The Dialogue between the Chairman of the Board and Investors: The Practice in the UK, the Netherlands and Germany and the Future of the German Corporate Governance Code Under the New Chairman

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Klaus J. Hopt
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Abstract

The dialogue of the board and its chairman with investors is an established practice in many countries, such as the United Kingdom, the USA, the Netherlands, Belgium, France and recently also Germany. In the UK this dialogue covers the whole range of relevant board topics, certainly including good corporate governance aspects such as the composition of the board and the remuneration of the directors as well as good corporate culture and ethics in the corporation. In Germany this dialogue may also take place between the chairman of the supervisory board and institutional investors; this is firmly established in the practice of most of the DAX-30-corporations, and some other corporations follow the trend. This practice is taken up by many codes of good corporate governance, for example in the UK Corporate Governance Code 2014 and the UK Stewardship Code 2012 as well as in the Corporate Governance Codes of France, the Netherlands, Belgium, the USA and since 2017 also in the German Code. The investor dialogue involving the chairman of the board, both in the one-tier and the two-tier systems, is legal and legitimate, but it has three main limits: insider trading and market abuse, company secrets, and equal treatment of the shareholders. The latter limit creates practical problems which are met by the various codes in different ways. While the competence for investor relations is primarily with the CEO viz. the chairman of the management board, the chairman of the (supervisory) board should also be available – within reasonable limits – to discuss supervisory board-related issues with investors. This has been rightly suggested by the German Corporate Governance Code, though it has met with certain doctrinal concerns. In many countries this dialogue is not restricted to the chairman of the board but extends to other board committe chairmen, to the senior independent directors and sometimes to all directors. It can be expected that the chairman of the board's dialogue with investors will sooner or later not only become a general practice, but that it will also be considered to represent good corporate governance.

Keywords: Board, investor dialogue, investor relations, supervisory board, German Stock Corporation Act, German, UK and Dutch Corporate Governance Codes, institutional investors, secrecy, inside information, equal treatment of shareholders

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Klaus J. Hopt*
Professor of Law
Max Planck Institute for Comparative and International Private Law
Mittelweg 187
Hamburg 20148, Germany
phone: +49 404 190 0206
e-mail: hopt@mpipriv.de

*Corresponding Author

The Dialogue between the Chairman of the Board and Investors

- The Practice in the UK, the Netherlands and Germany and the Future of the German Corporate Governance Code under the New Chairman -

Klaus J. Hopt, Max Planck Institute for Comparative and International Private Law, Hamburg

Survey

Summary

The dialogue of the board and its chairman with investors is an established practice in many countries, such as the United Kingdom, the USA, the Netherlands, Belgium, France and recently also Germany. In the UK this dialogue covers the whole range of relevant board topics, certainly including good corporate governance aspects such as the composition of the board and the remuneration of the directors as well as good corporate culture and ethics in the corporation. In Germany this dialogue may also take place between the chairman of the

supervisory board and institutional investors; this is firmly established in the practice of most of the DAX-30-corporations, and some other corporations follow the trend. This practice is taken up by many codes of good corporate governance, for example in the UK Corporate Governance Code 2014 and the UK Stewardship Code 2012 as well as in the Corporate Governance Codes of France, the Netherlands, Belgium, the USA and since 2017 also in the German Code. The investor dialogue involving the chairman of the board, both in the one-tier and the two-tier systems, is legal and legitimate, but it has three main limits: insider trading and market abuse, company secrets, and equal treatment of the shareholders. The latter limit creates practical problems which are met by the various codes in different ways. While the competence for investor relations is primarily with the CEO viz. the chairman of the management board, the chairman of the (supervisory) board should also be available – within reasonable limits – to discuss supervisory board-related issues with investors. This has been rightly suggested by the German Corporate Governance Code, though it has met with certain doctrinal concerns. In many countries this dialogue is not restricted to the chairman of the board but extends to other board committe chairmen, to the senior independent directors and sometimes to all directors. It can be expected that the chairman of the board's dialogue with investors will sooner or later not only become a general practice, but that it will also be considered to represent good corporate governance.

The dialogue involving the chairman of the (supervisory) board is a recent, very controversial topic in Germany.[1] In its revision of February 2017 the German Corporate Governance Code has for the first time dealt with this dialogue,[2] and this has met with criticism both as to this new provision and as to the Code in general. The German discussion concentrates nearly exclusively on the supervisory board and its chairman and his competence to engage in such a dialogue, which normally would be up to the chairman of the management board. Yet from a French and international perspective the topic is broader, namely as suggested by the title of this article: The investor dialogue of the chairman of the board, both in the one-tier system and the two-tier system. The practice of this dialogue is common in a number of countries, for example in the UK, the USA, the Netherlands, France and more recently in Germany. Legal questions both as to the competence of the board and as to the permissible content and legal limits of such a dialogue come up in all of these countries. Yet in most of them the issues are dealt with in their national corporate governance codes, not in the stock corporation laws.

I. The Practice in the UK and Germany

1. In the UK and other countries

In the UK the dialogue between institutional investors and not only the board but, more specifically, non-executive directors is common practice and considered to be good corporate governance.[3] This dialogue covers the whole range of relevant board topics, certainly including good corporate governance issues such as the composition of the board, the remuneration of directors, good corporate culture and ethics in the corporation. But it extends to other topics too, such as strategic planning, risk and capital structure. Many corporations in the UK contact the shareholders who are of importance for the corporation, for example the twenty to thirty largest shareholders in the enterprise register. They offer them a dialogue with the board chair and as a rule also the chairman of the remuneration committee. If investors come forward and ask for such a dialogue, the corporations are usually ready to comply with their wishes. Also chairmen of other committees, for example the chairman of the audit committee, are available for separate dialogues. A very important part of the dialogue deals with the composition of the board. This allows the investors to express their suggestions and wishes as to the performance of the present members, the structure and diversity of the board and possible new expertise and candidates, well before the issues come up in the next general assembly.

A similar dialogue takes place in the USA[4] and other countries like the Netherlands,[5] Belgium[6], France[7] and others as well.[8] It seems that this dialogue is a general common practice in most countries, though this does not necessarily mean that it is generally acknowledged that good corporate governance requires such a practice.

2. In Germany

In Germany the dialogue with investors is usually a component of the management board's efforts at investor relations. But today such a dialogue may take place also between the chairman of the supervisory board and institutional investors; this practice is firmly established in most of the DAX-30-corporations, and some other corporations follow the trend.[9] This dialogue with the chairman of the supervisory board usually takes place once a year, be it before the general assembly or after an evaluation of the board or well ahead of the general assembly if changes in the membership of the board are planned. In the latter case it usually takes place six to nine months before the general assembly. If the corporation is in a critical situation, there are ad hoc telephone calls or personal meetings with important investors. Usually the dialogue is with only one investor, not with a group of them, and is held at the seat of the corporation. Roadshows with the chairman of the supervisory board are rare. As in the UK, board composition and criteria for the nominations of new members of both the management and the supervisory boards are key topics, though individual candidates are not part of the dialogue. The control of the management board by the supervisory board, including the supervisory board's role in the strategy of the corporation, may be discussed too.

II. Legal and Self-Regulatory Responses

1. In the UK and other countries

In the UK the dialogue is addressed both in the UK Corporate Governance Code and the UK Stewardship Code. The Cadbury Report of 1992 had already recommended such a dialogue. [10] Today the UK Corporate Governance Code states as a main principle: "There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place."[11] The chairman of the board who is usually a non-executive director has particular responsibilities. But also other non-executive directors, in particular the senior independent director, should have the possibility of participating in meetings with important shareholders.

The dialogue of the board with investors is also mentioned in the UK Stewardship Code.[12] This is easily understandable because under the Stewardship Code institutional investors have a responsibility for the corporation and its corporate governance. As such they have an information right in order to be better able to exercise their control function over the board.

2. In Germany

a) The German Corporate Governance Code as of February 2017: A new "suggestion"

In Germany the existing practice of dialogue involving the chairman of the supervisory board has been taken up by the German Corporate Governance Code only just recently and after a heated discussion. In its version of 7 February 2017, the Code says: "The Supervisory Board Chair should be available – within reasonable limits – to discuss Supervisory Board-related issues with investors."[13] According to the website of the German Corporate Governance Code Commission (hereafter: the Commission), the provided English version is only a convenience translation. In its authoritative German version, the text reads: "Der Aufsichtsratsvorsitzende sollte in angemessenem Rahmen bereit sein, mit Investoren über aufsichtsratsspezifische Themen Gespräche zu führen." "Aufsichtsratsspezifisch" in German is somewhat narrower than "Supervisory Board-related", this should be kept in mind when we come later on to the possible topics for the dialogue. The original proposal of the Commission went further than the present version in one important point. The Code distinguishes sharply between "shall" ("soll"), as found in the proposal, and "should" ("sollte"),[14] as found in the present version. In the first case this would have been a "recommendation" which, while of course not binding, would nevertheless have required that any deviation from it must be disclosed under § 161 of the Stock Corporation Act. The present version has been softened to a mere "suggestion", which the board might consider but which it can drop without further ado and without having to disclose this fact.

b) Guiding principles for the dialogue between investors and German supervisory boards, July 2016

The Code's new suggestion had been prepared by eight "Guiding principles for the dialogue between investors and Germany supervisory boards".[15] These principles were drafted by a private Working Group in which I represented legal academia. This group consisted of practitioners and academics and was supported by a Stakeholder Advisory Group with influential members such as Manfred Gentz, the then Commission Chairman, and Paul Achleitner, the chair of the Deutsche Bank's supervisory board.[16] According to Principle 1, it is up to the chairman to decide whether to enter a specific dialogue, and the dialogue pertains exclusively to topics that are a part of the remit of the supervisory board. Principles 2 to 6 specify this remit, i.e. composition and remuneration of the supervisory board; internal organization and oversight of the board including the design of the control and participation processes, but excluding the results of the efficiency review regarding individual members; management appointment and removal and management remuneration; explaining the role of the supervisory board's participating role within the strategic planning and its assessment of the implementation; and the process of selecting the auditor and coordinating cooperation with him. The chair may call on other members of the supervisory board and the management board to participate in the dialogue (Principle 7). The final Principle 8 is important: it states that the supervisory board is to discuss with the management board the basic principles regarding the content and format of the dialogue with investors.

c) Praise and criticism, both as to the dialogue and to the Code in general

The reactions to the new suggestions of the Code (and the Guiding Principles) have been mixed.[17] The institutional investors and large corporations as well as portions of the financial press and academia approved of them.[18] Others, in particular other corporations, lawyers and traditional academia, criticized them, some very harshly. Most of the criticism was doctrinal, namely related to the role of the German supervisory board.[19] This board is traditionally considered to be merely an "internal organ", i.e. an organ with the sole task of internal control and advice, with investor relations being the exclusive domain of the management board. Practical reservations concerned the need for corporations to have a one-voice policy and the danger of difficult relations between the chairmen of the management and supervisory boards. As to these fears, which seem unfounded, see part III of this article.

Yet this criticism of the Code's suggestion to have such a dialogue is only a part of a much more general, widespread and fundamental criticism directed at the Code as such and at the Code Commission. The Code has been amended too frequently, it was said. It is too detailed and too long. The comply or explain-requirement leads to mere box-ticking. Any new points in the Code risk provoking further legislation and leading to overregulation. According to some voices, it would be best to completely do away with the Code, a suggestion that is of course nonsensical from an international point of view and without the slightest chance of coming about. As to these propositions and their positive evaluation, see part IV of this article.

III. Specific Legal Problems regarding the Chairman of the Board Dialogue with Investors

1. Investor relations of the company and the board

Among the many international Codes, the UK Code deals most specifically with relations between the board and shareholders. The whole section E is devoted to this topic. The Main Principle there states: "There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place."[20] And the two Supporting Principles say: "Whilst recognising that most shareholder contact is with the chief executive and finance director, the chairman should ensure that all directors are made aware of their major shareholders' issues and concerns. – The board should keep in touch with shareholder opinion in whatever ways are most practical and efficient."[21] Actually, as said before, the Cadbury Code of 1992 had already contained recommendations concerning investor relations.

The Revised Dutch Code of 2016 says: “The company should formulate an outline policy on bilateral contacts with the shareholders and should post this policy on its website.”[22] This is quite similar to § 4.1 section 1 of the French Code de gouvernement d’entreprise des sociétés côtées as of November 2016: “Il appartient à chaque conseil d’administration de définir la politique de communication financière de la société. Chaque société doit avoir une politique très rigoureuse de communication avec le marché et les analystes.”[23] The US Principles of Corporate Governance 2016 of the Business Roundtable maintain that “Regular shareholder outreach and ongoing dialogue are critical to developing and maintaining effective investor relations …”[24]

The need for and legality of investor relations is by now recognized also in other jurisdictions.[25] A major cause for this is the rapidly growing role and influence of US and other institutional investors. In this respect, the UK Stewardship Code of September 2012 was trailblazing in defining the role and the responsibility of institutional investors accountable for effective stewardship. The Code explains this in some detail: “4. For investors, stewardship is more than just voting. Activities may include monitoring and engaging with companies on matters such as strategy, performance, risk, capital structure, and corporate governance, including culture and remuneration. Engagement is purposeful dialogue with companies on these matters as well as on issues that are the immediate subject of votes at general meetings.”[26] While in some other countries, including Germany, the need for a special Code for institutional investors is rejected, there is common agreement that institutional investors do not only actually play an important role for the corporations, but that they also have a certain legal or quasi-legal responsibility.

2. Limits of these relations both for one-tier and two-tier boards and their chairmen

a) Insider trading and market abuse

While the general practice and importance of the company and board’s investor relations are undisputed, the limits on investor relations and specifically on a dialogue with shareholders outside of the general assembly are often neglected both in the Codes and in the surrounding discussion. The first and obvious limit is the general prohibition of insider trading and market abuse. This limit is a subtle one, and it has been discussed in the context of the legal duties of directors in roadshows and meetings of the board with financial analysts.[27] If inside information is disclosed in these contexts, whether purposely or inadvertently, it must be disclosed immediately to the general public. This applies to the dialogue of the board with investors as well. The Dutch Codes states therefore: “Analysts’ meetings and presentations to investors should not take place shortly before the publication of the regular financial information.” [28]

b) Company secrets

Another more doctrinal limit is the duty of the directors to keep company secrets. In many stock corporation acts this is mentioned specifically, in Germany for example in § 93 section 1 sentence 3 of the Stock Corporation Act.[29] Company secrets comprise all information that is not yet generally known but is to be kept secret in the interest of the company. While in essence keeping company secrets is mandatory, it is obvious that the board must have and does have the competence to concretize which information should be disclosed in the interest of the company. Today the notion of a company secret is of course still relevant under corporate law, but it has lost much of its practical relevance because of the broad application of the Market Abuse Regulation (MAR) of 2014. Doctrinal controversies remain in particular in countries with a two-tier system. There the traditional view maintains that the management board is the “master of company secrets”. Yet the more modern view distinguishes between the general competence of the management board for the information policy of the corporation and the specific competence of the supervisory boards for company secrets that fall in that board’s own sphere of competences, for example as to its own composition and remuneration or as to matters in which the management board has a conflict of interest and cannot speak for itself.[30] I shall come back to the competence questions at the end.

c) Equal treatment of the shareholders

In company and capital market law a serious limit on the investor dialogue is the principle of equal treatment of the shareholders. This principle exists in practically all company laws and is codified in many of them. § 53a of the German Stock Corporation Act states: “Shareholders shall be treated equally under equivalent circumstances.” According to the German Bundesgerichtshof this means that a different treatment is permitted “if it is objectively justified and therefore may not be characterized as arbitrary.”[31] The German Code says this in different words: “All other things being equal, the corporation will ensure equal treatment of all shareholders in respect to information.”[32] There is a considerable body of case law allowing differentiation between ordinary small shareholders and shareholders who have an entrepreneurial stake or interest,[33] for example if the board wants to get the latter to participate in an envisaged capital increase.[34] But as far as the investor dialogue is concerned, the German discussion has just begun, and the recently acknowledged roles – of stewardship and responsibility – placed upon institutional investors have not yet been taken into consideration more generally. In my view dialogue by the board with institutional investors outside of the general assembly is justified if the board considers it to be in the interest of the corporation and if no new material inside information is distributed to the public ahead of the ad hoc-disclosure.[35]

The question however remains: Even if this dialogue is justified, how can an informational imbalance between the participants in the dialogue and other shareholders be leveled out? The UK Code mentions the problem in a footnote: "Nothing in these principles or provisions should be taken to override the general requirement of law to treat shareholders equally in access to information."[36] It then proposes a duty of information in the annual report.[37] "Direct face-to-face contact" with "major shareholders" is mentioned and is obviously considered to be lawful, but no details are given. The German Code goes further: "The corporation shall disclose to shareholders, without any undue delay, all new material facts made available to financial analysts and similar addressees."[38] The French and the Dutch Codes are stricter. According to the French Code: "Toute communication doit permettre à chacun d'accéder en même temps à la même information".[39] And the Dutch Code says: "Analysts meetings, analysts presentations, presentations to institutional or other investors and press conferences should be announced in advance on the company's website and by means of press releases. … All shareholders should be able to follow these meetings and presentations in real time, by means of webcasting, telephone or otherwise. After the meetings, the presentation should be posted on the company's website."[40] The Belgian Corporate Governance Code recommends that the company enter into a dialogue with shareholders, in which the company is to treat all shareholders equally.[41] For this the company should design a disclosure and communication policy promoting an effective dialogue with shareholders and potential shareholders, for example by the organization of information sessions to which all shareholders should be invited.[42] In the USA selective disclosure is dealt with in the Regulation Fair Disclosure (FD) Rule 100(a). It covers new issuer disclosure to certain enumerated persons (in general, securities market professionals and holders of the issuer's securities who may well trade on the basis of the information) and requires the issuer to make public disclosure of that information. If the selective disclosure was intentional, the disclosure must be simultaneous.

If it was non-intentional, the information must be made by a method that is reasonably designed to effect broad, non-exclusionary distribution of the information to the public.[43] The US Corporate Governance Code 2016 of the Business Roundtable acknowledges this, but adds: “Communications with shareholders are subject to applicable regulations (such as Regulation Fair Disclosure) and company policies on confidentiality and disclosure of information. These regulations and policies, however, should not impede shareholder engagement. Direct communication between directors and shareholders should be coordinated through – and with the knowledge of – the board chair, the lead independent director, and/or the nominating/corporate governance committee or its chair.”[44]

To sum up, it can be said that the board may indeed have face-to-face contacts with major shareholders, but such contact may also be extended to other shareholders if this is in the interest of the corporation. In such a dialogue no privileged material information may be given away; rather, only already known information may be explained. At a minimum all new material facts made available in such a dialogue must be promptly disclosed. It may be advisable to go further and to allow other shareholders direct access to the dialogue, but this goes far and cannot yet be considered to be generally acknowledged good corporate governance.

3. Competence for the dialogue

a) The CEO viz. the chairman of the management board

The primary competence for a company’s dialogue with investors is of course in the hands of the CEO or, in a two-tier system, the chairman of the management board. In the German discussion many traditional voices maintain this without further ado and without seeing the legal problems. First, as discussed before, there are important limits on this dialogue also for the chairman of the management board, and, second, there are areas which do not fall into the competence of the CEO or the chairman of the management board and for which there must be a company organ available to inform the public if this is in the interest of the company. One example relates to cases in which the CEO or the chairman has a conflict of interest. Another example, in the two-tier system, is when discussion concerns the composition and work of the supervisory board itself.

b) The chairman of the supervisory board

In Germany the controversial discussion on the investor dialogue focuses on the role of the supervisory board and its chairman, and insofar it is very specific. What is undisputed is the fact that if the supervisory board is competent to give information to shareholders and decides to do so, it is the right and the duty of the chairman of the supervisory board to do so. But when is there a competence of the supervisory board to speak to the public?

In order to answer this question, one should remember that the main task of the supervisory board is to oversee the management board. Today it is commonly agreed that this control is not restricted to an ex post control but that it also comprises an ex ante control and advice function. Furthermore the law contains a number of provisions which expressly state that the supervisory board and its chairman may make declarations to the public, be it within the general assembly or outside of it.[45] This is true, for example, for the yearly comply or explain declaration under § 161 of the Stock Corporation, for the corporate governance declaration under § 289a of the Commercial Code, and for the joint statement of the management and the supervisory boards in cases of a takeover under § 27 of the Takeover Act. These examples and a number of other specific competences of the supervisory board suggest that the traditional view of the supervisory board being a merely internal organ (*Innenorgan*) is dated. The correct view seems to be that the supervisory board cannot be excluded from speaking to the public if the matter is within its own competence and if speaking to the public is in the interest of the corporation.

In practice, the following matters should be treated as being in the competence of the supervisory board and can be discussed with investors: the composition and compensation of the supervisory board, the nomination and dismissal of the management board as well as its compensation, and the cases in which the management board has a conflict of interest. The most difficult case is the strategy of the corporation. In the above-mentioned Guiding Principles, Number 5 ("Strategy development and implementation") is formulated very carefully: "The development and implementation of the corporate strategy is the responsibility of the management board. In the context of a dialogue with investors, the supervisory board can explain its participating role within the strategy process and its assessment of the implementation."[46] The criticism brought forward against this principle is unfounded. The supervisory board, too, is involved. The Stock Corporation Act shows this quite clearly: "The management board must inform the supervisory board on the intended business policy and other fundamental matters regarding the future strategy of the company (in particular finance, investment and personnel plans".[47] Reports of the management board on transactions which may have a material impact upon the profitability or liquidity of the company must be made sufficiently early, if possible, to enable the supervisory board to express its opinion before such transactions are entered into.[48] Quite apart from this provision, it is not only ex post that the supervisory board is responsible for monitoring whether the strategy is implemented; it is also to be done ex ante, and this is particularly true for important organizational duties and the corresponding control.

Much of the criticism stems from the fear that the supervisory board will go forward with the dialogue single-handedly and thereby expose the management board and weaken its position in the public. In order to avoid this, the Guiding Principles state: "The supervisory board discusses with the management board the basic principles of the content and format of the dialogue with investors."[49] It is generally acknowledged that the organs of the corporation have a legal duty of loyal cooperation,[50] and it is obvious that the corporation must speak with one voice. Normally this discussion between the two boards viz. between their chairmen will take place before the first dialogue commences. In this discussion the two boards may even agree on laying down general principles for such a dialogue in their corporation; in Germany one speaks of a so-called "Kommunikationsordnung".

Once the competence of the supervisory board for an external investor dialogue is accepted, it is questionable whether, internally, the chairman can proceed in his own discretion or whether he or she needs a resolution of the whole board for going ahead. This is a question relating to the rights and duties of the chairman vis-à-vis the board as a whole, and it may be regulated differently in the various jurisdictions. In Germany the role of the chairman of the supervisory board vis-à-vis his board is relatively limited.[51] Therefore the chairman will be well advised to secure an informal general agreement of the board for having such dialogues with investors. On the other hand, having to seek agreement for each individual dialogue and even having to obtain a formal board resolution for this would be too much and cannot be seen as being required by the law. In any case, if the board does not oppose the dialogue, it is up to the chairman of the board to have the dialogue with the investors since the chairman represents the board in the public.[52]

c) Other directors

As said before, the controversy in Germany is mainly about the competence of the supervisory board in the German two-tier system, and those who reject this competence of the board and its chairman would be even less willing to agree to a role of other directors in such a dialogue. Here, a quick look at how other countries deal with this question may be helpful. A broad approach is particularly true as regards the United Kingdom. The UK Corporate Governance Code states: “Non-executive directors should be offered the opportunity to attend scheduled meetings with major shareholders and should expect to attend meetings if requested by major shareholders. The senior independent director should attend sufficient meetings with a range of major shareholders to listen to their views in order to help develop a balanced understanding of the issues and concerns of major shareholders.”[53] Similarly the UK Stewardship Code provides that “if companies do not respond constructively when institutional investors intervene, then institutional investors should consider whether to escalate their action, for example by: … meeting with the chairman and other board members”.[54]

The US Corporate Governance Code 2016 also deals with board communication with shareholders: “When appropriate and in consultation with the CEO, directors should be equipped to play a part from time to time in the dialogue with shareholders on topics involving the company’s pursuit of long-term value creation and the company’s governance.”[55] Furthermore: “Direct communication between the directors and shareholders should be coordinated through – and with the knowledge of – the board chair, the lead independent director, and/or the nominating/corporate governance committee or its chair.” Similarly the Investor Stewardship Group’s Corporate Governance Principles for US Listed Companies state: “The appropriate independent directors should be available to engage in dialogue with shareholders on matters of significance, in order to understand shareholders’ views.”[56]

The usual argument of the proponents of the traditional view is that things are different in Germany because of its two-tier system. But they overlook that in the one-tier board, too, there is an important distinction between the executive directors and the non-executive directors. The latter have a control function similar to that of the supervisory board in the one-tier system, and there are clearly separate roles for the chairman of the board and the senior independent director that are similar to the separate roles for the chairman of the management board and the chairman of the supervisory board. Actually, in international practice and theory a considerable functional convergence between the two systems has come about.[57]

IV. The German Corporate Governance Code, its Modifications in February 2017 and its Projected Fundamental Revision as of 22 June 2017

1. The German Corporate Governance Code and its modifications in February 2017 as endorsed by the new German Corporate Governance Code Commission

a) The suggestion of an investor dialogue

As of 1 March 2017 the German Corporate Governance Code Commission features a new chairman. Dr. Manfred Gentz, long-time member of the management board of Daimler-Chrysler and chairman of the Code Commission since 2013, left the chair and was succeeded by Professor Rolf Nonnenmacher, formerly board spokesperson of the German auditing firm KPGM Deutschland. In the annual conference of the Commission on 21-22 June 2017, Rolf Nonnenmacher and the new Commission declared themselves to be fully aware of the criticisms but to nevertheless firmly uphold the former Commission's suggestion for investor dialogue. This means that the prevailing practice of the DAX-30-corporations and other large corporations has been firmly endorsed, and it can be expected that the practice of investor dialogue will further spread in Germany despite possible concerns of traditional legal academia.

b) Other modifications adopted in February 2017

The new Commission also endorsed the other modifications made by the former Commission as of February 2017. For the purpose of this lecture, it must suffice to enumerate these modifications without further analysis.[58] One of the controversial modifications was an add-on to the foreword: "These principles not only require compliance with the law, but also ethically sound and responsible behavior (the "reputable businessperson" concept, *Leitbild des Ehrbaren Kaufmanns*)." Then the role of institutional investors is addressed. New recommendations concern the compliance management system, whistleblowing, variable remuneration of the management board, the composition of the supervisory board, more specification regarding the voting proposals, specification of which of the supervisory board members is considered by the supervisory board to be independent, disclosure of the curricula vitae of new candidates for the supervisory board and better financial information apart from the half-yearly finance report.

2. The project of a fundamental Code revision by the new Commission as of 22 June 2017

a) No regulatory reforms in short intervals

One of the main criticisms of the Code has been that it is being constantly amended. In fact, since the first version of the Code in 2002, the Code has been amended twelve times, i.e. nearly every year. Yet a board has more important tasks than just to deal with new Code amendments. While the old Commission had already promised to slow down the amendment process, the new Commission has the intention to possibly even leave the Code as it stands for up to five years once it is overhauled completely. In the UK the revision cycle has been every two years, but it is planned to extend it to three years.

b) International convergence

The new Commission intends to better take into consideration other countries' experiences with their Codes. For this effort the Commission should take its time. The new Dutch Code was enacted in December 2014 after a lengthy public discussion of over one year including all interested parties in the economy and society, and with the result that the former Code was overhauled and changed completely. The revision of the UK Code was started some time ago, and it is expected that it will go on for another year. It is not yet clear in what direction the changes will go. This depends in part on how the discussion on the Green Paper issued in November 2016 by Prime Minister Theresa May develops. In the meantime it is already clear that much of what she presented will not go forward, such as labor codetermination. Still, one may expect that despite the Brexit the UK Code will retain its influence and possibly even its model character for other European Codes.

Compared to the Codes of many other countries the German Code is still relatively short. The new Dutch Code comprises fifty pages. The UK Corporate Governance Code of September 2014 amounts to thirty pages, but without the separate UK Stewardship Code for institutional investors of 2012. Nonetheless, the German Code is overly detailed, and it is hard to believe that each and every recommendation and suggestion is really essential for good corporate governance. Take for example number 5.4.5 which says: “Each Supervisory Board member must ensure that they have sufficient time available to discharge their duties.” Isn’t this a truism!

c) The purging of the Code

The new Commission is aware of this problem and has announced its intention to fundamentally purge the Code. In particular it intends to adopt a suggestion which I, together with others, have made, namely to do away with all parts of the Code that merely describe the present state of the German stock corporation law insofar as it relates to corporate governance.[59] When the Code was enacted in 2002, the then Commission thought the specific German regime of corporate governance, including the German two-tier system, needed to be explained to foreign investors. Already at that stage it was doubtful whether foreign investors would first read the Code before investing. But certainly today this idea is dated. Furthermore there are considerable drawbacks with this approach. Any brief description of German Stock Corporation law is bound to be superficial and possible even misleading. If an investor really wants to know more, a review of the Stock Corporation Act itself as well as the essential court decisions and leading commentaries is indispensable. Furthermore, summing up the relevant mandatory parts of the Stock Corporation Act has the consequence of obscuring the real character of the Code, namely voluntary self-regulation.

d) New structure of the Code

The new Commission hinted that the new Code might be structured very differently from the present one in order to be closer to the practice and the needs of boards. Right now the Code contains sections on Shareholders, the Management Board, the Supervisory Board, Cooperation between these two Boards, Transparency and Financial Reporting and Auditing. Codes of other countries have a different structure. The new Dutch Code as revised in December 2016 contains five chapters:[60] Long-term Value Creation; Effective Management and Supervision; Remuneration; The General Meeting and One-tier Governance Structure. Similarly the UK Corporate Governance Code of September 2014 enumerates five main principles of the Code: Leadership, Effectiveness, Accountability, Remuneration and Relations with shareholders. This latter Code is under revision, and it is planned to have a new version by 2018, but it seems that the fundamental structure of the Code will be kept.

Of course the overhauling of the Code will mean that the whole content of the Code will be put to the test. Among the pressing problems are, for example, the independence of the supervisory board members, the competence needed (in particular also digital competence), evaluation, diversity, business culture and business ethics, risk management and internal control, and in particular remuneration. But the new Commission has not yet mentioned where it will put its focus apart from assuring that there will be a long and comprehensive public discussion.

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[1] H.-C. Hirt/K. J. Hopt/D. Mattheus, *Dialog zwischen dem Aufsichtsrat und Investoren, Rechtsvergleichende und rechtsdogmatische Überlegungen zur Investorenkommunikation in Deutschland,* Die Aktiengesellschaft 2017, 725-379.

[2] German Corporate Governance Code (as amended on 7 February 2017), published in the Federal Gazette, 24 April 2017, B2 p. 2-11 with corrections in Federal Gazette, 19 May 2017, B2 p. 1.

[3] Hirt in Hirt/Hopt/Mattheus (note 1) at 727 et seq.. Hirt is an executive director and board member at Hermes EOS (Equity Ownership Services), one of the world's leading engagement services. Cf. Financial Reporting Council, The UK Corporate Governance Code, London, September 2014, and Financial Reporting Council, The UK Stewardship Code, London, September 2012.

[4] Cf. Business Roundtable, Principles of Corporate Governance, 2016, Washington, August 2016; cf. also Hirt in Hirt/Hopt/Mattheus (note 1) at 728 n. 26.

[5] Cf. Monitoring Committee Corporate Governance Code, The Dutch Corporate Governance Code, The Hague, 8 December 2016.

[6] (Belgian) Corporate Governance Committee, The 2009 Belgian Code on Corporate Governance, Brussels, 12 march 2009.

[7] afep, MEDEF, Code de gouvernement d'entreprise des sociétés cotées, Paris, révisé en novembre 2016.

[8] K. Becker/A. v. Werder, *Der Deutsche Corporate Governance Kodex im internationalen Vergleich,* Die Aktiengesellschaft 2016, 761 at 773 et seq.

[9] For the following details see Hirt/Hopt/Mattheus (note 1) at 728 et seq.

[10] Hirt/Hopt/Mattheus (note 1) at 726.

[11] The UK Corporate Governance Code (note 3), E.1, p. 22.

[12] The UK Stewardship Code (note 3), Stewardship and the Code No. 4.

[13] German Corporate Governance Code (note 2), no. 5.2 subsection 2.

[14] German Corporate Governance Code (note 2), no. 1 Foreword

[15] Guiding principles for the dialogue between investors and German supervisory boards, July 2016.

[16] The nine members of the Working Group and sixteen members of the Stakeholder Advisory Group are listed at the end of the Guiding Principles (note 15).

[17] The 2017 revisions of the German Corporate Governance Code had been prepared in a public dialogue between the Commission and whoever wanted to respond to the proposals of the Commission. Seventy-eight responses were given; they are available at the website of the Commission except where there was no consent to their publication.

[18] See for example G. Bachmann, *Dialog zwischen Investor und Aufsichtsrat,* in: Gesellschaftsrechtliche Vereinigung (VGR), ed., Gesellschaftsrecht in der Diskussion 2016, Cologne 2017, p. 135. Bachmann is a leading civil law and company law professor who contributes to the quasi-official commentary of the German Corporate Governance Code. See

H. Fleischer/L. Bauer/T. Wansleben, *Investorenkontakte des Aufsichtsrats: Zulässigkeit und Grenzen,* Der Betrieb 2015, 360; P. L. Leyens, *Information des Aufsichtsrats,* Tübingen 2006, p. 382 et seq.

[19] Cf. for example J. Koch, *Investorengespräche des Aufsichtsrats,* Die Aktiengesellschaft 2017, 129. Koch is author of the well-known commentary by Hüffer/Koch on the German Stock Corporation Act. He maintains that such a dialogue of the supervisory board is illegal de lege lata and would need to be authorized by a legislative reform.

[20] The UK Corporate Governance Code (note 3), The Main Principles of the Codes, Section E. Relations with shareholders, p. 6 and 22.

[21] Idem at p. 22.

[22] The Dutch Corporate Governance Code (note 5), Principle 4.2 on Provision of information: 4.2.2 Policy on bilateral contacts with shareholders.

[23] Code de gouvernement d'entreprise des sociétés cotées (note 7), § 4.1 section 1.

[24] US Business Roundtable, Principles of Corporate Governance 2016 (note 4), VIII. Relationships with Shareholders and Other Stakeholders, p. 25.

[25] H. Fleischer, *Investor Relations und informationelle Gleichbehandlung im Aktien-, Konzern- und Kapitalmarktecht,* ZGR 2009, 505.

[26] The UK Stewardship Code (note 3), p. 1.

[27] K. J. Hopt/C. Kumpan, in: H. Schimansky/H.-J. Bunte/H.-J. Lwowski, eds., *Bankrechts-Handbuch,* 5th ed., Munich 2017, vol. II, § 107 comments 60, 129 with further references.

[28] Dutch Corporate Governance Code (note 5), number 4.2.3 sentence 2.

[29] K. J. Hopt/M. Roth, *Grosskommentar Aktiengesetz,* 5th ed., Munich 2015, § 93 comments 279-325.

[30] Hirt/Hopt/Mattheus (note 1) at 736 et seq.

[31] BGHZ 120, 141 at 150 et seq.

[32] German Corporate Governance Code (note 2), number 6.1 sentence 1.

[33] BGHZ 120, 141 at 151 et seq.

[34] K. J. Hopt, *Familien- und Aktienpools unter dem Wertpapierhandelsgesetz,* ZGR 1997, 1 at 26; D. Weber-Rey/M. Reps, *Ankerbeteiligungen: Chancen für die Corporate Governance, Rechtsrahmen und Investorenvereinbarungen,* ZGR 2013, 597 at 629.

[35] See also H. Fleischer (note 25) at 524 et seq., 528 et seq.

[36] The UK Corporate Governance Code (note 3), Section E note 24.

[37] Idem at Section E.1.2: "The board should state in the annual report the steps they have taken to ensure that the members of the board, and in particular the non-executive directors, develop an understanding of the views of major shareholders about the company, for example through face-to-face contact, analysts' or brokers' briefings and surveys of shareholder opinion."

[38] German Corporate Governance Code (note 2) number 6.1 sentence 2.

[39] Code de gouvernement d'entreprise des sociétés cotées (note 7), § 4.1 section 2.

[40] The Dutch Corporate Governance Code (note 5), number 4.2.3.

[41] The 2009 Belgian Code on Corporate Governance (note 6), Principle 8.

[42] K. Geens, *Corporate Boards in Belgium,* in P. Davies/K. J. Hopt/R. Nowak/G. van Solinge, eds., *Corporate Boards in Law and Practice, A Comparative Analysis in Europe,* Oxford 2013, p. 120 at 149.

[43] U.S. Securities and Exchange Commission, Final Rule: Selective Disclosure and Insider Trading.

[44] US Business Roundtable, Principle of Corporate Governance 2016 (note 4), VII. Relationships with Shareholders and Other Stakeholders, p. 25 et seq.

[45] Hirt/Hopt/Mattheus (note 1) at 731 et seq.

[46] Guiding Principles (note 15), Form of the dialogue, No. 5 Strategy development and implementation.

[47] § 90 section 1 no. 1 of the Stock Corporation Act.
[48] § 90 section 2 no. 4 of the Stock Corporation Act.
[49] Guiding Principles (note 15), No. 8 Form of the dialogue.
[50] Hirt/Hopt/Mattheus (note 1) at 735.
[51] K. J. Hopt/M. Roth, *Grosskommentar Aktiengesetz,* 4th ed., Munich 2006, § 107 comments 62 et seq.
[52] Idem, § 107 comment 119.
[53] The UK Corporate Governance Code (note 3), section E.1.1 sentences 3 and 4.
[54] The UK Stewardship Code (note 3), Principle 4.
[55] US Business Roundtable, Principle of Corporate Governance 2016 (note 24), p. 25 et seq.
[56] Investor Stewardship Group, Corporate Governance Principles For US Listed Companies, 2017, Principle 3.3.
[57] P. L. Davies/K. J. Hopt, *Corporate Boards in Europe – Accountability and Convergence,* The American Journal of Comparative Law 61 (2013) 301; P. Davies/K. J. Hopt/R. G.J. Nowak, G. van Solinge, *Boards in Law and Practice: A Cross-Country Analysis in Europe,* in Davies/Hopt/Nowak/van Solinge (note 42), p. 4 et seq.
[58] Cf. A. v. Werder/J. Bartz, *Die aktuellen Änderungen des Deutschen Corporate Governance Kodex,* Der Betrieb 2017, 769; H.-U. Wilsing/K. von der Linden, *Compliance-Management, Investorengespräche, Unabhängigkeit und ein moralischer Imperativ – Gedanken zur Kodexnovelle 2017,* Deutsches Steuerrecht 2017, 1046.
[59] This corresponds to the suggestion of K. J. Hopt, *Der Deutsche Corporate Governance Kodex: Grundlagen und Praxisfragen,* in: Festschrift für Michael Hoffmann-Becking, Munich 2013, p. 563 at 578 et seq.
[60] The Dutch Corporate Governance Code (note 5)

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