German Company Law: Recent Developments and Future Challenges

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A. Introduction: A Decade of Company Law Changes

The last decade has been a time of changes in all branches of German company law. Whilst the changes in the law of civil partnerships go to the very fundaments of what was a firm belief for a hundred years in national law, the future of the private limited company is increasingly determined by the competition of regulators in the European common market. The European dimension of modern company law making is even more pervasive in the law of stock corporations where growing convergence can be noted in regard to the national approaches of the European Member States towards internal controls. A common denominator for most of the changes in German company law is the partly court driven, partly legislature driven attempt of a better adjustment of investor and creditor protection to evolving business needs. Looking on the changes from a wider angle that includes capital markets, however, there are signals for a shifting in the traditional approach of German corporate governance towards an increasingly market driven system.

B. Breaking with Traditional Boundaries: Legal Personality of Civil Partnerships

The most basic form for any type of co-operation is the *Gesellschaft bürgerlichen Rechts* (GbR) (civil partnership) that is subject to the more than one hundred year old provisions of the *Bürgerliches Gesetzbuch* (BGB) of 1896 (German Civil Code). The BGB applies to non-commercial partnerships but also lays the fundament for the law on commercial partnerships according to the *Handelsgesetzbuch* (HGB) of 1897 (Commercial Code). The breaking change in the legal understanding of the

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civil partnership came recently in 2002 when the *Bundesgerichtshof* (BGH) (Federal Civil Court of Justice) held that a GbR has its own legal personality.[1] The consequence is a largely parallel liability regime for civil and commercial partnerships. According to the BGH, new partners are liable for debts that stood before they joined the partnership. From the viewpoint of a creditor the advantage of this change in doctrine is a considerable facilitation of litigation. Today a law suit can be brought against the partnership itself. Formerly the procedural requirement to state the name of each single partner had proved to be a severe obstacle for litigation particularly in regard to law suits against foreign partnerships.

At the end of the last millennium, civil partnerships were extensively used as vehicles for partly disastrous engagements in real estates. With the run on properties in Eastern Germany shortly after the fall of the Berlin Wall in 1989 shares in realty partnerships were sold in huge numbers to small investors who in many cases were misled by unrealistic profit forecasts. After the breakdown of numerous business plans the courts had to decide whether the financing banks could hold the private investors liable for the debts of the partnership. The courts excluded these older cases from the application of the new liability regime described above.[2] Hence the assumption for these older cases still was that a partnership does *not* have its own legal personality. As a result, a single partner is only liable for debts of the company if he was properly represented according to agency law when the managing partner signed the financing agreements with the banks. This is the legal background for the understanding of the line of decisions by the BGH that tried to protect small investors from severe liability consequences but led to difficult modifications of well established doctrines of German agency law according to BGB ss. 164 et seq.[3] It will be seen in the future whether the overall consumer friendly approach of the courts will prevent banks to engage in the profitable financing of imprudent business plans.

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[1] Decisions by the Federal Court of Justice: BGHZ 146, 341. The most important developments in German company law are reported on a regular basis in the NEUE JURISTISCHE WOCHENSCHRIFT (NJW). Most recently on civil and commercial partnerships: Heribert Hirte, *Die Entwicklung des Personengesellschaftsrechts in Deutschland in den Jahren 2003 bis 2004*, NJW 718 (2005).

[2] BGH, NJW 1802, 1805 (2003).

[3] On the issues under German agency law, see Alexander Hellgardt & Christian Friedrich Mayer, *Die Auswirkungen nichtiger Grundverhältnisse auf die Vollmacht – eine rechtsdogmatische Einordnung und Bewertung der neueren BGH-Rechtsprechung zu den Bauherren- und Erwerbermodellen*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT – WERTPAPIER-MITTEILUNGEN (WM) 2380 (2004). On the specific implications of European consumer protection directives, see Caroline Meller-Hannich, *Haustürgeschäft, Immobilienkauf, Kreditvertrag und der enttäuschte Anleger – die Grenzen der richtlinienkonformen Auslegung und die Grenzen der Auslegung von Richtlinien*, WM 1157 (2005).

C. Lessons from Europe: Freedom of Movement of Private Limited Companies

The *Gesellschaft mit beschränkter Haftung* (GmbH) (private limited company) according to the GmbHG of 1892 (Limited Liability Companies Act) is the company type chosen by most of the middle-size businesses. Its core feature is the exclusion of its members' personal liability for the debts of the company in exchange for a minimum nominal capital of € 25.000.

A traditional focus of the case law lies on insolvencies and in particular, on directors' liabilities for breaches of the duty to institute insolvency proceedings in a timely manner.[4] Upon insolvency another difficult question arises concerning the legal treatment of a loan provided by a member in times of a crisis of the company. In a number of cases it was held that upon liquidation of the insolvent company creditors would be served on a preferential basis. Although the legislator backed up this rule in 1980 through the introduction of GmbHG ss. 32a, 32b, the members' responsibilities for capital impairments of the company remain highly controversial.[5]

A new challenge results from the free movement of capital and the freedom of establishment under Art. 56, 43 of the European Treaty that are the starting point for the growing presence of private limited companies incorporated in the U.K. and doing business in Germany[6]. The obvious advantage of the English private limited is that its incorporation is not subject to a minimum capital requirement as it is the case with its German counterpart. In a line of decisions starting with the famous *Centros* judgment[7] in 1999 the European Court of Justice (ECJ) dismissed a number of restrictions that applied to branches of foreign companies under national laws of several Member States and thus opened the door for a shopping of incorporation laws within the European common market.

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[4] GmbHG s. 64. One of the core problems is to precisely determine the time of illiquidity. For a recent analysis see Jochen Blöse, *Die Geschäftsführer-Haftung für Zahlungen bei Vorliegen von Insolvenzgründen – eine Schadensersatzverpflichtung am Maßstab von Plausibilitäten*, GMBHRUNDSCHAU (GmbHR) 832 (2005).

[5] See Karsten Schmidt, *Vom Eigenkapitalersatz in der Krise zur Krise des Eigenkapitalersatzrechts?*, GMBHR 797, 803 (2005).

[6] The full range of problems is discussed in EUROPÄISCHE AUSLANDSGESELLSCHAFTEN IN DEUTSCHLAND (Marcus Lutter ed., 2005).

[7] Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen,* Decision of 9 March 1999, E.C.R. I-1459 (1999). See for example Hanno Merkt, *Centros and its Consequences for Member State Legislatures*, 3 INT'L COMP. & CORP. L. J. 119 (2001).

As a first consequence of these developments Germany had to rethink its real seat theory that at the time was firmly rooted in private international law. With the subsequent decisions of the ECJ in *Überseering*[8] and *Inspire Art*[9] it became clear that the law applicable to foreign companies could no longer be connected to the main place of business but had to be determined exclusively by the place of incorporation.[10] Perhaps an even more far-reaching implication is the up-coming debate on the merits of the minimum capital requirement.[11] For long the exigency of the minimum capital requirement had been a firm belief in Germany. With the growing presence of English limited companies in continental Europe the minimum capital requirement appears as an obstacle for the competitiveness of the German private limited company. The state of the current debate signals a considerable probability that the minimum capital requirement will be lessened or even removed in the future.[12] The challenge will then be to provide a fine-tuning alternative means of creditor protection.

D. The Driving Force: Corporate Governance of Stock Corporations

The number of *Aktiengesellschaft(en)* (AGs) (stock corporations) according to the *Aktiengesetz* (AktG) (Stock Corporations Act) which was comprehensively revised in 1965 is growing but still very small compared to the masses of GmbHs. For the last decade, however, the stock corporation has been the driving force in company

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[8] Case C-208/00, *Überseering B.V. v. Nordic Construction Company Baumanagement GmbH (NCC),* Decision of 5 November 2002. See for example Kilian Baelz & Teresa Baldwin, *The End of the Real Seat Theory (Sitztheorie): the European Court of Justice Decision in Ueberseering of 5 November 2002 and its Impact on German and European Company Law*, 3 GERMAN LAW JOURNAL No. 12 (1 December 2002), at http://www.germanlawjournal.com/article.php?id=214.

[9] Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.*, decision of 30.9.2003. See for example Christian Kersting & Clemens Philipp Schindler, *The ECJ's Inspire Art Decision of 30 September 2003 and its Effects on Practice*, 4 GERMAN LAW JOURNAL 1277 (2003), at http://www.germanlawjournal.com/article.php?id=344.

[10] For a comprehensive analysis of the whole line of decisions see Eva-Maria Kieninger, *The Legal Framework of Regulatory Competition Based on Company Mobility: EU and US Compared*, 6 GERMAN LAW JOURNAL 741 (2005), at http://www.germanlawjournal.com/article.php?id=591.

[11] On the state of the discussion in Germany Karsten Schmidt, *supra* (note 5).

[12] According to a proposal by the Schröder-Government made shortly before the elections of September 2005 the minimum capital was to be reduced to 10.000 EUR. See GESETZENTWURF DER BUNDESREGIERUNG, ENTWURF EINES GESETZES ZUR NEUREGELUNG DES MINDESTKAPITALS DER GMBH (MINDESTKAPG), 1 June 2005 (Draft Bill of the Government, Draft law on the Reform of the minimum capital of the limited company), available: http://www.bmj.de/media/archive/950.pdf.

law, a development that is due to the intense debate on corporate governance in Germany.

A strong example is the *ARAG* judgment of the BGH in 1997.[13] It introduced a German form of the U.S. business judgment rule that subsequently expanded its effect to the duties of the directors of private limited companies. With the new *Gesetz zur Unternehmensintegrität und Modernisierung des Aktiengesetzes* (UMAG)[14] (Law on Company's Integrity and on the Modernization of the Stock Corporations Act) that is expected to come into force by the end of 2005, the business judgment rule will finally be included as a general principle applicable to directors' duties and liabilities under AktG s. 93.

The most important developments of the last decade concern the improvement of internal controls.[15] As a reaction to a number of corporate scandals in the end of the last millennium the AktG was amended by the *Gesetz zur Kontrolle und Transparenz im Unternehmensbereich* (KonTraG)[16] of 1998 (Law on Control and Transparency). The reform was mainly focused on the mandatory two-tier board model that is the core device of internal corporate governance in German stock corporations that, irrespective of size or listing, have to set up a supervisory board to control and to advise the management board.[17] The 1998-reform conferred the tasks to conclude the auditing contract and to determine the focus of the auditing process upon the

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[13] BGHZ 135, 244.

[14] GESETZ ZUR UNTERNEHMENSINTEGRITÄT UND MODERNISIERUNG DES AKTIENGESETZES, BT-Drs. 15/5693, 15 June 2005. The law was passed by the German parliament on 15 June 2005 and will come into force on 1 November 2005. For details see Markus Roth, *Das unternehmerische Ermessen des Vorstands,* BETRIEBS-BERATER (BB) 1066, 1067 (2004).

[15] With a focus on common trends in Europe, see Klaus J. Hopt & Patrick C. Leyens, *Board Models in Europe – Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy*, EUR. COMP. & FIN. L. REV. 135, 169 (2004). For a comparison between Germany and the U.S., see Patrick C. Leyens, *Deutscher Aufsichtsrat und U.S.-Board: ein- oder zweistufiges Verwaltungssystem? Zum Stand der rechtsvergleichenden Corporate Governance Debatte*, 67 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 57, 69, 96 (2003).

[16] GESETZ ZUR KONTROLLE UND TRANSPARENZ IM UNTERNEHMENSBEREICH, 27 July 1998, BGBl. I S. 786 (Federal Gazette). For details see Dieter Feddersen, *Neue gesetzliche Anforderungen an den Aufsichtsrat*, DIE AKTIENGESELLSCHAFT (AG) 385 (2000); Peter Hommelhoff & Daniela Mattheus, *Corporate Governance nach dem KonTraG*, AG 249 (1998); see also John W. Cioffi, *Restructuring "Germany Inc.": The Politics of Corporate Governance Reform in Germany and the European Union*, 24 LAW & POLICY 355 (2002).

[17] On the German supervisory board, see Klaus J. Hopt, *The German Two-Tier Board: Experiences, Theories, Reforms*, in COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH 227 (Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch, Stefan Prigge eds., 1998).

supervisory board and thus strengthened its control powers.[18] The reform also dealt with the conflicts of interests that arose from the common practice of extensive cross-directorships and mandates of bank representatives by reducing the number of supervisory positions a single person can hold at the same time.

Two years later, in 2000, the ongoing corporate governance debate led to the appointment of a governmental commission on corporate governance.[19] Its report of 2001 formed the basis for another major reform of the AktG by the *Transparenz- und Publizitätsgesetz* (TransPuG)[20] of 2002 (Law on Transparency and Disclosure). The core feature of the TransPuG is the introduction of an annual corporate governance statement.[21] Listed companies have to disclose their compliance or non-compliance with the recommendations of the German Corporate Governance Code of 2002.[22] The underlying comply-or-explain approach is an important step ahead and leads towards higher levels of transparency and governance standards that can be tailored to the individual needs of each single company. For example in England codes of conduct are a well-known regulatory tool.[23] For Germany they mean a new

[18] On the implications for the interplay between supervisory board and auditor, see Peter Hommelhoff, *Die neue Position des Abschlußprüfers im Kraftfeld der aktienrechtlichen Organisationsverfassung, Teil I*, BB 2567, 2573 (1998), and *Teil II*, BB 2625, 2634 (1998).

[19] BERICHT DER REGIERUNGSKOMMISSION CORPORATE GOVERNANCE (Theodor Baums ed., 2001). The strengths and weaknesses of the report were comprehensively discussed on a joint symposium of the leading German company law reviews, the ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) and the ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR). See CORPORATE GOVERNANCE – GEMEINSCHAFTSSYMPOSIUM DER ZEITSCHRIFTEN ZHR/ZGR, ZHR SUPPLEMENT NO. 71 (Peter Hommelhoff, Marcus Lutter, Karsten Schmidt, Wolfgang Schön, Peter Ulmer eds., 2002); for an inside account of the preparation of the commission's report, see *Reforming German Corporate Governance: Inside a Law Making Process of a Very New Nature. Interview with Professor Theodor Baums, interviewed by Peer Zumbansen*, 2 GERMAN LAW JOURNAL No. 12 (2001), at: http://www.germanlawjournal.com/past_issues.php?id=43.

[20] TRANSPARENZ- UND PUBLIZITÄTSGESETZ, 19 July 2002, BGBl. I S. 2681. For details see the contributions in DAS TRANSPARENZ- UND PUBLIZITÄTSGESETZ (Heribert Hirte ed., 2003).

[21] On the new corporate governance statement Marcus Lutter, *Die Erklärung zum Corporate Governance Kodex gemäß § 161 AktG*, 166 ZHR 523 (2000); Peter Ulmer, *Der Deutsche Corporate Governance Kodex – ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften*, 166 ZHR 150 (2002) 150.

[22] Deutscher Corporate Governance Kodex/German Corporate Governance Code, issued by the Regierungskommission Commission Corporate Governance on 26 February 2002, available in German and English at: http://www.corporate-governance-code.de/. The focus of the most recent changes of 2 June 2005 has been on a (too careful) increase of the standards of independence of the supervisory board. See Jan Lieder, *Das unabhängige Aufsichtsratsmitglied – zu den Änderungen des Deutschen Corporate Governance Kodex*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 569 (2005).

[23] On England, see Ben Pettet, *The Combined Code: A Firm Place for Self-Regulation in Corporate Governance*, J. INT'L BANK. L. 394 (1998). Corporate Governance Codes from all European Member States are available on web pages of the European Corporate Governance Institute: http://www.ecgi.org.

technique as company law traditionally had almost exclusively relied on statutory rules.

In Europe, the *Statute of the European Public Company* (*Societas Europaea*) of 2001, with its choice between the one-tier and the two-tier board, had already embodied the view that good governance does not necessarily depend on formal board organization.[24] This is also the perception in Member States where even more than two board model options exist.[25] Convergence in corporate governance as a whole is further triggered by the European Commission's Action Plan on Corporate Governance of 2003[26] that also formed the basis for the Commission's recommendation of code provisions on the role of independent non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board of 2004.[27]

For Germany the most difficult challenge arising from the increased standards of independent internal control results from its strong system of co-determination that provides for a mandatory presence of labor representatives on the supervisory board. Labor participation played an important role for the rebuilding of Germany after World Wars I and II. Arguably, today worker councils at the place of the plant serve as a sufficiently powerful device and would do alone for the safeguarding of labor interests.[28] Whilst such worker councils do not negatively interfere with internal controls the mandatory presence of labor representatives on the supervisory board on the long run will prove incompatible with the fostering of independent

[24] See Council Regulation (EC) No 2157/2001 of 8. 10. 2001 on the Statute for a European Company (SE), OJ L 294/1, 10. 11. 2001, Art. 38 b).

[25] For example: France and Italy. See Klaus J. Hopt & Patrick C. Leyens, *supra (*note 15), at 156.

[26] European Commission, Communication to the Council and the European Parliament of 21 May 2003, Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward, COM (2003) 284(01). The Action Plan follows closely the recommendations of the High Level Group of Company Law Experts, A Modern Regulatory Framework for Company Law in Europe, European Commission, Brussels, 4 November 2002, available at: http://www.europa.eu.int/.

[27] Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the supervisory board, OJ L 52, 25 February 2005, p. 51. An analysis is provided by Klaus J. Hopt, *Europäisches Gesellschaftsrecht und deutsche Unternehmensverfassung – Aktionsplan und Interdependenzen*, ZIP 461, 467 (2005).

[28] This is the view prevailing in countries that do without a system of co-determination as for example the UK. See Paul L. Davies, *A Note on Labour and Corporate Governance in the U.K.*, in: COMPARATIVE CORPORATE GOVERNANCE (*supra* note 17), 373, at 377. A comparative analysis of labor representation in the European Member States is provided by UNTERNEHMENS-MITBESTIMMUNG DER ARBEITNEHMER IM RECHT DER EU-MITGLIEDSTAATEN (Theodor Baums, Peter Ulmer eds., 2004).

management supervision in Europe.[29] Within the existing boundaries, the way ahead could be to exclude labor representatives from the integral forces of internal control as in particular the audit committee. One step further labor participation could be shifted away from the supervisory board and assigned to a new labor council with mere consulting powers towards the supervisory board as has recently been proposed by the *Berliner Netzwerk Corporate Governance* (Berlin Network Corporate Governance) in 2003.[30] However, proposals for a reshaping of the laws on co-determination – although hardly understandable from an international viewpoint – have been excluded from the national reform agenda almost as a matter of principle.

The control efficiency of the supervisory board and in particular of its audit committee is also a determining factor for a successful co-operation with the external auditor. The improvement of auditing standards and auditor independence has been another reform focus within recent years. Already the KonTraG of 1998 introduced a mandatory rotation for auditor firms that received more than 30% of their total earnings exclusively from one company within a period of five years. The *Bilanzrechtsreformgesetz* (BilReG)[31] of 2004 (Reform Law on Financial Reporting) lowered this threshold to 15% for auditors of listed corporations. As an additional result of the BilReG listed corporations are now obliged to report according to the international accounting standards IAS or IFRS. Finally, the *Bilanzkontrollgesetz* (BilKoG)[32] also of 2004 (Law on the Control of Financial Reporting) introduced a new two-level control and enforcement procedure for the financial reporting of listed companies. On the first level a new private expert panel reviews the annual reports and on the second level the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin)[33] (Financial Services Authority) executes its statutory powers where necessary.[34]

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[29] To the point: Peter Ulmer, *Paritätische Arbeitnehmermitbestimmung im Aufsichtsrat von Großunternehmen – noch zeitgemäß?*, 166 ZHR 271, 275 (2002). In the past only few named the problems, see Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 INT'L REV. L. & ECON. 203, 206 (1994).

[30] *Berliner Netzwerk Corporate Governance*, *12 Thesen zur Modernisierung der Mitbestimmung*, AG 200 (2004) (thesis 2, 11), also available at: http://www.bccg.tu-berlin.de/main/publikationen/12-Thesen-Papier.pdf.

[31] BILANZRECHTSREFORMGESETZ, 4 December 2004, BGBl. I S. 3166.

[32] BILANZKONTROLLGESETZ, 15 December 2004, BGBl. I S. 3408.

[33] *Bundesanstalt für Finanzdienstleistungsaufsicht*.

[34] In 2002 the powers of the former *Bundesaufsichtsamt für den Wertpapierhandel* (BAWe) and the *Bundesaufsichtsamt für das Kreditwesen* (BAKred) were concentrated in one single authority. This development is in line with the increasing need for capital market supervision and also with the approaches taken in

E. At the Crossroads: Globalizing Capital Markets and Forthcoming Changes of the German Governance System

An increasingly important factor for corporate Germany is capital market regulation. Traditionally the German corporate governance model relied on an insider control system influenced by the universal banking model and dominated by the representation of business and social interests on the supervisory board level.[35] With the growing awareness of the need for independent internal controls on the one hand and globalization of capital markets on the other hand it can be argued that Germany is standing at the crossroads of a considerable system change.[36]

A visible preparation for the future challenges is the extension of the laws on liability for false or misleading capital market information.[37] A first dash of regulation in 1998 led to a tightening of the provisions on prospectus liability under Börsengesetz (BörsG)[38] s. 44 (Stock Exchange Act) and Wertpapier-Verkaufsprospektgesetz (VerkProspG)[39] s. 13 (Securities Sales Prospectus Act). In 2004 a second dash introduced a liability regime concerning insider information under *Gesetz über den Wertpapierhandel (Wertpapierhandelsgesetz)* (WpHG)[40] ss. 37b, 37c (Securities Trading

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other European Member States as for example the U.K. where the Financial Services and Markets Act of 2000 created the powerful Financial Services Authority as a new "Super-regulator" for the supervision of Financial Markets.

[35] From a comparative perspective Paul L. Davies, *Board Structure in the UK and Germany: Convergence or Continuing Divergence?*, 2 INT'L COMP. & CORP. L. J. 435 (2001). For a note on the "erosion" of the traditional networking approach see Peer Zumbansen, *Germany Inc. Eroding? – Board Structure, CEO and Rhenish Capitalism* –, 3 GERMAN LAW JOURNAL No. 6 (1 June 2002), at http://www.germanlawjournal.com/article.php?id=156.

[36] Harald Baum, *Change of Governance in Historic Perspective: The German Experience*, in: CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATE, AND MARKETS IN EUROPE, JAPAN, AND THE US (Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda, Harald Baum eds., *forthcoming* 2005). Similar Ulrich Noack & Dirk Zetzsche, *Corporate Governance Reform in Germany: the Second Decade*, SSRN-WORKING PAPER, June 2005, available at: http://ssrn.com/Abstract=646761.

[37] A comprehensive analysis on theory and practice of liability for false capital market information in the European Member States, Switzerland and the U.S., including an economic analysis, has been undertaken by the Max Planck Institute for Foreign Private and Private International Law, Hamburg. The project started with an expert opinion for the German Federal Ministry of Finance on the law of prospectus liability in the EU member states and Switzerland. See PROSPEKT- UND KAPITALMARKTINFORMATIONSHAFTUNG – RECHT UND REFORM IN DER EUROPÄISCHEN UNION, DER SCHWEIZ UND DEN USA – (Klaus J. Hopt, Hans-Christoph Voigt eds., 2005).

[38] BÖRSENGESETZ, 21 June 2002, BGBl. I 2010.

[39] WERTPAPIER-VERKAUFSPROSPEKTGESETZ, 9 September 1998, BGBl. I 2701.

[40] GESETZ ÜBER DEN WERTPAPIERHANDEL, 9 September 1998, BGBl. I 2708.

Act).[41] The most recent reform project sought to severely expand the personal liabilities of management and supervisory board directors for breaches of information duties under a draft *Gesetz zur Verbesserung der Haftung für falsche Kapitalmarktinformation* (KapInHaG)[42] (Capital Market Information Liability Act). One of its core shortfalls was the lack of a mechanism to protect directors against abusive shareholder actions and to protect the company against the danger that the management spends its time in the courtroom instead of leading the company.[43] The KapInHaG was finally stopped due to heavy criticism from practice and legal scholars but work will probably be resumed in the new legislative period of 2005 to 2009.

The system change is challenged by the public fear that within the European common market national corporate autonomy could be lost to foreign investors. An illustration for this fear is Germany's difficult role in the struggle for the European takeover directive.[44] Perhaps even more explaining is s. 33 of the new Wertpapiererwerbs- und Übernahmegesetz (WpÜG)[45] of 2001 (German Takeover Statute), which leaves considerable room for the defense of a target company against a takeover. This lack of a strict neutrality obligation of the target management must be seen as an obstacle for a strong takeover market that would execute welcome external control over management. It also signals that Germany is not (yet) prepared to leave its governance system entirely to market control.

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[41] A further amendment to be noted in this context is the introduction of a new regime for market manipulation under WpHG ss. 20a et seq. See David C. Donald, *Applying Germany's Market Manipulation Rules to Disruptive Trades on the Eurex and MTS Platforms*, 6 GERMAN LAW JOURNAL 650, 657 (2005), at http://www.germanlawjournal.com/article.php?id=581.

[42] *Bundesministerium der Finanzen* (Federal Ministry of Finance), ENTWURF EINES GESETZES ZUR VERBESSERUNG DER HAFTUNG FÜR FALSCHE KAPITALMARKTINFORMATION, 7 October 2004, available at: http://www.jura.uni-augsburg.de/prof/moellers/aktuelles/kapinhag_gestoppt.html.

[43] For an overview on the draft law and for an analysis of its key problems, see Johannes Semler & Stephan Gittermann, *Persönliche Haftung der Organmitglieder für Fehlinformationen des Kapitalmarktes – Zeigt das KapInHaG den richtigen Weg?*, NZG 1081, 1085 (2004).

[44] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, OJ L 142, 30.4.2004, p. 12. The finally adopted text to large parts goes back to the Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, European Commission, Brussels, 10 January 2002, available at: http://www.europa.eu.int/. See hereto, e.g., Silja Maul & Athanasios Kouloridas, The Takeover bids Directive, 5 GERMAN LAW JOURNAL 355 (2004), at http://www.germanlawjournal.com/article.php?id=411; for a background of the Directive's painful legislative history, see Peer Zumbansen, *European Corporate Law and National Divergences: The Case of Takeover Regulation*, 3 WASH. U. GLOB. STUD. L. REV. 867 (2004), at http://www.law.harvard.edu/students/orgs/hela/papers/Zumbansen%20National%20Divergences.pdf.

[45] WERTPAPIERERWERBS- UND ÜBERNAHMEGESETZ, 20 December 2001, BGBl. I 3822.

One of the core requirements for a strong market based economy is the absence of state intervention. In Germany state privileges are rare in general. An example, however, is the Volkswagen-Law of 1960[46] that provides the Federal State of Lower Saxony with two seats on the supervisory board and in addition restricts the voting power of private shareholders. The ECJ already dismissed similar arrangements in Belgium, France, Portugal, Spain and the U.K. in its so-called golden shares judgments of 2002 and 2003.[47] It will be seen whether the action taken by the European Commission in 2004 against Germany and its Volkswagen-Law will become the next marking point in this line of decisions.[48] Altogether the European policy strongly points towards a more liberal common market.

Looking into the future, the shifting towards increasingly market driven governance systems will be one of the core challenges not only for Germany but also for Europe with its presently 25 Member States and its view to further accessions.

[46] BGBl. I S. 585.

[47] Decisions of 4 June 2002, Cases C-367/98 (Portugal), C-483/99 (French Republic) and C-503/99 (Belgium), and of 13 May 2003, Cases C-98/01 (United Kingdom), C-463/00 (Spain). See Johannes Adolff, *Turn of the Tide?: The „Golden Share" Judgements of the European Court of Justice and the Liberalization of the European Capital Markets*, 3 GERMAN LAW JOURNAL No. 8 (1 August 2002), at http://germanlawjournal.com/print.php?id=170.

[48] European Commission, Press Release, Brussels, 13 October 2004, IP/04/1209.