Gemeinschaften, "Vorschlag für eine 13. Richtlinie des Europäischen Parlaments und des Rates auf dem Gebiet des Gesellschaftsrechts über Übernahmeangebote", Febr. 7, 1996; KOM (95) 655 endg.

[53] Detailed assessment and criticism by *G.F. Thoma*, Der neue Übernahme-Kodex der Börsensachverständigenkommission. Working Paper (Osnabrück 1996).

[54] Deutscher Bundestag, Drucksache 13/367 (30.01.1995).

Table 1: Ordinary share stakes in excess of 25%, 50% and 75 % for the largest 171 German industrial quoted companies in 1990

	>25%	>50%	>75%
A. Companies with a widespread shareholding[1]	14.6%	42.7%	77.8%
B. Companies with a large shareholder	85.4%	57.3%	22.2%
the largest shareholder being ...			
1. Another German company	27.5%	21.1%	9.9%
2. An insurance company	1.8%	0.0%	9.9%
3. A trust/an institutional investor	12.9%	6.4%	1.8%
4. A family group	20.5%	16.4%	5.3%
5. A foreign company[2]	9.9%	8.8%	5.3%
6. A bank	5.8%	0.0%	0.0%
7. The German State	1.2%	1.2%	0.0%
8. Other German authorities	3.5%	2.9%	0.0%
9. A foreign state	0.0%	0.0%	0.0%
10. Unknown	2.3%	0.6%	0.0%
Total[3]	100.0	100.0	100.0

Notes: [1] Acompany is widely held, if it has no shareholder holding of at least 25% of its voting capital.

[2] Including foreign holding companies.

[3] Discrepancies in the total may to due to rounding errors.

Source: Franks/Mayer, The Ownership and Control of German Corporations. LSE and Oxford University Working Paper (1994)

Figure 1

Corporate Governance Structure of Siemens Aktiengesellschaft

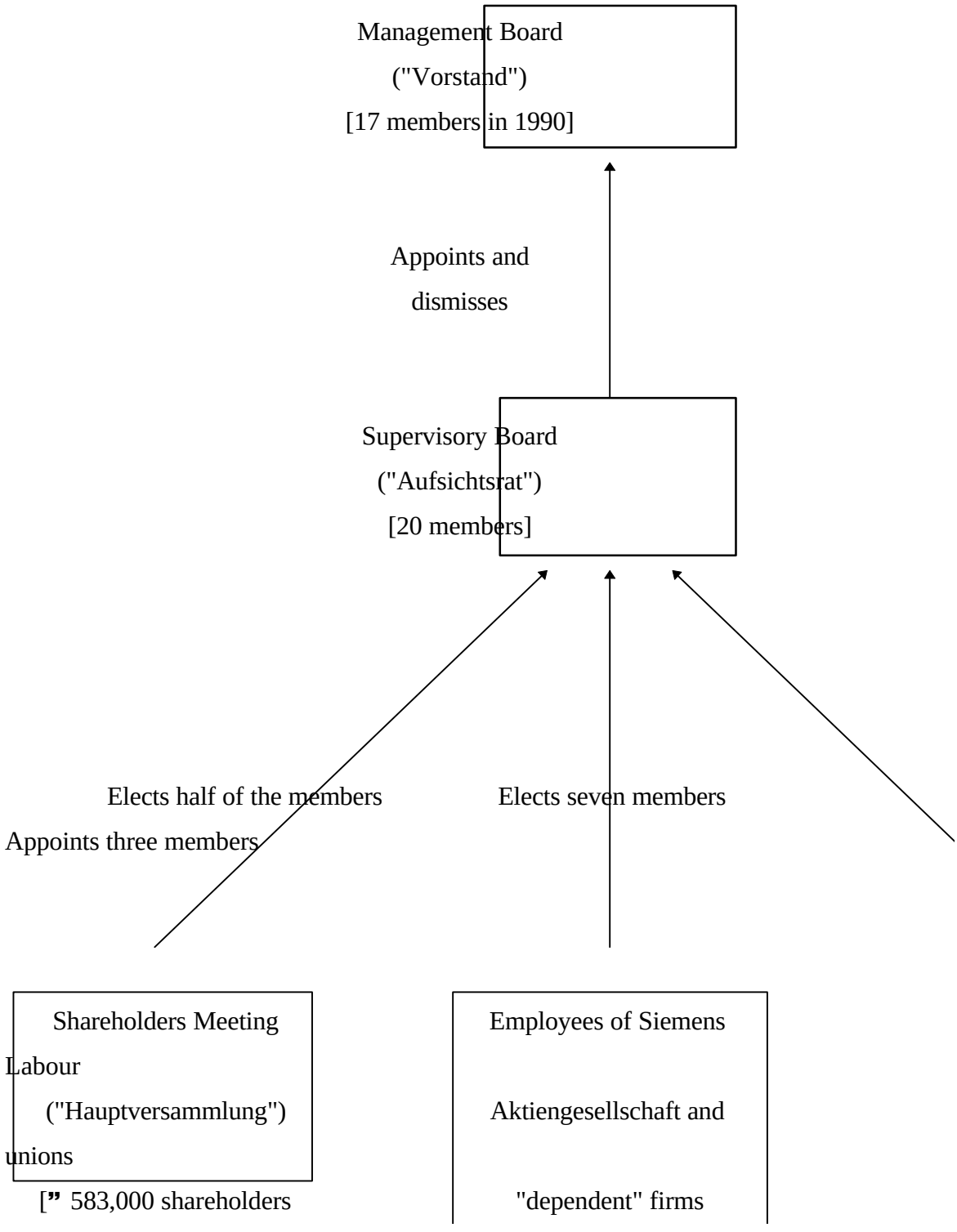

Table 2: Domestic Listed Companies by Country and Their Total Market Value at End of 1993

Country	Capitalisation		Domestic Listed Companies
	in Ecu mn	% of GDP	
B	69,526	38.6	165
DK	35,504	30.6	206
D	409,610	25.1	664
GR	10,738	17.1	130
F	404,926	37.9	726
IRL	15,259	38.9	53
I	128,056	15.1	242
L	17,170	195.1	56
NL	162,356	61.5	239
P	10,432	16.3	89
ESP	105,675	25.9	374
UK	1,065,515	132.4	1,927
EU12	2,434,766	44.3	4,871
AUS	25,178	16.3	111
SF	20,922	29.7	57
SWE	95,095	59.7	197
EU15	2,575,961	43.8	5,236
CH	240,812	113.9	215
N	24,332	27.8	120
JAPAN	2,672,638	73.8	1,667
US-NYSE	3,752,446	70.3	1,788
US-NASDAQ	703,827	13.2	4,310

Note: Listed companies include main and parallel markets; listes companies and market capitalisation do not include investment trusts, listed unit trusts and UCITS; the data refer to the main market of the states mentioned, except for Germany, where it covers the federation of German exchanges.

Source: FIBV, Federation of European Stock Exchanges, and *European Economy*.

Table 3: Voting rights[a] of banks in shareholders meetings of the 24 largest stock corporations with widely dispersed ownership in 1992

No.	firm	presence (%)	own holdings	subsidiary investm. funds	proxies	all
1	Siemens	52,66		9,87	85,61	95,48
2	Volkswagen	38,27		8,89	35,16	44,05
3	Hoechst	71,39		10,74	87,72	98,46
4	BASF	50,39	0,09	13,61	81,01	94,71
5	Bayer	50,21		11,23	80,09	91,32
6	Thyssen	67,66	6,77	3,62	34,98	45,37
7	VEBA	53,40		12,62	78,23	90,85
8	Mannesmann	37,20		7,76	90,35	98,11
9	Deutsche Bank	46,79		12,41	82,32	94,73
10	MAN	72,09	8,67	12,69	26,84	48,20
11	Dresdner Bank	74,59		7,72	83,54	91,26
12	Preussag	69,00	40,65	4,51	54,30	99,46
13	Commerzbank	48,23		15,84	81,71	97,55
14	VIAG	69,68	10,92	7,43	30,75	49,10
15	Bayr. Vereinsbank	55,95		11,54	73,15	84,69
16	Degussa	73,26	13,65	8,65	38,35	60,55
17	AGIV	69,96	61,19	15,80	22,10	99,09
18	Bayr. Hypo	68,87	0,05	10,69	81,38	92,12
19	Linde	60,03	33,29	14,68	51,10	99,07
20	Deutsche Babcock	37,30	3,22	11,27	76,09	90,58
21	Schering	37,42		19,71	74,79	94,50
22	KHD	69,60	59,56	3,37	35,03	97,96
23	Bremer Vulkan	52,09		4,43	57,10	61,53
24	Strabag	67,10	74,45	3,62	21,21	99,28
average		58,05	13,02	10,11	60,95	84,09

a In % of the votes present; includes voting rights of bank-controlled investment funds.

Source: Baums/Fraune Die Aktiengesellschaft 1995, 97 (102 f.).

Table 4: Personal direct interlocks between firms and banks

(both out of the group of the 100 largest enterprises)

Rank	Year	Bank (B)	Number of the firms	
			into whose supervisory board B sent its managers	which sent their managers into the supervisory board of B
14	1990	Deutsche Bank	35	2
20	1990	Dresdner Bank	19	1
23	1990	Commerzbank	16	4
36	1990	Bayerische Vereinsbank	3	2
52	1990	Bayerische Hypotheken- und Wechselbank	2	4
73	1990	Westdeutsche Landesbank	5	1
93	1990	DG Bank - Deutsche Genossenschaftsbank	5	0

Source: Neuntes Hauptgutachten der Monopolkommission, Bundestags-Drucksache 12/3031, at p. 228-232.