European Company Law and Corporate Governance: Where Does the Action Plan of the European Commission Lead?

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Abstract

The EU Company Law Action Plan of May 21, 2003, is one of the most important documents issued by the European Commission in this field in a long time. It tells what the Commission intends to regulate and not regulate within the next five to ten years. This article explains the background of the Action Plan and its connections with securities, auditing, and takeover regulation and discusses the list of actions in two parts: topics other than corporate governance (inter alia capital maintenance, groups of companies and pyramids, restructuring, and new European company law forms) and corporate governance in particular. Key problems of European corporate governance include better disclosure by an annual corporate governance statement, helping shareholders to exercise their rights, independent directors and committee work, directors' remuneration, responsibility of board members to investors for financial statements, voting policy disclosure by institutional investors, choice between the one-tier and the two-tier board, and generally more shareholder democracy. In 2004 and 2005 the Commission came up with a number of concrete steps to address these problems, especially regarding independent directors and directors' remuneration. The debate this has spawned in the member states is colorful and occasionally highly controversial.

Keywords: EU Company Law Action Plan, Corporate Governance, board members liability, directors remuneration, investor protection

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European Company Law and Corporate Governance:
Where Does the Action Plan of the European Commission Lead?

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Survey

Company law reform in the European Union[1] and European corporate governance[2] is a fascinating area which is acutely relevant for companies and company law practice throughout Europe. After the voting down of the draft European Constitution in France and the Netherlands, there were some dire predictions about the future of the European Union in general and its law reform plans in particular. I think this is greatly exaggerated. The economic core of the Union, i.e. the internal market, is untouched. Economic policy-making and legal harmonization will go on, though maybe for some time at a somewhat lower speed.

This is particularly true for European company law as well as securities, auditing, and takeover regulation, and even more so for the whole area of banking and financial market regulation.

The EU Company Law Action Plan of 21 May 2003,[3] and its impact on company law and in particular on corporate governance, seems to be suitable for this conference for three reasons. First, it is highly topical to know *what* the European Commission intends to regulate and what it does not intend to regulate within the next five to ten years, and *how* it is going about it, namely by aiming at a distinctively European, more flexible route as compared with the post-Enron U.S. approach. Second, this plan, while purporting to be aimed at mere framework regulation, cuts considerably into member state company law and company practice (the well-known federal-state issue) and is already controversial for this, quite apart from specific rules. Third, I carry a certain responsibility for it because I belonged to the seven-member High Level Group of Company Law Experts chaired by Jaap Winter. This group prepared the report for the European Commission that was the basis for the Action Plan and which the Action Plan followed closely. This report of 4 November 2002 will be referred to in brief as the High Level Group Report.[4] But it must be kept in mind that the group had prepared another report for the European Commission half a year earlier,[5] thereby helping the European Commission to again set afloat the 13th directive on takeovers after the European Parliament had voted down the proposal in a stalemate vote of 273 to 273.

Although our American and Japanese audience may be less or not at all informed about the Action Plan, since it has been discussed widely in Europe it seems best to take a middle path: instead of describing the content of the Action Plan in its many details, I shall give a background picture of why the High Level Group proposed certain actions, the problems inherent in them, and what major critiques have been brought forward in the meantime. This will be done in three parts: preparing the stage with setting the Action Plan in perspective (I), looking at the list of planned actions on topics other than corporate governance (II), and going into the corporate governance part of the Action Plan in more detail (III).

I. The Company Law Action Plan of 2003: Setting the Stage

1. The Company Law Action Plan of 21 May 2003: Its History and Background, in Particular the Report of the High Level Group of 4 November 2002

With the official List of Actions at hand, one can very quickly rush through the European Commission's plans for the next years in a first overview:[6]

The first thing to see in the list is a clear prioritization: short term, 2003-2005; middle term, 2006-2008; and long term, 2009 onward. However, the thrust is clearly on short and middle term.

In a bird's-eye view, six broad areas are covered: 1) corporate governance; 2) raising and maintenance of legal capital; 3) groups of companies; 4) restructuring; 5) new European company forms such as the European private company as well as other enterprise and foundation forms; and 6) transparency of national legal forms. The main concern of the Commission is certainly corporate governance, and this will be the focus of this article. But the other areas are also important and not less controversial.

The objectives of the Action Plan are twofold. The first goal is to strengthen shareholders' rights and the protection for employees, creditors, and other parties with which companies deal. This is meant mainly to create and maintain confidence in companies within the European Union. The second aim is closely interrelated with the first. The Commission intends to foster the efficiency and competitiveness of business, with special attention to some specific cross-border issues. The one cannot be reached without the other; they are two sides of the same coin. As Internal Market Commissioner Frits Bolkestein said,

> Company law and corporate governance are right at the heart of the political agenda, on both sides of the Atlantic. That's because economies only work if companies are run efficiently and transparently. We have seen vividly what happens if they are not: investment and jobs will be lost; and in the worst cases, of which there are too many, shareholders, employees, creditors and the public are ripped off. Prompt action is needed to ensure sustainable public confidence in financial markets.[7]

This is not only a political statement. Our High Level Group is of the same opinion. Indeed, investor confidence is a key concept of European financial and company law,[8] just as it was at the origin of the American securities regulation in the 1930s. The problem with 'confidence' is that it is a rather loose concept. Taken as a legal idea, it is highly general and open to legal construction, while economically it is difficult to make it an operational concept to work with empirically, and the European Commission has done neither of both. As we all know, of course, there is certain support for the relevance of investor protection by the empirical work of LaPorta and colleagues who pretend to have proven the relationship between good, reliable company law and the financial development of countries. Yet the critique is well known as well, i.e. the inversion of the causal relationship, as Jack Coffee and others see it. Whatever position one takes in this debate, a replication of these American studies in Europe would be welcome, though certainly with more neutral criteria and better knowledge of the European legal and factual situation. Until then, the Commission was right to proceed and act as it did, even in the face of uncertainty and based on mere plausibilities.

The Action Plan thus positions us in the middle of European company law harmonization. This is a long and quite painful political process. There is no need to recapitulate the history of the ups and downs of company law harmonization. Nor must the many company law directives and draft directives be enumerated here once again. Quite apart from the mere drafts that have their own momentum already, there are no less than 22 original, modified, and supplementary directives in this field. One can get an idea of the sheer mass of European rules in company law and related fields by looking at a recently edited textbook, *European Company and Financial Law*,[9] which comprises the legal texts and makes reference to case law dealing with them. Besides company law it contains banking law, consumer law related to financial transactions, insurance law, and securities regulation. This book contains 158 legal instruments (directives, regulations, and recommendations) in 1,371 pages.

At the end of this section, a short word on the smaller and medium enterprises (SMEs): the European Commission is well aware of their different needs and intends to adapt appropriate company law and corporate governance rules for them in the form of lighter and more flexible framework rules.[10] This has been recognized in the UK and other European countries as being highly desirable in view of the overwhelming overall importance of SMEs in Europe. The European Commission is right in following this trend under European law. On the other hand, the Commission definitely plans to come up with more demanding rules for listed companies, i.e. companies with securities traded at a stock exchange or on a regulated market. Again, this seems to follow a trend in a number of member states to have two legal company regimes depending on stock exchange trading.

For regulatory purposes, the High Level Group has proposed making a distinction between three categories of companies instead of two, i.e. listed companies, open companies, and closed companies.[11] The reason for having the middle category, i.e. open companies, is the following: in Germany and some other countries, relatively few companies are listed.[12] As of

August 2004, we had 15,835 stock corporations (AG and KGaA). As of September 2004, only 666 of the German stock corporations were listed (compare this to the UK with 2,409 listed companies, to NASDQ with 2,907, and the New York Stock Exchange with 1,823). From a European regulatory point of view, it is unsatisfactory to treat all the approximately 15,000 non-listed German stock corporations just like closed companies – or else it is difficult to really deregulate the regime for closed companies. But this is an open question.

2. The Company Law Action Plan and Its Connections with Securities, Auditing, and Takeover Regulation

The Company Law Action Plan is an ambitious program, but it does not show the true extent of European regulatory involvement in the field. There are at least two areas that are not covered in it even though they are or might be crucial for corporate governance, namely better auditing and market questions (the financial market, and in particular the market for corporate control, i.e. the 13th directive). This needs two words of explanation, one general and one more specific.

In general, there is a close connection between the Financial Markets Action Plan of 1999[13] and the Company Law Action Plan of 21 May 2003. Mr. Bolkestein was highly successful with the former, but company law harmonization was unsuccessful for decades. Bolkestein's ingenious idea was to link both fields and both regulatory schemes by using the experience with and the political success of the Financial Markets Action Plan for progress in company law. This was politically very skilful and has also worked out well legally and economically, at least as far as we can see up to now.

This strategy was also used for the two specific fields mentioned previously. First, better auditing: this has long been a concern of the Commission and of separate groups within and outside the Commission that are working on it. Therefore, it was not included in the terms of reference of the High Level Group. The Commission was nevertheless very active in this field. Let me just mention the recommendation of 16 May 2002 on the independence of the statutory auditors - basic principles; the ten-point action plan on statutory audit of 21 May 2003, published on the same date as the Company Law Action Plan; the recent draft directive modernizing the 8th directive, the latter dating back to 16 March 1994; and the draft directive of 27 October 2004 on modifying the 4th and 7th directives on accounting and on group accounting.[14] Further European measures are underway. Whether the Commission should step in by regulating auditors' liability toward third parties is still an open question. The various national schemes are highly divergent and many of them are closely interwoven with general civil law liability concepts. Yet in some member states such as Germany, there is a definite trend toward establishing auditors' third-party liability, though only limited to cases of gross negligence and subject to a cap.

As to European securities regulation[15] and more specifically the market for corporate control, there is now finally the 13th directive of 21 April 2004 on takeover bids,[16] even though it is a heavily watered-down version of the Council compromise reached in December 2003. This directive has had its own path, problems, and critiques. This is not the place to take up the economic discussion as to the wisdom or misconception of the idea of a level playing field, the anti-frustration rule including the new breakthrough rule, and the mandatory bid rule.[17] Let me just make two remarks. First, I think that as far as corporate governance is concerned, having European framework rules for takeovers does not simply amount to more regulation; instead, it helps to break up artificial barriers between member states, promotes competition, and contributes to a certain degree to the development of a market for corporate control in those member states where in practice no such market has existed.[18]

Second, it seems important to see that the European takeover regime is part of corporate governance, i.e. external corporate governance via the market for corporate control.[19] The traditional theory is that takeovers may (but do not always) have a disciplinary effect on the management of the target. Modern empirical findings are mixed, however. While there are findings in the UK that there is little or no such disciplinary effect, other pieces of research find that corporate markets indeed act as a 'court of last resort', as an external source of discipline when internal control mechanisms are relatively weak or ineffective.[20] In Germany an intensive discussion has begun on what changes in our takeover statute will be necessary in order to comply with the directive. At a closer look these changes are quite substantial despite the optional regime of Art. 9 to 12 of the directive on neutrality of the target's board and on breakthrough.[21]

3. The Impact of the Company Law Action Plan in Brussels and in the Member States

The European Commission has already started carrying out the Action Plan. A draft 10th directive on cross-border mergers of companies with share capital has been on the table since 11 November 2003.

A pre-draft of the 14th directive on the cross-border change of seat of a company is circulating; officially only the public consultation document is available, the consultation having closed in April 2004. The pre-draft is upsetting the German trade unions who fear for their national sacred cow, the German species of labor co-determination in the company board.

A Commission recommendation fostering an appropriate regime for the remuneration of directors of listed companies was issued on 14 December 2004.[22] On 15 February 2005, the Commission came up with a further recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board.[23]

Likewise, consultation on board responsibilities and improving financial and corporate governance information has taken place. The draft directive of 27 October 2004, amending the 4th and 7th directives concerning the annual accounts of certain types of companies and consolidated accounts, deals in its Section 10A with 'responsibility and liability for the annual accounts and the annual report'.[24]

Finally there is the second consultation document of 13 May 2005 on 'Fostering an appropriate regime for shareholders' rights'.

The momentum of the Action Plan as well as of its forerunner, the High Level Group report, is conspicuous. It has been discussed in all member states by the legal profession, in the political arena, and in the financial press. In general the reaction has been positive, though there has also been criticism. The criticism reaches from fundamental opposition under the subsidiarity principle and the economic concept of regulatory competition to more specific critiques of the single actions proposed. The Commission is not impressed by the fundamental critique, however, and is proceeding with various instruments concerning the different actions. I shall come to some of these later on.

After having set the stage, I would now like to highlight some of the major problems of the corporate governance actions listed in the Action Plan. I do this not just for the sake of reporting them, but in view of our conference topic: Are these measures part of a change of governance, and is such a change a transition from more state and regulation to more market and flexible solutions such as self-regulation and others?

II. A Glance at the List of Planned Actions: Topics Other than Corporate Governance

1. Capital Maintenance (Short Term, Medium Term, Long Term)

The legal capital issue, which is currently under the tight regime of the 2nd directive, is under intense attack by economists, comparative law experts, and the English community. At the same time, a coalition in Germany of more traditional company lawyers and federal judges is defending the status quo. The European Commission is following a careful step-by-step approach. First it wants to simplify the 2nd directive on the basis of the recommendations of the SLIM group as supplemented by the High Level Group (the so-called SLIM-Plus directive).[25] A draft directive has been issued,[26] and interestingly enough it contains provisions for a general squeeze-out as well as a sell-out right.[27] In the medium term it intends to mandate a study on the feasibility of an alternative to the capital maintenance regime.[28] Depending on the outcome of this study, such an alternative regime might be introduced in the 2nd directive. France has already reacted to these planned changes by creating a new form of limited liability company with a minimum capital of 1 euro, thus making it obvious that legal capital and capital maintenance are no longer an indispensable counterpart to limited liability. In Germany the Ministry of Justice came out with a pre-draft of a reform act on the limited liability company (GmbH), lowering the legal capital from 50.000 euro down to 10.000 euro and introducing stronger personal liability of the directors as a substitute, a bit along the lines of the English wrongful trading. Yet the outcry by German academics and judges made the Ministry lose courage, and the pre-draft is considerably less far-reaching. The topic is so controversial in Germany that not only are there already a considerable number of law review articles both pro and con, but three major conferences are expected.[29] Furthermore, there is a large group of academics and practitioners steered by Marcus Lutter, who many years ago wrote his habilitation on legal capital.[30] Their forthcoming report is expected to try to counterbalance the report by the British Rickford group.[31]

2. Groups of Companies (Short Term and Medium Term), Pyramids (Medium Term)

Groups of companies is a famous battlefield; as early as 1998, the Forum Europaeum on Group Law proposed more focused framework regulation as a middle ground between the German Konzernrecht and the muddle-through-by-piecemeal and ad hoc interventions of some other countries.[32] Bits and pieces of the draft 5th directive and even of the abortive 9th directive on groups of companies[33] can be recognized in the Action Plan. However, in these early drafts the approach was completely different insofar as they tried the old way of full or at least maximum harmonization, with the German Konzernrecht as a model. This was doomed to fail, as legal comparativists predicted quite early, because it was legally too complicated and economically too burdensome and inflexible. The High Level Group[34] – as the Forum Europaeum before it – took a fresh look at this and chose a new approach, looking for a mere framework harmonization and picking out a few strategic problems, in particular certain rules of the game. In choosing these, the Group had its eye more on facilitating cross-border and other economic activities and less on laying down specific legal fairness rules; predictably, this was not met with praise in Germany.

The Action Plan followed the Group in this. The program includes 1) more disclosure on group structure and group relations, both financial and non-financial; 2) framework rules for groups allowing the adoption at subsidiary level of a coordinated group policy; and 3) prohibition of stock exchange listing for abusive pyramids. The draft directive of 10 October 2004, amending the 4th and 7th directives,[35] already contains rules on increased transparency of related party transactions and off-balance sheet arrangements, including the use of special purpose entities and offshore centers. These rules will probably be minimum harmonization, i.e. Germany will remain free to stick to its old, stricter group law provisions. Of course, this will come at a price in the international competition for attracting foreign companies or keeping the national ones in the country and for establishing or maintaining company headquarters in one of the EU member states. In any case, as a consequence of the Action Plan, Karel van Hulle from the European Commission declared the 5th and in particular the 9th directives to be dead.

3. Restructuring (Short Term and Medium Term)

Restructuring beyond national frontiers is an obvious economic necessity, but it is severely hampered by German boardroom labor co-determination. European progress in this respect has been blocked for decades by a baneful German coalition of trade union lobbyists and political opportunists. Yet there are signals from Brussels that a compromise might be forced on Germany, hopefully not along the example of the European company which keeps the most far-reaching (German) co-determination model as a fall-back solution and thereby hampers German enterprises considerably and unreasonably in international competition. As mentioned before, there is a draft 10th directive on cross-border mergers of companies with share capital dating from 11 November 2003,[36] and an unofficial pre-draft of the 14th directive on the cross-border change of seat of a company.[37] Furthermore, the European Commission is considering simplifying the 3rd directive concerning legal mergers and the 6th directive concerning legal division.

4. The European Private Company (Short Term and Medium Term)

The European private company is a younger sister of the European company (Societas Europaea). While the latter is a European stock corporation, the former would be a kind of European limited liability company. A model statute of the European private company has been developed through close cooperation between the University of Heidelberg and the Chamber of Commerce of Paris (there: CREDA).[38] The European Commission intends to mandate a feasibility study in order to assess the practical needs for – and problems of – such a European private company, and it envisages a possible proposal for a Statute for a European Private Company (depending on the outcome of the feasibility study). The High Level Group had taken a similarly careful approach,[39] not because it called into doubt the usefulness of the work done in Heidelberg and Paris, but because it saw the clear need for prioritization of action. After all, legislative work is a scarce resource.

5. EU Legal Forms (Short Term and Medium Term)

The European Commission intends to seek active progress on current proposals as to the European association and to assess the need for the creation of other EU legal forms, e.g. the European foundation.[40] The Statute of the European Mutual Society as well as the directive concerning labor co-determination were already enacted on 18 August 2003.[41]

6. Transparency of National Legal Forms (Medium Term)

Finally the European Commission intends to introduce basic disclosure rules for all legal entities with limited liability, subject to further examination.[42]

III. Corporate Governance in Particular

1. Better Disclosure by an Annual Corporate Governance Statement

According to the Action Plan, listed companies should be required by the member states to include in their annual documents or annex to them a coherent and descriptive statement covering the key elements of their corporate governance structures and practices. Such a statement should give the investors and the market a true and fair view of the corporate governance situation of the individual company, thus enabling them to make a better and more competitive choice. It has been left open whether auditors shall have a function concerning the corporate governance statement. Disclosure, recommended by the High Level Group to the Commission as the preferable approach, is generally the least intrusive means of regulation; if effective, it may be the best way of regulating companies.[43] The draft directive of 10 October 2004, amending the 4th and 7th directives,[44] contains new articles concerning the disclosure about corporate governance practices by issuers that have their securities traded on a regulated market.

Though such a measure seems rather flexible and unobtrusive, it has been met with sharp criticism in some member states. In Germany, for example, the German Lawyers Association (DAV) has objected that such a statement is superfluous because much of the information to be included is already available from other — though divergent — sources. It is considered to stretch disclosure too far, in particular regarding the concept of related parties. But most of all, the criticism is levied against having such a statement in the annual report or otherwise belonging to it, since in this case it needs to be audited. With the latter critique the DAV may have a point, though information without a certain certification is of doubtful value.

2. Helping Shareholders Exercise Their Rights

The Action Plan seeks to promote shareholder activity, for example, by asking questions, tabling resolutions, voting in absentia, participating in general meetings via electronic means, and so on. These facilities should be offered to shareholders across the EU. Specific problems related to cross-border voting should be solved as soon as possible. These problems concern particularly cross-border institutional investors and those from outside the EU. Enhancing shareholders' rights by mandatory law fits into a governance system that is more market-oriented because it strengthens self-help by shareholders and investors. A second consultation on 'Fostering an appropriate regime for shareholders' rights' concluded on 15 July 2005. How far this whole approach will lead remains to be seen, in particular whether institutional investors may be convinced to become more active in the general assembly instead of just following the old Wall Street rule by voting with their feet, i.e. walking out and selling their block of shares. The private investors themselves will hardly move, at least not the normal ones, since the possible gains and the necessary efforts are just not commensurate. Rational apathy will remain as the general rule. Whether hedge funds will jump in more often – as they already occasionally do – is quite doubtful. This is a rewarding strategy for them only if the company has reserves it does not use or intends to use as takeover currency, and if there is a chance for the hedge funds to force the company to pay out instead, as was done in the case of the German Stock Exchange (Deutsche Börse) in the spring of 2005 after its conditional takeover bid targeted against the London Stock Exchange.

3. Promoting the Role of Independent Non-executive or Supervisory Directors

The Action Plan envisages that minimum standards on the creation, composition, and role of the nomination, remuneration, and audit committees should be defined at the EU level and enforced by the member states, at least on a 'comply-and-explain' basis (some practitioners sob: 'comply-and-complain'). As mentioned before, the European Commission has already come forward with a recommendation on the role of non-executive or supervisory directors of listed companies. This recommendation of 15 February 2005,[45] provides that at least a majority of the members of the three key board committees (nomination, remuneration, and audit) should be composed of independent non-executive or supervisory directors. It goes very far in defining the requirements of 'independence'. In its annex II, the profile of independent non-executive or supervisory directors is described. The annex contains not less than nine categories of case situations which should be considered in determining lack of independence. Among them are the following:

a) not being an executive or managing director of the company or an associated company, and not having been in such a position for the previous five years;

b) not being an employee of the company or an associate company, and not having been in such a position for the previous three years;

c) not to receive, or have received, significant additional remuneration from the company or an associated company (including any participation in a share option or any other performance-related pay scheme);

d) not being or representing in any way the controlling shareholder (control being defined as in the 7th directive);

e) not having, or having had within the last year, a significant business relationship with the company or an associated company. Business relationships include the situation of a significant supplier of goods or services (including financial, legal, advisory, or consulting services), of a significant customer, and of organizations that receive significant contributions from the company or its group.

All this has met with great concern in Germany. It was felt that, if this rule were binding, it would mean the end of both German group dominance via the supervisory boards of subsidiaries and labor co-determination in these boards. Furthermore, the DAV objected that no binding rules for committees are needed. The recommendation has taken a more careful approach than the original draft. This has been considered a victory of German lobbying in Brussels. Not only is the measure a mere recommendation, as it was always planned to be, but it is up to the board to ultimately determine what constitutes independence. Furthermore, there is an exemption for non-senior management labor members in the board under 'a system of workers' representation recognized by law and providing for adequate protection against abusive dismissal and other forms of unfair treatment'. But it seems that the German press and even many public officials and professionals are not fully aware of what such a European recommendation means. Of course, it is not legally binding. But it is well known that the European Commission practices a kind of 'salami tactic', i.e. getting its way by first issuing a recommendation and later enacting a directive if the recommendation is not complied with.

Yet there is more to it. The recommendation lays down a good corporate governance standard on independent directors that follows closely the Anglo-American regulatory pattern and is becoming standard international practice. This means: If German boards do not follow this recommendation, they might be blamed for not living up to international good corporate governance standards. Even worse, if foreign stock exchanges incorporate this recommendation as some already do, foreign listing may become difficult for German companies.

4. Directors' Remuneration

There is no need to mention the many scandals that have come up in many of our countries and have been denounced at length in the financial press. For the U.S., the abuses have been described recently in a comprehensive book, *Pay Without Performance*.[46] In Europe the problem is urgently felt too.[47] For Germany, the 30 million DM / 15 million euro premium (the whole payment sum was 65 million DM / 32 million Euro) that the remuneration committee of the supervisory board of Mannesmann granted to the outgoing chairman of the management board, Klaus Esser, after the takeover by Vodafone was cleared, continues to stir up public concern and envy. In total, 111 million DM/¤ 55 million were handed out generously to the outgoing management. Because there is no way for single shareholders to attack this payment via a derivative action under present German company law, the case was denounced to the public prosecutor, and a criminal proceeding was started at the court of lower instance (*Landgericht*) Düsseldorf against the remuneration committee members for embezzlement of company assets. The court dismissed the claim,[48] but the public prosecutor has lodged an appeal to the *Bundesgerichtshof*. Most recently, the attorney general at the Bundesgerichtshof came up with its opinion, according to which the directors concerned committed a criminal offense. It remains to be seen how the court will decide in the end. The decision of the lower court might be reversed and the case might be sent back for decision under new instructions by the Bundesgerichtshof.[49]

The fine irony in this is that not only did the chairman of the committee benefit personally from related committee decisions, which is of course unacceptable, but the chairman of the management of the Deutsche Bank, Josef Ackermann, and the (former) chairman of the German Trade Union Association, Klaus Zwickel, were both members of this committee and are now jointly accused of embezzlement — what a nice instance of full harmony between capital and labor! But to speak less sarcastically and more seriously, the fact that the trade unions consented to the severance payment sheds serious doubts on the proclaimed monitoring quality of labor co-determination in company boards (beyond the usual pursuit of mere self-interest of labor).

Although it has been observed with some justification that German society is an envy society – in stark contrast to American society and much more than people in many other countries – the fact remains that such payments might undermine the confidence of the shareholders and their willingness to invest in domestic and foreign companies. Accordingly, the High Level Group recommended European rules on management remuneration for listed companies. These rules comprise disclosure of the remuneration of individual directors, a shareholders' vote on remuneration policy, and accounting of remuneration including remuneration by stock options.[50] In the meantime, the European Commission has come up with its recommendation of 14 December 2004.[51] It has taken up the first two recommendations of the High Level Group. Accounting for stock options in the balance sheet need not be dealt with in this Commission recommendation. But the IAS/IFRS have been changed recently to include such an accounting principle, and the EU accounting law will follow IAS/IFRS accounting. In the meantime, Germany has also taken action. Since I have dealt with these issues elsewhere in more detail,[52] I shall add here just a few words.

a) First as to *disclosure:* Full faithful and audited disclosure is useful, both as a basis for shareholder decision-making and as a conduit for information to the stock market, which may react to it in one way or another. The British Directors' Remuneration Report Regulations 2002 give an example of what kind of information to publish. In principle there is agreement on the usefulness of such disclosure rules. What is highly controversial is mandatory individual disclosure. The arguments that individual disclosure is not relevant for the shareholders and may even be harmful because it causes envy and tends to level up the payment habits of companies in general do have some weight, but in balance they are not convincing. Full individual disclosure, including any severance payments, is provided for in the recommendation of the European Commission. In Germany as in some other member states, the legislators went further and prescribed mandatory individual disclosure since the comply-and-explain provision in the German Corporate Governance Code as revised in the spring of 2003 was not a success. While it was expected that companies would feel uneasy and fear reactions at the stock exchange and by foreign investors if they did not follow the code – a fact which they must publish – a considerable part of the DAX 30 companies chose to explain that they did not want to follow this code recommendation. As a result, a recent German act as of July 2005 makes individual disclosure a mandatory reporting requirement. Exemption from this requirement is possible by a two-thirds majority in the general meeting.

In addition, a very recent decision of the German Federal Court found quite unexpectedly that already under the present corporate law, stock options for supervisory board members are illegal.[53] Whether the court will also extend this prohibition to phantom stock is not self-evident and must be seen. An obiter dictum in the decision and an explanation given by the chairman of the Second Senate of the Court that made the decision, *Volker Röhricht*, leads in this direction. The latter has illustrated the rationale of his decisions by an often-quoted slogan: 'The management board and the supervisory board shall not drink from the same fountain.' In other words, the controlled and the controller should not sit in the same boat. Yet this slogan also shows that the court may have gone too far. Quite independently of this court decision, the German government is planning new rules with specific prohibitions, and company law practice is already beginning to react to the uncertainties created by the court and the legislative measures it fears to come. Some companies have even decided to abolish their stock option plans completely for board members, i.e. also for management board members. Most recently, the well-known Zurich economist Bruno Frey and others have contended more generally that stock options are the wrong way of remunerating directors.

b) *Shareholder decision-making:* Board remuneration is a matter best left to the audit committee, provided that non-executive directors have at least the majority. Yet an annual vote on the principles and limits of board (and senior officers') remuneration might be beneficial in acting as a brake, even if shareholders rarely dissent from what is proposed. This is the solution that has been enacted in the UK, though there the vote is not for approval but only of an advisory nature (and, if I am not mistaken, further reforms are underway). This was also the position taken by the High Level Group. The recommendation of the European Commission followed it and settled for an advisory vote on the remuneration statement.

c) *Mandatory accounting:* The traditional accounting standards, U.S. GAAP and IAS/IFRS, have tolerated the common practice of just mentioning the fact that share options for directors are outstanding in a mere note to the balance sheet. Since the IAS/IFRS have become stricter[54] and since the EU has decided to follow the IFRS regime, at least as a matter of principle and after reexamination for possibly appropriate European law deviations, stock options will have to be treated as a cost on the balance sheet. The hard question is how to determine this cost.[55] One route would be to account for stock options at 'fair value' and to try to specify how this should be determined in the revised accounting standards. Yet this will be settled by IFRS as it stands now and as it will be developed further after there is practical experience with the new rules. Of course, accounting for stock options as a cost will have the effect of diminishing distributable profits. Yet for this very reason, cost accounting might be the only brake on exorbitant stock options that really makes itself felt.[56]

5. Responsibility of Board Members for Financial Statements

The European Commission plans to confirm at the EU level the collective responsibility of board members for financial statements.[57] In this context, it must be seen that the Commission has supplemented the already-mentioned action of enhancing corporate governance disclosure[58] by the addendum 'including confirmation of collective responsibility of board members for key non-financial statements'. This responsibility is meant to be personal liability as a means of improving financial statements and corporate governance disclosure. The Action Plan leaves open under what conditions such liability should arise (gross negligence?), whether there may be a cap, and in particular to whom this liability should be – the company or the investors at large (internal or external liability). The relevant article of the draft directive of 10 October 2004, amending the 4th and 7th directives,[59] reads as follows:

> Member States shall ensure that the members of the administrative, management and supervisory bodies of the company are collectively responsible towards the company for ensuring that the annual accounts and the annual report are drawn up and published in accordance with the requirements of this Directive.

In Germany a draft law[60] provides for external liability (i.e. liability toward shareholders) for written as well as certain oral financial statements, but only in cases of gross negligence. All this is highly controversial and may lead to a host of damage suits. As an example, it must be remembered that even under the present German system – i.e. rather restrictive internal liability – in May 2004, 13,000 lawsuits concerning the Telekom placement were pending, and another 17,000 complaints were still under mediation. If there is a change of government in autumn of 2005, it is improbable that this draft law will still be enacted.

6. Institutional Investors, Choice Between the One-Tier and the Two-Tier Board, and More Shareholder Democracy

a) The Action Plan contains a number of other corporate governance measures.[61] One is achieving better information on the role played by institutional investors in corporate governance. Institutional investors should be obliged to disclose their investment and voting policies. The High Level Group[62] discussed whether one should go even further and oblige institutional investors to vote. But in the end, it declined recommending this, not only because of the difficulty of defining who is an institutional investor, but primarily because such an obligation could turn out to be counterproductive in leading to even more votes for the management, as German share voting by the banks indicates. But even the rather timid disclosure proposal of the High Level Group and the Action Plan has met with criticism from the DAV, for example.

In any case, it is clear that institutional investors play a major role. This is naturally true in countries such as the UK with a high percentage of shares held by institutional investors. But institutional shareholder activity is also starting to get stronger in other countries with a relatively small percentage of institutional shareholding, such as Germany. A good example can be found in the 2004 Daimler Chrysler general assembly, where a mutual fund of the Deutsche Bank criticized Jürgen Schrempp and indirectly Hilmar Kopper, the chairman of the supervisory board and former Deutsche Bank chief. The subsequent acid exchange of critiques by Hilmar Kopper and Christian Strenger from the mutual fund were telling. In late July 2005, Jürgen Schrempp had to step down before the end of his contract in 2008 without severance pay and without moving over into the supervisory board.

A problem for itself are the hedge funds and their recent activism in the general meetings. The first thunderous case was the general meeting of the German Stock Exchange (Deutsche Börse) on 25 May 2005. The German government is considering regulating these activities, though only by way of mandatory disclosure rules. More far-reaching proposals include double or multiple voting rights for long-term shareholders as in France. Yet this is a doubtful proposal, both in terms of its effectiveness as well as its compatibility with European law. Making such rules effective is highly difficult in view of the domicile of many of these funds in exotic places such as the Cayman Islands. Even enforcing the making of a mandatory bid by hedge funds acting in concerted action in another EU member state is a difficult task for a national supervisory agency in view of gathering the proofs and actually forcing the foreign hedge funds to comply. On the other hand, the European Commission views multiple voting rights with suspicion. Their abolition is right on the agenda of the Company Law Action Plan.

b) Another measure to be mentioned is offering to listed companies the choice between the one-tier and two-tier board structures, a choice that already exists in France and Italy, for example, and which is also advocated in Austria and Germany.[63] In Germany this proposal has met with sympathy, not only from academics but also in practice, for example from the DAV. In Germany such a choice appeared unthinkable until very recently. This is due in part to the traditional – though disputed – opinion that stock corporation law must in principle be mandatory law. But a more important reason was German labor co-determination, which was felt to be incompatible with a one-tier board system. Yet the enactment of the statute of the European company (*Societas Europaea*, SE), which clears the way for shareholder choice between the two systems, has changed the mood. Germany is about to transform this statute by giving labor the same quasi-parity status in an SE one-tier board as it has now in the two-tier boards. If, as may be expected, this amounts to having no major German one-tier-board SEs, there may even be a case against Germany in the European Court of Justice for failing to transform the SE statute correctly.

c) Last but not least, the Action Plan notes that it is intended to give further effect to the principle of proportionality between capital and control. Furthermore, the Commission states that there is a strong medium to long-term case for aiming to establish a real shareholder democracy, and that the Commission intends to undertake a study on the consequences of such an approach.[64] Economically this is rather controversial. This controversy became apparent when the High Level Commission recommended breaking through double and multiple voting shares in case of public takeovers,[65] which without such special rights would otherwise be successful. Institutional investors are usually in favor of one share, one vote. This has just been shown dramatically in Sweden where, as in the other Scandinavian countries, multiple voting shares are common. As in other companies belonging to the Wallenberg empire, in Ericsson AB, Stockholm, one A-share carried one thousand votes. On 31 August, the general assembly voted to change to a system in which A-shares carry only ten votes (though with the proviso that the A-shareholders will receive compensation in kind).

Outlook

There are many other pressing problems with the Action Plan and European company law reform, among them the so-called technicalities. Technicalities are often treated as less important, but actually they are often decisive as to whether certain rules are law in action or remain law in the book. I cannot do more here than to list some of them:

What are the right instruments: for example, regulation, directive, recommendation, code of conduct, study, and, instead of binding law or law at all, non-binding instruments such as recommendations and even mere studies?

A careful look at the available sanctions and their use is indispensable, for example, liability, fines, disqualification, special investigation, concepts as wrongful trading, and last not least tax (levy of tax, but also tax incentives).

The right instruments and appropriate sanctions are useless without enforcement. Relevant questions concern the force of disclosure, the choice between self-regulation and enforcement and state enforcement, and the use of class actions as they exist already in some member states, while in others consumer, investor, and other associations may bring an action under certain circumstances. In Germany an act of June 2005 provides for a *Musterklage*, i.e. not a class action or an association action but a 'sample' action in which certain elements common to different lawsuits by different shareholders are to be established and decided upon with binding force beyond inter partes. Finally, effective international cooperation of the national securities and exchange commissions instead of a European SEC is a hot topic.

Where does the Action Plan finally lead? Well, the European law-making process is going on rather quickly – maybe even too quickly, because following all these consultation documents, checking out what they would mean for the national companies and national company law, and coming up with good arguments and counterproposals is not easy. The stress is felt not only by the German Ministry of Justice, which is understaffed, but also by German companies.

Maybe subsidiarity, as laid down in Art. 5 EC, should be taken more seriously in company law as well as in harmonization and European rule-making more generally. Basically, it maintains that the Community may be active only and insofar as the member states cannot do it as well. Of course, this is a very general formula which in a way is more political than legal. It is controversial, indeed, as to what degree this concept is fully legal and, in particular, scrutinizable by the European Court of Justice. This is true despite the spectacular tobacco advertisement decision of the European Court which struck down a European rule in prohibition of such advertising.

An economic mirroring of subsidiarity is regulatory competition (i.e. competition of legislators and rule-makers). This is a topic of its own and could easily fill the whole conference.[66] Let me confine myself to two brief remarks. Europe now has its own broad political and economic discussion on this topic, with the same battle lines we're familiar with from the U.S. and the 'genius of American law', i.e. the race to the bottom or the race to the top or, if you will, William Cary v. Ralph Winter, Roberta Romano, and others. In contrast to the U.S., the European battle lines are in general still drawn between the economists and the lawyers, though this is slowly changing, as evidenced by an initiative of the European Corporate Governance Institute and the American Law Institute. Their new 'Transatlantic Corporate Governance Dialogue' was opened with a one-day panel discussion round in Brussels on 12 July 2004, entitled 'Regulatory Competition and Subsidiarity in Corporate Governance in a Transatlantic Perspective'. This controversy is naturally relevant for the subject of our conference, i.e. the governance systems being more state- or more market-oriented. Yet one must be aware that not having European regulation does not automatically mean less state and less regulation, since the member states may have even more regulation in the field and a regulatory competition process may be less likely to arise than in the U.S. because of many specifically European barriers such as language, culture, history, and politics.

Finally, a word on case law is appropriate. The famous triad of leading cases of the European Court of Justice concerning the freedoms under the EC Treaty is well known:[67] *Centros*, *Überseering*, and *Inspire Art* (some also count the new French case, *Hughes de Lasteyrie du Saillant* of 11 March 2004, among this group of cases; this case dealt with taxing outgoing companies, a kind of tax *Daily Mail* situation). Though it is still disputed in Germany, the clear legal consequence of these cases is that the traditional protective seat theory is no longer applicable to member state companies.

Furthermore, one should mention the five golden share cases,[68] with more to follow, including possibly the Volkswagen case. This second group of cases sets clear limits to schemes by which member states tried to uphold their say in privatized companies by means of golden shares. While the legal details of both lines of case law belong to the most broadly discussed topics in today's European law, the overall trend is clear: these decisions break down traditional legal barriers between member states, invoke individual freedoms and private initiative, and thus have the effect of strengthening competition and reducing the need for and importance of framework harmonization.

Yet this case law needs supplementation by European framework rules for company law, as illustrated by the 13th directive on takeovers. Such framework rules do not simply amount to more regulation; instead, they might help to break up artificial barriers between member states, promote competition, and contribute to a certain degree to the development of a market for corporate control in those member states where in practice no such market has existed.

In sum, I think in company law and related areas we are overall on the right track. The momentum of the Action Plan is conspicuous. It has been discussed in all the member states and, despite some criticism, the European Commission is proceeding steadily with various instruments concerning the different actions. Some of them have been discussed in more detail in this presentation. As I said at the beginning, I am not fearful for our common European future.

[1] See first R. Kraakman/P. Davies/H. Hansmann/G. Hertig/K. J. Hopt/H. Kanda/E. B. Rock, *The Anatomy of Corporate Law, A Comparative and Functional Approach,* Oxford 2004, and the review article by D.A. Skeel, Jr., Corporate Anatomy Lessons, Yale L. J. 113 (2004) 1519-1577.
On European company law, see S. Grundmann, *Europäisches Gesellschaftsrecht,* Heidelberg 2004 and M. Habersack, *Europäisches Gesellschaftsrecht,* 2d ed., Munich 2003. The most recent German article is by K. J. Hopt, Europäisches Gesellschaftsrecht und deutsche Unternehmensverfassung - Aktionsplan und Interdependenzen, ZIP 2005, 461 with further references. For texts and cases, see K. J. Hopt/E. Wymeersch, eds., *European Company and Financial Law, Texts and Leading Cases,* 3d ed., Oxford 2004.

[2] Cf. the list of references in K. J. Hopt/H. Kanda/M. J. Roe/E. Wymeersch/S. Prigge, eds., *Comparative Corporate Governance, The State of the Art and Emerging Research,* Oxford 1998, p. 1201-1210; more recently Th. Clarke, ed., *Corporate Governance,* 4 vols. London/New York 2005.
As to Europe, see K. J. Hopt/J. G. García/J. Rickford/G. Rossi/J. S. Christensen/J. Simon/J. Winter, European Corporate Governance in Company Law and Codes, Report prepared for the European Corporate Governance Conference of 18.10.2004, The Hague; see also K. J. Hopt, Common Principles of Corporate Governance in Europe? in: J. A. McCahery et al., eds., *Corporate Governance Regimes, Convergence and Diversity,* Oxford 2002, p. 175.
As to German corporate governance, see P. Hommelhoff/M. Lutter/K. Schmidt/W. Schön/P. Ulmer, eds., *Corporate Governance,* Common symposium organized by the two leading German law reviews in the field ZHR/ZGR, Heidelberg 2002, with general report by K. J. Hopt, p. 27-67, and P. Hommelhoff/K. J. Hopt/A. v.

Werder, eds., Handbuch Corporate Governance, Leitung und Überwachung börsennotierter Unternehmen in der Rechts- und Wirtschaftspraxis, Cologne and Stuttgart 2003.

[3] European Commission, Communication to the Council and the European Parliament, Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward, Brussels, 21.5.2003, COM(2003) 284 fin. Short survey by K. van Hulle/S. Maul, Aktionsplan zur Modernisierung des Gesellchaftsrechts und Stärkung der Corporate Governance, ZGR 2004, 484. Economic critique ('strength of diversity') f. ex. by K. Lannoo/A. Khachaturyan, Reform of Corporate Governance in the EU, EBOR 5 (2004) 37.

[4] *A Modern Regulatory Framework for Company Law in Europe, Report of the High Level Group of Company Law Experts,* European Commission, Brussels, 4 November 2002, 161 p., reprinted in G. Ferrarini/K. J. Hopt/J. Winter/E. Wymeersch, eds., *Reforming Company and Takeover Law in Europe,* Oxford 2004, Annex 3, p. 925 et seq. See also previously K. J. Hopt, Modern Company and Capital Market Problems: Improving European Corporate Governance after Enron, J. of Corporate Law Studies 3 (2003), 221-268.

[5] *Report on Issues Related to Takeover Bids, Report of the High Level Group of Company Law Experts,* European Commission, Brussels, 10 January 2002, 96 p., reprinted in Ferrarini et al., idem, Annex 2, p. 825 et seq. The volume contains many articles that deal directly or indirectly with the two reports and in a certain manner may be considered the first comprehensive book on them. If necessary the two reports are distinguished in this article as High Level Group Report I and II.

[6] See Annex to the Company Law Action Plan.

[7] On the history of the High Level Group Reports, see K. J. Hopt, Kapitalmarktorientierte Gesellschaftsrechtsentwicklung in Europa - Zur Arbeit der High Level Group of Company Law Experts, in: P. Nobel, ed., *Internationales Gesellschaftsrecht einschliesslich internationales Kapitalmarktrecht,* Bern 2004, p. 73. See also J. Winter, EU Company Law at the Cross-Roads, in G. Ferrarini et al., *Reforming Company and Takeover Law in Europe,* loc. cit. (n. 4), p. 3.

[8] See N. Moloney, The Regulation of Investment Services in the Single Market: The Emergence of a New Regulatory Landscape, EBOR 3 (2002) 293 at 207 et seq.

[9] K. J. Hopt/E. Wymeersch, eds., *European Company and Financial Law, Texts and Leading Cases,* 3d ed., Oxford 2004.

[10] Company Law Action Plan, 2.1.

[11] High Level Group Report, ch. II.4.

[12] For the following figures, see Deutsches Aktieninstitut, *DAI-Factbook 2004,* Frankfurt 2004, table 01-1-a.

[13] European Commission, Financial Services Action Plan, COM(1999) 232 with progress reports. See N. Moloney, EBOR 3 (2002) 293; idem, New frontiers in EC capital markets law: From market construction to market regulation, C.M.L.Rev. 40 (2003) 809.

[14] See the latter in COM(2004) 725. More generally, see T. Richter, *Jahresabschlußprüfung und Prüfungsanforderungen in der Europäischen Union,* Baden-Baden 2003.

[15] See N. Moloney, *EC Securities Regulation,* Oxford 2002, and more recently E. Ferran, *Building an EU Securities Market,* Cambridge 2004; from a German perspective, see Stock Exchange Experts Commission at the German Federal Ministry of Finance, EU financial market integration: Achievements, deficits and proposed actions, Frankfurt, 21.9.2004.

[16] O.J.E.U. 30.4.2004 L 142/12.

[17] See f. ex. A. McCahery/L. Renneboog/P. Ritter/S. Haller, The Economics of the Proposed European Takeover Directive, and M. Burkart/F. Panunzi, Mandatory Bids, Squeeze-Outs and Similar Transactions, both in G. Ferrarini et al., *Reforming Company and Takeover Law in Europe,* loc. cit. (n. 4), p. 575 and 737 as well as other contributions contained therein; E. Berglöf/M. Burkart, European Takeover Regulation, *Economic Policy,* April 2003.

[18] Cf. P. Davies/K. J. Hopt, Control Transactions, in R. Kraakman et al., *The Anatomy of Corporate Law,* loc. cit. (n. 1), p. 157.

[19] As to the distinction between internal and external corporate governance, see K. J. Hopt, Corporate Governance in Germany, in K. J. Hopt/E. Wymeersch, eds., Capital Markets and Company Law, Oxford 2003, p. 289 at p. 299 et s., 313 et s.

[20] See f. ex. O. Kini/W. Kracaw/S. Mian, The Nature of Discipline by Corporate Takeovers, J. of Finance LIX/4 (2004) 1511 at 1550.

[21] K. J. Hopt/P. O. Mülbert/C. Kumpan, Reformbedarf im Übernahmerecht, AG 2005, 109.

[22] See in more detail infra III 4.

[23] See in more detail infra III 3.

[24] COM(2004) 725, supra I 2 n. 14.

[25] SLIM (Simpler Legislation for the Internal Market), Report of the European Commission, 4.2.2000, COM(2000) 56 fin., Annex 1 Recommendations Company Law; reprinted in more detail and with reasons in ZIP

1999, 1944; cf. T . Drygala, Die Vorschläge der SLIM -Arbeitsgruppe zur Vereinfachung des Europäischen Gesellschaftsrechts, AG 2001, 291 at 292 et seq.

[26] See the draft directive modifying the second directive, 29.10.2004, COM(2004) fin.

[27] Art. 39a of the draft directive as amended. These squeeze-out and sell-out rights are to be distinguished from those that are following a successful public takeover and are contained in the 13th directive.

[28] High Level Group Report II, ch. IV: Capital Formation and Maintenance. Cf. from an economic perspective L. Enriques/J. Macey, Creditors versus Capital Formation: The Case Against the European Legal Capital Rules, 86 Cornell Law Review 1166 (2001).

[29] One in December 2005 organized by H. Eidenmüller/W. Schön, another in January 2006 organized by the company law review ZGR as its biannual symposium, and a third in September 2006 by the German Lawyers Association (Deutscher Juristentag) in its section on business law.

[30] M. Lutter, *Kapital, Sicherung der Kapitalaufbringung und Kapitalerhaltung in den Aktien- und GmbH - Rechten der EWG,* Karlsruhe 1964.

[31] J. Rickford, Reforming Capital - Report of the Interdisciplinary Group of Capital Maintenance, European Business Law Rev. 2004, 919 -1027. Cf. before f. ex. E. Ferran, Legal Capital Rules and Modern Securities Markets – the Case for Reform, as Illustrated by the U.K. Equity Markets, in: K. J. Hopt/E. Wymeersch, eds., *Capital Markets and Company Law* , loc. cit. (n. 19), p. 115.

[32] Forum Europaeum Konzernrecht, Konzernrecht für Europa, ZGR 1998, 672 at 698 et seq., 704 et seq.

[33] There was only a pre-draft which was circulated unofficially in December 1984.

[34] High Level Group Report II, ch. V.2: Transparency of Group Structure and Relations, ch. V.3: Problems for the Creation and Functioning of Groups of Companies, and ch.V.4: Pyramids; as to the following discussion, see K. J. Hopt, Konzernrecht für Europa - Zur Diskussion um die Vorschläge des Forum Europaeum Konzernrecht -, in: J. Basedow et al., eds., Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht, Tübingen 2000, p. 17 at 23 et seq.

[35] COM(2004) 725, supra n. 14.

[36] COM(2003) 703 as of 18.11.2003, Common Standpoint of the Council as of 15.11.2004. Cf. P. Wiesner, Der Betrieb 2005, 91.

[37] Pre-draft as of 20.4.1997, reprinted in German in ZIP 1997, 1721 and ZGR 1999, 157. Cf. S. Grundmann, *Europäisches Gesellschaftsrecht*, loc. cit. (n. 1), 2004, § 24; S. Leible, Niederlassungsfreiheit und Sitzverlegungsrichtlinie, ZGR 2004, 531.

[38] J. Boucourechliev/P. Hommelhoff, eds., *Vorschläge für eine Europäische Privatgesellschaft,* Cologne1999; P. Hommelhoff/D. Helms, eds., *Neue Wege in die Europäische Privatgesellschaft,* Cologne 2001.

[39] High Level Group Report II, ch. IX: medium term.

[40] Cf. K. J. Hopt/R. Walz/T. von Hippel/V. Then, eds., *The European Foundation - A New Legal Instrument,* Cambridge U.K. (forthcoming).

[41] O.J.E.U L 207/1 and 207/25.

[42] High Level Group Report II, ch. VIII.2: General Rules for Enterprises (transparency for all legal persons with limited liability).

[43] High Level Group Report II, ch. II.3: Disclosure of Information as a Regulatory Tool; also already the High Level Group Report I, ch. I.3: General Application of Guiding Principles, Duty to Disclose.

[44] COM(2004) 725, supra I 2 n. 14.

[45] Recommendation, 15.2.2005, O.J.E.U. L 52/51.

[46] L. Bebchuk/J. Fried, *Pay without Performance, The Unfulfilled Promise of Executive Compensation,* Cambridge, Mass., London 2005.

[47] G. Ferrarini/N. Moloney, Executive Remuneration and Corporate Governance in the EU: Convergence, Divergence, and Reform Perspectives, ECFR 2004, 251; G. Ferrarini/N. Moloney/C. Vespro, Executive Pay: Convergence in Law and Practice Across the EU Corporate Governance Faultline, J. of Corporate Law Studies 4 (2004) 243.

[48] Landgericht Düsseldorf, decision of 22.7.2004, ZIP 2004, 2044.

[49] Oral hearings are scheduled for October 2005.

[50] High Level Group Report II, ch. III.4.2: The remuneration of directors.

[51] Recommendation, 14.12.2004, O.J.E.U. L 385/55.

[52] K. J. Hopt, Modern Company and Capital Market Problems: Improving European Corporate Governance after Enron, J. of Corporate Law Studies 3 (2003), 221 at 233 et seq. with further references.

[53] Bundesgerichtshof (BGH), ZIP 2004, 613.

[54] The IFRS 2 as of February 2004 require that from 2005 on stock options have to be accounted for under a current fair value method.

[55] Cf. K. Crook, Accounting for Share-Based Remuneration, in G. Ferrarini et al., *Reforming Company and Takeover Law in Europe,* loc. cit. (n. 4) p. 347,

[56] High Level Group Report II, ch.III.4.2.4.

[57] Cf. the comprehensive comparative law study by K. J. Hopt/.H.-C. Voigt, eds., *Prospekt- und Kapitalmarktinformationshaftung - Recht und Reform in der Europäischen Union, der Schweiz und den USA -*, Tübingen 2005; summary in K. J. Hopt/H.-C. Voigt, WM 2004, 1801.

[58] Annual corporate governance statement, see supra III 1.

[59] See already supra n.14.

[60] The so-called KapInHG, one of these terrible modern acronyms for new laws. For details, see K. J. Hopt/H.-C. Voigt, loc. cit. (n. 57).

[61] Company Law Action Plan 3.1.1: Information about the role played by institutional investors.

[62] High Level Group Report II, ch. III.3.3: Responsibilities of institutional investors.

[63] Cf. K. J. Hopt/P. C. Leyens, Board Models in Europe, ECFR 2004, 135 at 156 et seq., 163 et seq.

[64] Company Law Action Plan 3.1.2: Shareholder democracy.

[65] See High Level Group Report I, supra n. 5.

[66] As to competition and information in European company law, see S. Grundmann, Die Struktur des Europäischen Gesellschaftsrechts von der Krise zum Boom, ZIP 2004, 2401 at 2405 et seq.

[67] K. Schmidt, ZHR 168 (2004), 493 reports that there is a three-digit number of contributions on *Centros* and *Überseering* alone and already 60 on *Inspire Art* (as of August 2004).

[68] S. Grundmann/F. Möslein, Golden Shares – State Control in Privatised Companies: Comparative Law, European Law and Policy Aspects, Euredia 2001-02/4, 623.

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