

**Introduction**

On June 21, 2002, the German chamber of federal states ("Länder"), the *Bundesrat*, approved of a bill which had prior to that passed the national parliament ("*Bundestag*").<sup>1</sup> The bill which introduces a number of substantial changes to the German law governing Stock corporations<sup>2</sup>, had to a large degree been prepared under the auspices of two specially formed governmental commissions concerned with a reform of German corporate governance. The governmental commission 'Corporate Governance Code', convened in September 2001 by Federal Minister of Justice, Mrs Herta Däubler-Gmelin, and chaired by Mr Gerhard Cromme, Spokesman of the supervisory's board of German steel manufacturer ThyssenKrupp,<sup>3</sup> presented its work on 26 February 2002 to the Ministry of Justice, and the occasion was seized by both the Minister as well as the Commission's Chairman to express enthusiasm for the commission's work and its value to improve German corporate governance, in particular with regard to attracting foreign investors.<sup>4</sup>

The relatively little mention that was made in the press of the bill's passage from the commission's proposal onto the parliamentarians' desks<sup>5</sup> can hardly illuminate the significant characteristics of the connected law making processes. This paper sets out to trace these developments and to place them into the wider context of law making reform. In this respect, reform does not only concern company law but, more generally, involves national, European and international attempts to improve law making procedures by allowing for a wider inclusion of private actors in norm setting procedures.<sup>6</sup> What is involved from the point of view of democratic theory, is the since-long growing tension between a functionally reduced, rubber-stamping parliament on the one hand and a fast moving, hardly controllable administration which is in close contact and interaction with private actors, on the other. At the same time,

the currently widespread attempts at improving respective national laws on corporate governance and firm organization<sup>7</sup> must be seen against the background of an allegedly overwhelming pressure of international convergence towards a set of corporate governance principles, most notably established in the US and the UK.<sup>8</sup> At the forefront of attention we commonly find the particular two tier system in German corporate governance of supervisory and director board,<sup>9</sup> the role of banks and the underdeveloped capital market in comparison, for example, with the US.<sup>10</sup>

# The Privatization of Corporate Law?

## Corporate Governance Codes and Commercial Self-Regulation Peer Zumbansen\*

### Law Making By Private Groups?

"Ein reizvoller Gedanke oder eine Katastrophe?"<sup>11</sup>

"Bei der Frage nach dem ‚wer‘ besteht Einigkeit: jedenfalls nicht der Gesetzgeber."<sup>12</sup>

"I don't believe in Congress making accounting rules."<sup>13</sup>

The German governmental commission 'corporate governance code', which took up its work in 2001, followed suit to a first commission which had been convened the previous year with the task of outlining a list of amendments to the governing German stock corporation law and of preparing what would later form the core of the recently adopted *Transparency and Disclosure Act*.<sup>14</sup> This was deemed necessary against the background of widespread critique of German companies' systems of corporate governance and a number

\* Thanks to Andreas Maurer, Sung-Kee Kim, Alexander Somek and Rajan Subberwal for helpful comments. Remaining errors are mine alone.

1 See, for the legislative history, <http://dip.bundestag.de/extrakt/14/019/14019892.htm> (last visited 18 July 2002).

2 See, Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz – abbr. TraPuG) [*Transparency and Disclosure Act*], adopted by the German Bundestag on May 17, 2002. The draft bill had been presented on November 26, 2001, the Government had agreed on the bill on February 6, 2002, See <http://content.bfinance.de/BFinance/de/BFCContent.nsf/TopicDocuments2/A477?OpenDocument> (26 June 2002); see also the documentation in *Neue Zeitschrift für Gesellschaftsrecht (NZG)*, 2002, pp. 78–81.

3 See the relevant information on the Commission at: <http://www.corporate-governance-code.de/index-e.html> (last visited 23 July 2002).

4 See press release at: <http://www.corporate-governance-code.de/eng/news/presse-20020226.html> (last visited 23 July 2002).

5 See "Aufsichtsräte bekommen mehr Macht über die Vorstände", *Frankfurter Allgemeine Zeitung*, No. 142 (2002), 22 June, p. 12.

6 See, e. g., for the current endeavours on the European level, Armstrong, in: Mountain or Molehill?, 99 ff.: "The normative case for a more autonomised transnational civil society [...] lies in the inclusion of a new constituency of voices, interests and expertise within elite transnational governance."; Armstrong, *Rediscovering Civil Society*, 105, qualifies the reaching out to civil society to be more than just a cure of an unsatisfactory supranational parliamentary system, but as reflecting the EU's development of 'new forms of governance'; cf. the other contributions in 8 *ELJ* No. 1 (March 2002); with particular emphasis on administrative law, see also Harlow, *European Administrative Law*, 216 ff., placing the analysis of contemporary admin. law against the background of 'a global context' and a definite tilt from the interventionist to the regulatory state.

7 See, hereto, the contributions in Feddersen/Hommel-hoff/Schneider (Hrsg.), *Corporate Governance*; Hopt/Wymeersch (eds.), *Comparative Corporate Governance*; Baums, *Bericht der Regierungskommission, Introduction*; see, for a list of worrying items in German corporate governance, e.g., Lutter, *Kontrolle der gesellschaftsrechtlichen Organe*, 85.

8 See, Hansmann/Kraakman, *End of History*; crit-

ically Branson, *Uncertain Prospect*; Jacoby, *Corporate Governance in Comparative Perspective*; see, for an instructive comparison, Kaplan, *Corporate Governance und Unternehmenserfolg*, 301 ff.; Vitols, *Varieties of Corporate Governance*, 337 ff.

9 See, e. g., Hopt, *Corporate Governance und deutsche Universalbanken*, 3, underlining the far reaching nexus with the disputed system of co-determination; see also Hopt, *Two Tier Board*, 10, 17 ff.; Mülberr, *Bank Equity Holdings*, 362, 364 ff., discussing the claim that the supervisory board had traditionally been weakened in order to refrain employees' influence within the firm.

10 See, e. g., Hopt, *Corporate Governance und deutsche Universalbanken*, 246, rejecting the commonly made claim of strongest, intimate ties between German firms and their "Hausbanken"; see also Baums, *Corporate Governance in Germany*, 31 ff.; Mülberr, *Bank Equity Holdings*, 447 ff.

11 Havermann, *Private Regelung*, 700. (An intriguing idea or a catastrophe?)

12 Lutter, *Kontrolle der gesellschaftsrechtlichen Organe*, 85.

13 Buffett, *Corporate Ethics*, 7.

14 *Supra* note 2.

of corporate insolvencies after serious misinformations of the companies' supervisory boards by the board of directors. The critique focused on the law's alleged insufficiencies with regard to investor shareholder interest protection, which was said to be among the main reasons for German firm's difficulties to attract equity on foreign capital markets. This first commission, which had been chaired by Law Professor Theodor Baums, delivered its comprehensive report on July 10, 2001,<sup>15</sup> in which it took issue with a series of questions which have been on the mind of many of today's academics and politicians in the field of company law.<sup>16</sup> According to the government's assignment, the commission was asked to draw conclusions from the specific shortcomings of German stock corporation law with regard to management control by shareholders, as had already become strikingly obvious in the much disputed Holz Müller decision of the German Federal Court of Justice.<sup>17</sup> Another venue for the commission was to sketch the necessary path to reform in light of internationalized and globalized capital markets and ensuing repercussions on national systems of corporate governance, the informational politics between the board of directors and the supervisory board as well as the introduction of modern IT means within corporate governance.<sup>18</sup>

The work of both commissions, that of 2000/01, chaired by Mr Baums, and that of 2001/02, chaired by Mr Cromme, is of interest not only because it outlines significant reform perspectives and proposals leading to concrete legislative proposals.<sup>19</sup> Moreover, the commissions' activities mark significant examples of integrating scientific expertise into law making procedures.<sup>20</sup> It comes as no surprise, that this has spurred applause as well as critique.<sup>21</sup> While some have ex-

pressed their support of this form of installing a forum in order to solicit dispersed and urgently needed information, feeding into concrete law making proposals for the Federal legislature,<sup>22</sup> others have pointed to various drawbacks of this particular form of law making.<sup>23</sup> One of the main critiques concerns the alleged 'exclusion' of the parliament from the actual process of conceptualizing and preparing of the legislative proposal.<sup>24</sup> In this respect, it has been alleged that the soliciting of experts into the open parliamentary arena would make the law's genesis more transparent and, ultimately, render it more legitimate.<sup>25</sup> Another critical issue concerns the fundamental question whether or not a private body of experts is or should in fact be entitled and authorized to draw up binding law.<sup>26</sup>

As to the first strand of critique, it can easily be maintained that different forms of soliciting information by experts in order to prepare (legislative) processes of law making are not at all anything new or unheard of.<sup>27</sup> Quite to the contrary, the inclusion of private expertise into law making processes is not only common practice but, arguably, unavoidable in view of an ever proliferating and further dispersing body of societal, private knowledge<sup>28</sup> of which the state has always been dependent. This holds true even if this state is no longer neither the 19<sup>th</sup> Century interventionist state reserving the right to govern and shape the market nor the 20<sup>th</sup> Century, modern Welfare State as broker and mediator of societal conflicts and interests through different patterns of juridification.<sup>29</sup> The post-modern, 'supervisory' state, as contemporary public governance is sometimes coined in political science<sup>30</sup>, can fulfil its function only to the degree that both its information-intake procedures and regulatory in-

**15** See Baums, Interview: Reforming German Corporate Governance; see the report at: Baums, Bericht der Regierungskommission.

**16** Commentators have observed the commission's work as having laid no less than the foundation to an encompassing modernization of German company law, See: <http://content.bfinance.de/bfinance/de/BFContent.nsf/TopicDocuments2/A471?OpenDocument> (26 June 2002).

**17** See BGHZ 83, p. 123 (Decision of February 25, 1982), also published in *Neue Juristische Wochenschrift* (NJW) 1982, p. 1702; see, hereto Rosengarten, in: *Liber Amicorum Buxbaum*, 445; see also Spindler, *Deregulierung des Aktienrechts?*, 56, placing the judgement in the context of significant case law related to redrawing competence and control lines within the corporation.

**18** See Baums, Bericht der Regierungskommission, sub A, quoting a letter from Chancellor Gerhard Schröder to the Commission's Chairman, pointing out that it is in the government's interest to explore possible improvements of German stock corporation law with regard to the competitiveness of German firms and to the increased integration of information technology within the firm's governance structures; hereto, see already Noack, *Neuerungen im Recht der Hauptversammlung*, 620 ff.

**19** See, *supra* note 2.

**20** For a discussion of the procedure and quality of this know-how integration, see Baums, *Interview: Reforming German Corporate Governance*.

**21** See, e. g., Noack, *Neuerungen im Recht der Hauptversammlung*, 620, calling the Code drafted by the Cromme-Commission, 'a peculiar set of rules' ("ein Regelwerk von eigenartiger Gestalt"); Peltzer, *Handlungsbedarf in Sachen Corporate Governance*, 593, highlights the fact that the the

Code has been drafted without a legislative authorization nor democratic legitimization; see, even more polemically, P. Kirchhof, *Demokratie ohne parlamentarische Gesetzgebung?*

**22** See, e. g., Baums, Interview: Reforming German Corporate Governance.

**23** See, e. g., Wolf, *Corporate Governance*, 59, 60; in the same vein P. Kirchhof, *Demokratie ohne parlamentarische Gesetzgebung?*, 1332, 1333, critically observing a 'deparlamentarization' (*Entparlamentarisierung*) both with regard to the EU's (i. e. the Council's) appropriation of law making sectors formerly reserved by the Member States and the executive's practice on the national level of seeking consensus with market players before pushing this consensus through the parliament; see already *idem.*, *ZGR* 2000, 609; for a thorough discussion of private law making, See F. Kirchhof, *Private Rechtsetzung*; in the U.S. American context, the canonical text is Jaffe, *Law Making by Private Groups*, 1 ff.; See now Freeman, Symposium: The Contracting State; *idem.*, *The Private Role in Public Government*.

**24** See, Wolf, *Corporate Governance*, P. Kirchhof, *Demokratie ohne parlamentarische Gesetzgebung?*, *supra* note 23.

**25** *Id.*

**26** *Id.*

**27** See, e. g., the examples given by Schmidt-Pruß, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, and also the reflections by Di Fabio, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*; cf. Ladeur, *Regulierung von Selbstregulierung*, 63: "Der Staatsapparat büßt seine Rolle in der Mediation und Aggregation des allgemeinen Handlungswissens und eines allge-

meinen Regelbestandes ein und wird selbst zum Manager fragmentierter begrenzter Interventionen auf der Grundlage spezialisierter Wissens."

**28** See, again, Ladeur, *Negative Freiheitsrechte*, esp. 13, 19–20; Ladeur, *Theory of Autopoiesis*, 31–33; Ladeur, *Regulierung von Selbstregulierung*, 63, arguing that 'specialized bodies of knowledge' (*spezialisierte Wissensbestände*) can only with great difficulty be traced back to commonly shared expectations and shared knowledge; see Hommelhoff/Schwab, *Staats-ersetzende Privatgremien*, 694, suggesting that, e. g. in the allegedly fast-evolving field of accounting standards but also in many other areas of corporate or commercial law policy, neither the parliament nor the executive were capable to provide for the necessary expert knowledge, see also, *id.* at 700; in the same vein: Havermann, *Private Regelsezung*, 698, with regard to innovative forms of product design and distribution as well as new financial instruments.

**29** See, the overview and reflection by Calliess, *Prozedurales Recht*, 55 ff.; Teubner, *Juridification*, 4: "[...] juridification describes a reality which is not merely a problem of jurists, nor a national phenomenon. *Verrechtlichung* does not only spring from the well-known Teutonic tendency towards overregulation, so the discussion of the problem is not confined to German jurisprudence. Although national divergences exist [...], the phenomenon is universal, and the debate international and interdisciplinary."

**30** See, e. g., Willke, *Supervision des Staates; Bogdandy, Sittlicher Interventions- oder vermittelnder Supervisionsstaat?*; cf. Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat*, 43 ff.; 286–294; see also Calliess, *Prozedurales Recht*, 55–60, for a discussion of different connotations of contemporary 'statehood' (*Staatlichkeit*).

struments are suited to a fast evolving, heterarchical societal production of norms and knowledge.<sup>31</sup> The emerging and changing forms of ‚informal‘ and ‚procedural‘ political conflict resolution and public-private governance reshape the face not only of today’s nation states<sup>32</sup> but, clearly, also that of international politics.<sup>33</sup>

### Parliament’s Prerogative

Yet, there is some discussion as to whether the soliciting of expert opinions from a group of experts engaging in serious research and analysis in order to undertake a requested analysis differs fundamentally from what has since long been practiced in contemporary parliamentary life: the invitation of experts to parliamentary hearings and interrogations.<sup>34</sup> This does indeed lead to a whole array of questions pertaining to the issue of inducing expert knowledge into both parliamentary and bureaucratic law and decision making processes.<sup>35</sup> Yet, in idealizing rational debate and open deliberation on the parliamentary floor<sup>36</sup>, one runs the danger of overburdening parliamentary democracy, which has always been characterized by the structured chaos of public debate, the biasedness of prepared and party-line guided speeches as well as by the cleavage between a handful of experts on the one hand and a majority of laymen with regard to specific topics on the other.<sup>37</sup> Only where such exclusive emphasis is laid upon parliament-based forms of law making, can the fact that government commissions work ‚outside‘ the parliament easily provide the negative image of ‚behind closed doors‘ politics.<sup>38</sup> While this does not have to mean to pick up an older and, yet, enlightened – even if singularly ill-natured *Schmittian* – critique of parliamentary democracy, in which the correct observation pertained to the ineffectiveness of the parliamentary body to engage in productive deliberation

– thereby not being able to confront the ‚arcanic‘ practice of lobbying, haggling and consensus-seeking which took place behind executive doors<sup>39</sup> – the skepticism towards commissions is justified where it points to the parliament’s exclusion from its own soliciting and hearing of experts. Indeed, there is a difference between convening a commission of experts and later presenting their findings to the parliamentary assembly and the invitation and open hearing before the congress assembly.<sup>40</sup>

The task at this point then is to merge the perspectives. The rightist critique of parliamentarism in the name of a virtual, even utopian world of unimpaired and rational parliamentary discussions à la Schmitt,<sup>41</sup> did a lot of damage to the conceptualizing of parliamentary rule as such, but also helped to see parliamentary rule in its separation-of-powers context. In particular, this critique and its further elaborations, also from the political left<sup>42</sup>, can productively be taken as an occasion to take a closer look at contemporary administrative law making processes, where a substantial sharing of law making power with private actors is – rightly and readily being seen as normal.<sup>43</sup>

### Private Ordering v. Public Ordering

The second critique mounted against ‚private‘ law making bodies such as the two recent government commissions on corporate governance is harder to refute. The core issue appears to be whether or not privately enacted norms may be given binding effect vis-à-vis third parties to the norm generation. While an intuitive answer would suggest a clear „no“, the matter at stake here does indeed escape such a straightforward assessment. While it is a common place in private law that contractual obligations concern foremost and only the contracting parties<sup>44</sup>, we have been witnessing a decisive

31 See, e.g., Ladeur, *Regulierung von Selbstregulierung, passim*; with regard to supranational law making: Scott/Trubek, *Mind the Gap*, 3.

32 See, Hommelhoff/Schwab, *Staats-ersetzende Privatgremien*, 698: „Die Einbindung privater Gremien scheint gegenwärtig nicht mehr nur punktuell-vereinzelt, sondern generell zum Mittel moderner Rechtssetzungstechnik heranzuwachsen.“

33 See, e. g., Zürn, *Sovereignty in a Denationalised World*, 39 ff.; Knill/Lehmkuhl, *Private Actors and the State*, 41 ff. See, also the EU Commission’s communication of 13 June 2000, regarding standard setting in the field of corporate accounting, where the Commission explicitly plans to nominate „highly qualified experts“ for a comparative review of IAS (international accounting standards) and the EU’s own directives on accounting, [http://europa.eu.int/comm/internal\\_market/en/company/account/news/com359en.pdf](http://europa.eu.int/comm/internal_market/en/company/account/news/com359en.pdf), at p. 8 No. 22 (19 July 2002).

34 P. Kirchhof, *Demokratie ohne parlamentarische Gesetzgebung?*, 1332 f. strongly contrasts expert commissions and pre-legislative bargaining between the government and market players and expert hearing before the parliamentary assembly.

35 This is certainly not a mere national issue: see, for example, for the case of the EU, Vos, *EU Committees*, 40–1, discussing the participation of ‚civil society‘; see also Shapiro, *Administrative Law Unbound*, 369 ff., discussing administrative law’s contribution to global cooperation and networks; see also Armstrong, in: *Mountain or Molehill?*, with particular reference to the EU’s experientia-

tion with ‚new forms of governance‘ in connection with the Commission’s „White Paper on Governance“.

36 P. Kirchhof, *Gesetzgebung und private Regelung*, 681: „Das parlamentarische Verfahren der öffentlichen Diskussion verbürgt das staatlich erreichbare Maß an Vernünftigkeit und Gemeinwohlverbindlichkeit des Gesetzesinhalts.“

37 See, Peltzer, *Corporate Governance Codices*, 12 f., for an instructive analogy to the impossibility of rational deliberations within a supervisory board of 20 members, providing the ground for the insertion of new members by other ways of decision making.

38 see P. Kirchhof, *Demokratie ohne parlamentarische Gesetzgebung?*, 1333, speaking of ‚secretive governmental conversations‘ (*verschwiegene Regierungsgespräche*); this notion is picked up by Hommelhoff/Schwab, *Staats-ersetzende Privatgremien*, at 707.

39 See the *locus classicus*, Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (1926), 7. Aufl., Berlin 1993.

40 See, P. Kirchhof, *Gesetzgebung und private Regelung*, 689: „Das Parlament ist sachverständig kraft Wahl, spezialisiert sich in den jeweiligen Ausschüssen, bedient sich im übrigen in Anhörungen des in Staat und Gesellschaft verfügbaren Sachverständigen. [...] Das Demokratieprinzip baut darauf, dass der Sachverständige seinen Sachverstand weitergeben kann, das Parlament für sachverständigen Rat zugänglich ist.“

41 We may also mention one of Carl Schmitt’s most influential disciple, Ernst Forsthoff: see, for

more details, Forsthoff, *Der Staat der Industriegesellschaft*; Staff, *Die Wahrung staatlicher Ordnung*. See also Ossenbühl, *Not des Gesetzgebers*, 7–9, with explicit references to Forsthoff’s diagnosis of the pressure resulting from technological progress on parliamentary law making.

42 See, hereto, Neumann, *Verfassungstheorien politischer Antipoden*.

43 Aman, *Administrative Law for a New Century*, 90 ff.; Schmidt-Preuß, *Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*; see also Günther, *Wandel der Staatsaufgaben*, 51 ff.; Freeman, *Private Role in Public Governance*, 592 f.; Shapiro, *Administrative Law Unbound*, 369: „Today, elected and nonelected government officers, nongovernmental organizations, political parties, interest groups, policy entrepreneurs, ‚epistemic communities‘, and ‚networks‘ are all relevant actors in the decision-making processes that produce government action.“

44 See, e. g., Collins, *Regulating Contracts*, 23; Bäuerle, *Vertragsfreiheit und Grundgesetz*, 65, describing the different ordering function of private (contract) law and public (administrative) law; see also Hunt, *Constitutionalism and Contractualisation*, 38, recognizing both the need and the emergence of a ‚modern conception of constitutionalism‘, which reaches beyond a strictly parliamentary vision of law making; see also Peltzer, *Corporate Governance Codices*, 11. For a greater picture, see now Walker, *Constitutional Pluralism*.

evolutionary development in the public (constitutional) governance of private contract law to recognize the social role played by private transactions.<sup>45</sup> Indeed, it is not unknown to private law litigation, that contracts between two (or more) parties often unfold effects upon third parties to the contractual agreement.<sup>46</sup>

This connection between contractual 'private ordering' and the norm setting by commissions might, however, be misleading. First of all, it is not entirely clear, whether or not the commissions are in fact 'private' by nature. This can be doubted at least in those cases where government officials are participating in the commission's work, such as was the case in the first commission of 2000–01.<sup>47</sup> While the second commission, whose task it was to draw up a Code of Best Practice, a.k.a. *Corporate Governance Code*<sup>48</sup>, was made up only of private actors, i. e. representatives of large firms or academic institutions, the commission's personnel might also not entirely provide the answer to the question as to whether any of these commissions is furnished with the proper competence to enact binding law. More important, then, is the nature of the commission's empanelling. Where the commission is convened upon the initiative and request by the government, there is indeed considerable reason to qualify it to be more 'public' in nature than if it were upon the initiative of a commercial actor, such as a bank or another private interest group.<sup>49</sup>

#### When do Corporate Governance Codes become Law?

The question at this point must be: did these commissions, after all, enact binding law? It is true that the right to initiate legislative proposals lies with the government and with the *Bundestag* and the *Bundesrat*.<sup>50</sup> This is also the starting observation of those critics that characterize pre-legislative consensus seeking between government and societal interest groups or the work of the mentioned government commis-

sions as examples of an on-going and proliferating 'deparliamentarization'.<sup>51</sup> Yet, in view of the work actually presented by the commissions, in July of 2001 and, then, in February 2002, it can be well disputed if any binding law had in fact been adopted by these commissions. The proposals of the first commission were much more than just an encompassing survey of current company law, drawn up against the background of increasing pressure to react to international capital markets' demands.<sup>52</sup> While very concrete proposals for changes to be enacted through normal legislative procedures were included in the (first) commission's report<sup>53</sup>, the commission itself did *not* formulate norms.<sup>54</sup> The line here between the commission's report and the recommendations made in it and what the parliament later adopted in form of the *Transparency and Disclosure Act*<sup>55</sup>, amending the Stock corporation law<sup>56</sup>, albeit thin, must be kept in mind.

It might be different again with the Code presented by the second German Corporate Governance Code commission, a task which was foreseen and, to a substantial degree, already prepared by the work of the Baums commission.<sup>57</sup> The Cromme commission drew up a corporate governance code, the dispositions of which clearly and admittedly build upon the coming into being of the *Transparency and Disclosure Act*. While the code is to remain voluntary in nature, its compliance is to be made a matter of – obligatory – public declaration by the management, according to newly enacted provisions in German stock corporation law.<sup>58</sup> This then marks a significant difference to other private, but also international codes drawn up either by banks and other commercial interest groups or, as in the case of the OECD, by expert representatives from selected states and from the European Commission.<sup>59</sup> What we can observe here, in fact, is that the procedural setting discussed under the first critique is closely linked to the question whether or not the commissions set binding law. It is true, when looking at the members of the re-

<sup>45</sup> See, hereto, Hunt, Constitutionalism and Contractualisation; Collins, Regulating Contracts, 46 ff.; Bäuerle, Vertragsfreiheit und Grundgesetz, 121, 123 ff.; Hart, Einleitung vor §§ 116 ff.; Hart, Zur konzeptionellen Entwicklung des Vertragsrechts, 66 ff.; see now Hestermeyer, Report on the BGH's Jurisprudence in Private Law, forthcoming in: THE ANNUAL OF GERMAN & EUROPEAN LAW (Miller/Zumbansen eds.), Berghahn Books, Spring 2003, Section C II.

<sup>46</sup> See, e. g., the jurisprudence of the *Bundesgerichtshof* (BGH – Federal Court of Justice) concerning third party effects of expert testimony contracts: BGH, JZ 2000, p. 725; earlier BGH, in: Neue Juristische Wochenschrift (NJW) 1979, p. 1595; BGH, in NJW 1982, p. 2431, and BGH, in NJW 1984, p. 355; BGHZ 127, 378; BGHZ 138, 157; See also BGHZ 133, 168; for a discussion of this jurisprudence, see *Markesinis/Unberath, German Law of Torts*, pp. 265–288; cf. Canaris, ZHR 163 (1999), 206; Gounalakis, NJW 1998, 3593; Zumbansen, Drittschützende Wirkung eines Anwaltvertrages, 442 ff.; see already Kessler, Die soziale Funktion des Vertrages zugunsten Dritter, 81 ff.

<sup>47</sup> See, Report of the (First) Government Commission Corporate Governance, chaired by Professor Theodor Baums, section B, available at: [http://www.ovs.de/corporate\\_governance.htm#bericht](http://www.ovs.de/corporate_governance.htm#bericht).

<sup>48</sup> See, Wolf, Corporate Governance, p. 59 note 3; see the list of members of the (Second) Government Commission Corporate Governance, chaired by Dr. Gerhard Cromme, available at: <http://www.corporate-governance-code.de/eng/>

[http://www.corporate-governance-code.de/eng/download/CorGov\\_Endfassung\\_E.pdf](http://www.corporate-governance-code.de/eng/download/CorGov_Endfassung_E.pdf) (27 June 2002).

<sup>49</sup> Latter examples include the code commissions for the Deutsche Bank, the 'Berliner Initiativkreis' and the 'Frankfurt Commission', all mentioned in Peltzer, Corporate Governance Codices, at 11.

<sup>50</sup> See, Art. 76 para. 2 *Grundgesetz* (German Basic Law), available at: [http://www.uni-wuerzburg.de/law/gm00000\\_.html](http://www.uni-wuerzburg.de/law/gm00000_.html) (27 June 2002).

<sup>51</sup> See, Wolf, Corporate Governance, and P. Kirchhof, Demokratie ohne parlamentarische Gesetzgebung?, *supra* note 23; P. Kirchhof, Gesetzgebung und private Regelsetzung, 690.

<sup>52</sup> See, Peltzer, Handlungsbedarf in Sachen Corporate Governance, 593; Seibert, TraPuG, 608.

<sup>53</sup> See, in particular, Chapters 2 and 3 of the Report's English language Summary, available at: [http://www.ovs.de/ovs\\_homepage/pdf/zusammenfassung\\_english.pdf](http://www.ovs.de/ovs_homepage/pdf/zusammenfassung_english.pdf) (27 June 2002).

<sup>54</sup> For Schulze-Osterloh, Gesellschaftsrecht und Globalisierung, 1436, it goes without saying that these norms are not 'law', which leads him to find the term 'soft law' as used by Marcus Lutter (in: ZGR 2001, 225) *misleading*.

<sup>55</sup> *Supra* notes 2 and 3.

<sup>56</sup> See, *supra* note 2.

<sup>57</sup> This is acknowledged by both the Federal Justice Minister, Mrs Däubler-Gmelin, and the commission's Chairman, Mr Gerhard Cromme in their statement before the press on the occasion of the the publication of the commission's report:

See <http://www.corporate-governance-code.de/eng/news/presse-20020226.html> (27 June 2002).

<sup>58</sup> See, Section 16 of the Act, inserting a new § 161 into the Stock Corporation Act (AktG). Accordingly, the Supervisory Board and the Board of Directors are obliged to issue, once a year, a declaration explaining whether or not they follow the guidelines of the Commission's recommendations.

<sup>59</sup> See the OECD Principles of Corporate Governance (1999), available at: <http://www.oecd.org/pdf/M00008000/M00008299.pdf> (visited 3 July 2002); Code of Best Practice, developed by Deutsche Grundsatzkommission Corporate Governance (2000), consisting of legal academics and practitioners, among them Theodor Baums, the later Chair of the first government commission. The Code is available at: <http://www.worldbank.org/html/fpd/privatesector/cg/docs/germany%20code%20g.pdf> (3 July 2002); German Corporate Governance Code, developed by the Berliner Initiativkreis, consisting of German managers and focusing on the particular management side of corporate governance, available at: [http://www.gccg.de/codex\\_eng.htm](http://www.gccg.de/codex_eng.htm) (3 July 2002). There have also been codes developed by commercial institutes themselves: see, e.g., the Corporate Governance Codes, developed by the Deutsche Bank, dating from March 2001, available at: [http://ircontent.db.com/ir/data/corpgovernance\\_en.pdf](http://ircontent.db.com/ir/data/corpgovernance_en.pdf) (3 July 2002); cf. Pfitzer/Oser/Orth, Reform des Aktienrechts, 157 f.

spective commissions, that surely where they have been convened upon a government's initiative but, also where well reputed experts have convened on their own, in both cases their work has proven to be of a law preparatory quality.

The boundaries between expert opinion and binding law then is admittedly thin, particularly in a case such as that of the Cromme commission, where the drafted code sets out a duty for companies to annually issue an explanation as to whether or not they comply with the code's provision. This *'comply or explain'* principle loses its genuinely voluntary character in the moment where the legislature actually introduces this duty into codified law.<sup>60</sup> Yet, at the same time, the code itself is not *'law'* in the sense of being a set of – directly – enforceable norms.<sup>61</sup> Its significant character, and with that, its practical relevance, on the other hand, is to be seen in its effect on the actual *behavior* of firms. Whether or not firms do comply with the code's dispositions relating, e. g., to transparency and disclosure of executive compensation<sup>62</sup>, the publication of the firm's reports on the internet<sup>63</sup>, or the facilitating of personal exercise of shareholders' voting rights<sup>64</sup> will, according to the rules established by the Code, remain within the discretion of the company.<sup>65</sup> The Code explicitly foresees that companies do not have to comply with *'recommendations'*. And yet they are *obliged* – this was rightly anticipated to be stipulated in the *Transparency and Disclosure Act* – to issue an annual explanation whether or not they did comply.<sup>66</sup>

This is not without further difficulties, however. Intentionally, the code's distinction between *information*, *recommendations* and *suggestions* runs as follows: whereas certain provisions of the Code remain not binding and can, as regards to the anticipated *'shaming'* effect which non-compliance will induce, aptly be called *'soft law'*, the information-

sections, often substantial parts of a Code, spell out what has been the governing law all along – the *'hard law'*, that is.<sup>67</sup> The *'suggestions'*, finally, are not supposed to have any binding character, whatsoever. The commission clearly underlined that the code is to be continuously subjected to adaptation and change. In its *voluntary* nature, i. e. as regards recommendations and suggestions, it is to be recognized by the accompanying law, but shall not be included in its coercive, i. e. enforceable range. Yet, as regards Section 161 AktG, this obligation – in governing law – might attain a highly difficult quality when the annual declaration is not or falsely issued.<sup>68</sup> According to Section 243 para. 1 AktG, the general assembly's resolution to approve of the management's actions, can be rescinded in the case of breach of the law. The latter would, theoretically, be the case if the declaration were not issued. Of comparable trickyness is the case in which the issued declaration is false. The law's silence as to the respective correctiveness of the declaration's content can hardly be understood as a voucher for an untrue declaration.<sup>69</sup> Yet, considering that Section 161 AktG obliges the management to issue a declaration, it clearly follows that both the failure to do so as well as an untrue declaration constitutes a breach of duty on the side of management.<sup>70</sup>

More problems arise as to the content of the *'explanation'* which is due in the case that the recommendations were not followed.<sup>71</sup> In this respect, the appropriate step must be to draw on experiences made in foreign company law regimes where codes and the problem of compliance have a relatively longer history.<sup>72</sup> Already a superficial glance reveals a firm awareness of the code commissions as to the drawbacks connected with companies that merely *'boxtick'* their compliance as opposed to actively engaging in making the *circumstances* of their compliance/non-compliance trans-

60 See, *supra* note 58. The quality and assessment of this obligatory annual *'explanation'* must certainly be disputed, see, e.g., Peltzer, *Handlungsbedarf in Sachen Corporate Governance*, 594; regrettably, the just published, leading commentary on German stock corporation law, by Uwe Hüffer, remains silent on this new codification, see Hüffer, *Aktiengesetz*, § 161 AktG.

61 Lutter, *Kontrolle der gesellschaftsrechtlichen Organe*, 86, with regard to informations and suggestions.

62 Very critically hereto Wolf, *Corporate Governance*, *supra* note 23, at 60.

63 See, e.g., Section 2.3.1 of the Cromme's commission's German Corporate Governance Code.

64 *Supra* note 63, Section 2.3.3.

65 *Supra* note 63, Section 1: Foreword, differentiating between voluntary recommendations (*'shall'*), suggestions (*'should'*, *'can'*), and legally compelling provisions, according to existing law.

66 See, Section 16 *Transparency and Disclosure Act*.

67 Notably, this can so far as to actually include a provision in the code, that the management is not to break the law; see, hereto Schulze-Osterloh, *Gesellschaftsrecht und Globalisierung*, 1435 f., citing the *'Berlin'* Corporate Governance Code, *supra* note 49, Sections III.1.1.2., IV. 1.1.1. As regards the Government Commission's proposals, the informations to be included in the Code are designed to illustrate the particularities of the German system to the foreign reader/investor, see, Baums, *Bericht der Regierungskommission*; see also Ulmer, *Der deutsche Corporate Governance Kodex*, 153; Lutter, *Kontrolle der gesellschaftsrechtlichen*

*Organe*, 86, and Berg/Stöcker, *Anwendungs- und Haftungsfragen*, 1570, highlight the informative value of the code with regard to the dispersed corporate law in various codifications and statutes, in particular for the foreign investor.

68 See, hereto Ulmer, *Der deutsche Corporate Governance Kodex*, 165; Berg/Stöcker, *Anwendungs- und Haftungsfragen*, 1571 f., recognize an evident threat of capital market sanctioning if management fails to give explanations for non-compliance. The argument itself, however, is threatened with becoming circular, as the authors refute the capital market's sanctioning with the management providing for an explanation (in case of non-compliance), in which case the code's recommendations would not amount to a factual coercion and additional regulation (of an already over regulated, German corporate law) but, rather, the future substitution of mandatory law by recommendations. Yet, the authors fail to provide any grounds for how the assessment of a *'reasonable'* (*'nachvollziehbare'*) justification for non-compliance is to be made. Surely, there is no forum where to engage in concrete evaluations and assessments of a particular company's *comply-or-explain* behavior. Furthermore, when the judge is asked to assess an eventual breach of duty by management (*id.*, at 1577), she cannot rely on the code's recommendations and suggestions for a minimum standard: instead, a *'well substantiated'* (*'gut begründete'*) derogation from the code is not seen as bad corporate governance. The question remains: who is to say whether or not the reasons given are *'good'*?; see also Ehrhardt/Nowak,

*Durchsetzung von Corporate-Governance-Regeln*, 337, 344 f., arguing for an efficient system of enforcement of privately enacted corporate governance codes in order to safeguard minority shareholders' protection.

69 Ulmer, *Der deutsche Corporate Governance Kodex*, 165, with further discussion of potential liabilities incurred by management bodies, both in civil and in tort law, *id.* at 168 f.

70 Berg/Stöcker, *Anwendungs- und Haftungsfragen*, 1577.

71 See, Ulmer, *Der deutsche Corporate Governance Kodex*, 171 f., suggesting that, notwithstanding the law's lenience in this regard, management will be prompted by public pressure to provide for an explanation; Berg/Stöcker, *Anwendungs- und Haftungsfragen*, 1573, recognize – in seeming contradiction to a prior assessment, *id.*, at 1572, where a factual coercion was denied – a *de facto* obligation for management to give reasons for non-compliance with the code. This factual obligation is seen by the authors to be the true aim of the code, *id.*, at 1573.

72 In this vein: Lutter, *Kontrolle der gesellschaftsrechtlichen Organe*, 86, arguing that Germany is without any relevant experience in this matter; see, for the case of the UK, the Hampel report, Sections 1.12–1.15, drawing on the work of both the priorly convened Cadbury and Greenbury Committees, which were, too, charged with conceptualizing rules for corporate governance. The reports are all available at: [http://www.ecgi.org/codes/menu\\_europe.htm](http://www.ecgi.org/codes/menu_europe.htm) (last visited 18 July 2002).

parent. A comparative perspective, then, will remain valuable and, in fact, indispensable with regard to interpreting the Cromme-code where it obliges the corporate bodies to explain (“erläutern”) “possible deviations from the recommendations” of the code.<sup>73</sup>

The different layers of norms which can be found in the code, the recommendations as well as the reformulations of otherwise codified law, show that this form of norm setting cannot be detached from its socio-legal environment. A code commission will not only refrain from attempting a general overhaul of the corporate system because it was empanelled by the government. More importantly, a complete overhaul is not likely to be undertaken in light of traditionally grown and long established systems of corporate organization. In that respect, commissions might be seen as having reforms as their subject, not revolutions.<sup>74</sup>

### Soft Law, Hard Law, Reflexive Law

It is against this background that law making – on the national and international level – tends to transcend the black-and-white boundaries of law and *not-law*.<sup>75</sup> While *soft law* – as might be the most appropriate term used in order to qualify the recommendations and suggestions in the code<sup>76</sup> – can be used deliberately in order to provide for a procedure of constant revision and update, its counterpart, *hard law*, refers to a set of norms from which the rest is being distinguished but to which it optimally will lean. The tension between the policy aims pursued by legal intervention and the difficulties arising with their implementation characterize the modern state’s learning experiences in steering clear of flooding civil society with regulatory law, while safeguarding a constitutionally desired level of legal and social protection.<sup>77</sup> Only the increasing awareness of the shortcomings of regulatory law as to the concrete circumstances and its addressees has led to a growing sensibilisation for the intrinsic value of contextually framed societal practices and customs<sup>78</sup>, while regulatory law’s claim to govern complex situations has steadily been opened for the constant pressures of revision and adaptation.

**73** See, Section 3.10 of the German Corporate Governance Code, English version available at: [http://www.corporate-governance-code.de/eng/download/CorGov\\_Endfassung\\_E.pdf](http://www.corporate-governance-code.de/eng/download/CorGov_Endfassung_E.pdf) (last visited 18 July 2002); the German version, *id.*, and in: Die Aktiengesellschaft 2002, 236, at 237; for a literary interpretation, see Peltzer, *Handlungsbedarf in Sachen Corporate Governance*, 595; see, the respective section of the FSA’s (Financial Services Authority) Listing Rules, § 12.43A, available at: <http://www.fsa.gov.uk/pubs/ukla/chapt12-3.pdf> (13 August 2002); Berg/Stöcker, *Anwendungs- und Haftungsfragen*, 1570, point to the threat of delisting which a listed company faces when failing to issue this declaration.

**74** Compare only the *introductory* assessments of the German corporate governance system in the Cromme commission’s Code, *supra* note 63 Section 1: “The dual board system, also established in other continental European countries, and the internationally widespread system of management by a single management body (Board of Directors) converge in practice to the intensive interaction of the Management Board and the Supervisory Board. *Both systems are equally successful.*” (My emphasis, P. Z.) This positive assessment, how-

ever, is cast into doubt by other, foreign observers: see, Ulmer, *Der deutsche Corporate Governance Kodex*, 180 f., citing Paul Davies, ZGR 2001, 268 ff.

**75** See, hereto, the contributions by Neyer and Gessner in: Gessner/Budak (eds.), *Emerging Legal Certainty*.

**76** Even if this does not ‘answer all questions as to its legal force’, see, Ulmer, *Der deutsche Corporate Governance Kodex*, 161.

**77** See, e. g., Teubner, *Juridification*, 6–19.

**78** Hereto, see, Teubner, *Reflexives Recht*; Teubner/Willke, *Kontext und Autonomie*.

**79** See, the contributions in: Joerges/Mény/Weiler eds., *Mountain or Molehill?*; see also the contributions in 8 *European Law Journal*, No. 1 (March 2002).

**80** See, Armstrong, *Rediscovering Civil Society*, *supra* note 35 with further references.

**81** Ashiagbor, *Soft Harmonisation*, 226 f.

**82** The OMC, originally modelled on the European Employment Strategy, is now used in other areas as well, e. g. in the field of social exclusion or pension reform: see, Scott/Trubek, *Mind the Gap*, 4: “Unlike the CCM [‘classical community method’, P. Z.], which is designed to create law at the Union level, the OMC aims to coordinate the actions of

### EU Governance: Law Making With Civil Society

There is a certain reflection of these developments in the contemporary, ardently discussed forms of reforming governance on the European level. The EU Commission’s White Paper of 2001 has spurred a lively debate and inquiry into law making procedures aiming at more adequacy, legitimacy as well as flexibility, allowing for regular revision and reform.<sup>79</sup> Still, critics argue that the Commission has not gone far enough in addressing the legitimacy problems of EU law making.<sup>80</sup> In this context, the currently much discussed ‘Open Method of Coordination’ (OMC), which fully crystallized as a new form of EU governance at the European Council meeting in Lisbon in March 2000<sup>81</sup>, takes a central place in this on-going search for ‘good governance’, but it remains to be seen whether this balancing act between the EU bodies and Member states will in fact lead to a greater integration of civil society and, thus, to a corresponding, greater base of legitimacy for EU acts on the other.<sup>82</sup>

What this shows, at any rate, is that there is a strong nexus between on-going searches for law making reform on national level via expert opinion, soliciting by regulatory agencies and governments leading to commissions’ proposals and a possibly new approach to the harmonization programmes pursued on the European level. The exhaustively long way to the adoption and passage of the European Company (*societas europaea* – SE) statute in October 2001 can be seen as reflecting the high degree of continuing divergences among Member states corporate governance systems.<sup>83</sup> While this, or to take another example, the (failed) Takeover Directive of July 2001<sup>84</sup>, seems only to underline the problems connected with (orthodox and unorthodox theories of) harmonization<sup>85</sup>, the contemporary inquiry into and the experimentation with new forms of governance may not only lead to a different institutional approach, but to another take on ‘integration’ and ‘harmonization’ in general.<sup>86</sup> Explicitly, even skeptical observers of the Commission’s and the Council’s proposals of new governance modes highlight the particular approach represented by the OMC, where the decisive starting point is the ‘diversity’ of Member states’ regimes and the

the several Member States in a given policy domain and to create conditions for *mutual learning* that hopefully will induce some degree of voluntary policy convergence.” (my emphasis, P. Z.); see also Ashiagbor, *Soft Harmonisation*, 226 ff.; Syrpis, *Legitimising European Governance*; Hodson/Maher, *Open Method as a New Form of Governance*; Dougan, *Vive la Différence?*, all with further references.

**83** For an account of the regulatory attempts leading to the ‘compromise of Nizza’ in December 2000 and the Directive and Regulation of Autumn 2001, see Jahn/Herfs-Röttgen, *Europäische Aktiengesellschaft*; Thoma/Leuering, *Societas Europaea*; see also Hopt, *Europäische Aktiengesellschaft*.

**84** See, hereto Pluskat, *Scheitern der Übernahmerrichtlinie*; see also Hommelhoff/Witt, *Bemerkungen zum deutschen Übernahmegesetz*.

**85** See, for a careful assessment, Dougan, *Vive la Différence?*.

**86** See, hereto, already Dougan, *Minimum Harmonization*, 858 f., describing the move from Single Market harmonization policy to the integration of more policy objectives through consecutive treaties since 1986.

corresponding methodological answer to this the initiation and the deliberate permission of continuous ‚learning processes‘.<sup>87</sup> This theme is, by no means, a new kid on the block, as it can easily be traced back into the centre of post-industrial states' learning experiences with regulatory law, juridification and the need for reflexive forms of law in a post-interventionist and post-regulatory environment.<sup>88</sup>

The EEC's founding years' euphoria, e. g. in the field of company law<sup>89</sup>, have given way to a much more sober perspective on the possibilities to create an integrated level playing field for companies in Europe.<sup>90</sup> But, different, firmly rooted national traditions with regard to industrial relations, firm ownership and capital markets<sup>91</sup>, which could be described negatively as ultimately resisting further harmonization, can and must also be evaluated from another angle: the EU's harmonization programmes inevitably meet with significant developments ‚one level below‘, i. e. within the Member states, but also with reform processes on ‚a level above‘, i. e. on an international level. While Member states continue to adapt their company laws to globalized economic challenges, there is a similarly active search for common denominators with regard to corporate governance (OECD, World Bank) and accounting principles (IAS, US-GAAP) on the international level.<sup>92</sup> The EU's eventual turn towards a practice of governance that allows for *soft* coordination and is based upon enhanced learning by information and cooperation, is indicative of contemporary European policy setting and, at the same time, illustrates general challenges to law making in a multi-level regime, involving actors on the national, European, and International level.<sup>93</sup> Among the OMC's significant elements is surely the practice of benchmarking in order to ‚share experience and to encourage the spread of best practice‘.<sup>94</sup> It is this, literally opened, form of governance that resembles and coincides with contemporary changes in law making on the national level. The necessity of parliamentary systems to deal with risk and uncertainty, and to accommodate societal pressure coming from a highly complex and heterogeneous social sphere, has prompted various forms of softer law making and, importantly, a greater involvement of experts and other bearers of ‚private knowledge‘. Having said this, it becomes quite obvious that our qualification of commissions and other expert groups engaged in norm setting

transcend a simple public-private dualism, which we have long grown accustomed to against the background of the European tradition of separating state and society.<sup>95</sup>

## Conclusion

For the time being, however, the habitual perspective taken vis-à-vis reform issues related to corporate governance is a slightly different one. Whereas we have here emphasized the institutional and methodological side of norm setting and law making along the line of observed tendencies to delegate and to ‚privatize‘ law making competences, contemporary commentators of company law reform, i. e. with regard to stock corporation law, situate themselves in a differently defined field. Their *champ de travail* is demarcated by state regulation and intervention on the one hand and market order and self-regulation on the other. The German choice, then, has traditionally been: ‚To regulate or not to regulate‘. And, the traditional answer has been, indeed, to regulate.<sup>96</sup> The realm of options for the protection of shareholders' interests have thus been perceived to range from coercive, binding law („vested rights“) to an approach of entrusting this protection into the capital market. In the latter extreme, the shareholder's position as that of a rightsholder in a corporation would basically be seen as a tradable asset, the value of which would be determined by the market, not by ‚the law‘.<sup>97</sup> There is, certainly, much more to be said to this set of alternatives, and the most recent crashes of *Enron*, *Global Crossing*, and *Worldcom* might be seen in this respect as counterparts to those corporate fallings from grace (*Balsam*, *Metalgesellschaft*, *Holzmann*), which spurred much of the contemporary German reform debate on corporate governance.<sup>98</sup>

But it is against this background that – on both sides of the Atlantic – the search for ‚good governance‘ in company law will continue. It will do so by involving the wide range of public, private and hybrid law making forms which we have increasingly grown accustomed to. For this, valuable lessons can be drawn from earlier examples of commercial self-regulation (e. g. standard contracts), as well as from other, contemporary developments in other fields (environmental law, commercial arbitration<sup>99</sup>). The rich spectrum of experiences on the national, European and international level is reflective

<sup>87</sup> See, Syrpis, Legitimising European Governance, passim; de la Porte/Pochet, Social Benchmarking, 291, 293.

<sup>88</sup> See, Teubner, Reflexives Recht, 13 ff.; Teubner, Regulatorisches Recht; Günther, Wandel der Staatsaufgaben, *supra* note 43; see also the contributions to Brüggemeier/Joerges (eds.), Workshop zu Konzepten postinterventionistischen Rechts: see Hommelhoff/Schwab, Staats-ersetzende Privatgremien, 714, arguing for a ‚reflective reception‘ of accounting standards provided by standard setters on the side of the legal supervisory agency. This can well imply the creation of specially educated task force agencies in order to safeguard ‚an accompanying legal supervision‘, *id.* at 717.

<sup>89</sup> See, e. g., Schmitthoff, Future of European Company Law; for a recent account see, Wouters, European Company Law, 257 ff.

<sup>90</sup> Wouters, European Company Law, 276 ff. linking the staggering progress in European company law harmonization to the change of political context, not least expressed in the Treaty's subsidiarity and proportionality provisions.

<sup>91</sup> Wouters, European Company Law, at 280.

<sup>92</sup> See, Hommelhoff/Schwab, Staats-ersetzende Privatgremien, 708 ff.; see also, Witherell, Corporate Governance, for an assessment of international cooperation in fighting governance failures and corporate misconduct, but also with regard to developing secure capital markets in emerging markets.

<sup>93</sup> See, for a concise analysis of the possible prospects for European company law making: Deakin, Regulatory Competition, 190 ff.

<sup>94</sup> Hodson/Maher, Open Method as a New Form of Governance, 721, citing Helen Wallace, The Institutional Setting, in: Wallace/Wallace eds., Policy-Making in the European Union, 4<sup>th</sup> Ed., 2000, at 33.

<sup>95</sup> See, e. g., Calliess, Prozedurales Recht, *supra* note 29.

<sup>96</sup> See, hereto the brilliant account by Spindler, Derregulierung des Aktienrechts?, 53 ff., 57, stressing the different approach taken by American corporate law, which – for the most part – is state law, which is, in turn, ‚enabling‘ law, giving firms great discretion in designing their governing law. ‚Cor-

porate law‘ as such, then, serves for one as framework providing default rules, while it does, on federal level, contain a considerable number of binding rules pertaining to safeguard investors' interest and the trust in the capital market; Ulmer, Der deutsche Corporate Governance Kodex, 178 f., contemplating the code's allegedly meager achievements as to further de-regulate corporate law. See also, Ebke, Zukunft der Rechtsetzung, 109–112.

<sup>97</sup> Spindler, Derregulierung des Aktienrechts?, at 59.

<sup>98</sup> Interestingly, the commentators are quick to point out the futility of premature European trimphancy with regard to the recent events in corporate America: see, The Economist, 13 July 2002, p. 54, denouncing any pride in ‚Europe's gentle form of Capitalism‘ in light (or shadow, for that matter) of highly disputable governmental interventions at the side of falling corporate giants.

<sup>99</sup> See, hereto DeLy, Lex Mercatoria, 159 ff.; Zumbansen, Piercing the Legal Veil.

of an on-going search for ways to adequately mobilize societal knowledge while being aware and conscious of divergent national trajectories of socio-legal and economic development.

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