

**Modern Company Law Problems:  
A European Perspective  
Keynote Speech**

**by**

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Company law reform seems to be on the agenda in nearly all of our countries. The driving forces behind current company law reform are much the same: i.e., the pressure of internationalization and competition, rapid growth and changes in the shareholder population, the emergence of new industries, and the striking developments in financial markets and modern technology. Yet the recipes for how to deal with these new challenges vary considerably.<sup>1</sup> In some countries board reform is clearly the focus. In other countries the role of the shareholders, both institutional and private, is being enhanced—and this in view of global markets and modern technology. Some continental European company lawmakers—legislators as well as judges and regulators—are working on laws and rules on groups of companies. Still others believe in labor co-determination both in the plant and in the company’s boardroom. In modern economics there are those who hold shareholder and investor protection to be a primary parameter in comparative corporate governance and ultimately in economic performance, while others plead for letting the market prevail over inflexible national company laws and doctrinalities. As to form, the classical legislation by ministries and parliament is being challenged by the national and international code movement. We all know that the OECD was one of its prime movers.<sup>2</sup>

Is it possible to grasp these multifarious realities? Are they determined purely by history and path-dependence, or is there a reasonable chance for rational choice and purposeful modern company law drafting? The answers, if any, to this fundamental question depend, of course, on whom you ask. I think, therefore, that the organizers of this conference were wise to ask for two keynote addresses: one from an American Chief Justice with fine theoretical insight, and one from a European academic with some practical exposure both as a judge at a court of appeals and as counsel to German legislators. So the following short remarks should be taken for what they are: they are neither an economic or legal theory of company law, nor are they a front-line report from an in-house counsel or a similar company law practitioner; instead, they are some comparative observations on major modern company law problems that many of us face, viewed from a European perspective.

## I. Old and New Problems in Company Law

### 1. Shareholders and Delegated Management: The Berle-Means Problem

The famous Berle-Means story of 1932 concerns the separation of ownership and control in the modern public limited company. This story reflects the American reality of companies. Modern economic theory has developed the principal-agent problem as its basic question, namely, how company law can make the board more responsive to shareholder interests. Modern company law reform initiatives in many countries including Germany have tried to cope with this problem. Usually these reforms have not touched the fundamental structure of the board, i.e., the one-tier or the two-tier board have been maintained. Instead, they dealt with board reform issues such as size of the board, business judgment rule, independent directors, conflicts of interest, board committees, frequency and efficiency of board meetings, back stage office, remuneration and liability, etc.<sup>3</sup> One key problem is finding the right balance between delegation through the business judgment of the directors, and control by structural and other legal rules and, ultimately, by liability.<sup>4</sup>

## 2. Minority Shareholders and Majority Shareholder: The Classical European Worry

The primary principal-agent conflict in continental European company laws is not the conflict between the shareholders and the board of directors, but rather the conflict between the minority shareholders and the majority shareholder. This reflects the different prevailing patterns of stock ownership and control structures in the United States and Great Britain on the one side and, broadly speaking, in continental European states on the other.<sup>5</sup> Accordingly, two general types of corporate governance systems have been distinguished: insider and outsider systems. In the United States and Great Britain, neither individual shareholders nor institutions hold a large fraction of shares in the company. On the continent, shareholding is highly concentrated in the hands of families or other companies (the group phenomenon). In Germany and some other countries, the universal banks—as distinguished from investment banks and insurance companies—play a considerable role in this. Even reciprocal and cross shareholdings are frequent. In such companies, the board is sometimes just the puppet of the controlling shareholder or the parent. European companies laws respond to this, if at all, by various measures of minority rights and minority protection. There are large differences among countries in how well investors, both shareholders and creditors, are protected by law. A recent theory holds these differences in law and the effectiveness of their enforcement across countries as an important factor for the capital markets and, ultimately, for the economy of the various countries.<sup>6</sup>

### 3. Outside Shareholders in the Group of Companies: Just a German Idiosyncrasy?

In most countries, groups of companies have not given rise to a specific codified law of groups. As you know, this is different in Germany. The Stock Corporation Act of 1965 was the first to codify a law of groups for dependent stock corporations.<sup>7</sup> More recently similar rules have been developed by German courts for limited liability companies (GmbH) and even commercial partnerships. Countries such as Portugal and some non-EU states have followed the German codification example. Early attempts to do the same at the EU level, the draft 9<sup>th</sup> Directive, failed. This is not to say that there is no law of groups in other countries.<sup>8</sup> Upon closer examination there is even extensive group law, though it is found in specific fields—such as bank and insurance supervision, labor law, and, of course, tax law—rather than in general company law. In addition, there is a considerable body of case law as to limited liability companies. But the approach is different. There is no coherent body of specific group law provisions; instead, the controlling shareholder has specific duties toward the minority shareholders, whether in the independent company or in a group.

Most recently, principles and proposals for a European corporate group law were elaborated by the Forum Europaeum Konzernrecht in a cooperative effort by many European academics, legislators, and practitioners.<sup>9</sup> These proposals have attracted considerable attention in a number of European countries.<sup>10</sup> Their starting point is that the existence of company groups has long been an economic reality everywhere. To cope with this, framework rules by both European and national legislators are necessary. While full harmonization of group law within the EU is neither feasible nor advisable, a certain degree of uniformity in the European single market is indispensable (the “level legal playing field”). Rules proposed by the Forum Europaeum include disclosure; legal recognition of group management under certain safeguard conditions; special investigation in the independent company as well as in the group; mandatory bid; buy-out and withdrawal rights; and, ultimately, liability for wrongful trading.

### 4. Capital, Disclosure, Creditors, and Other Stakeholders

Minimum capital rules have long been a characteristic element of continental European company law. They were adopted by the EU in its second company law directive. Capital requirement and maintenance rules have been most extensively developed in Germany, both

by legislation and case law. These rules are highly detailed and sophisticated, and are, of course, defended fervently by lawyers and academics alike—not without self-interest. Anglo-American wisdom and modern economic theory call these capital rules into question.<sup>11</sup> They submit that legal capital rules provide little for company creditors, while burdening shareholders, some of the creditors, and society as a whole. Controlling shareholders and/or managers of major public companies (and in groups, the parent) gain from such rules limiting dividends. Instead of minimum capital requirements, stated capital and disclosure rules are proposed as being more apt in a market economy.

The defendants of capital rules<sup>12</sup> point to the fact that in the United States, major creditors secure their interest by debt covenants. The debtor must promise to restrict dividend payments, maintain a certain minimum capital, and observe a fixed relation figure between his own capital and debt capital. In a way, the market simulates legal capital rules. Smaller creditors, however, are protected only in an indirect way because they have no say in modifications or even termination of debt covenants. Aside from contractual protection, creditors have no protection at all unless by law. As to the debtors, they face various cumulative and sometimes even contradictory restrictions. This controversy cannot be decided here. Suffice it to say that in Germany, the major banks that have long been defending capital rules have “become more interested in the fee-earning securities business and thus favor a more market-oriented corporate system.”<sup>13</sup> While EU directives tend to have a long life—some speak of the “petrification effect”—these market developments may turn out to be stronger than the law.

What about other stakeholders? According to the classical view in Germany and some other countries, the purpose of the stock corporation is not just to maximize shareholders’ value, but to lead to an even promotion of shareholder and various stakeholder interests.<sup>14</sup> This has been the subject of an awesome host of legal doctrine. Some of this reminds us of medieval theology. In practice, however, shareholder interest and stakeholder interest often go together, at least if shareholder interest is seen not as short-term, but as medium- or long-term. It follows that the real issue is whether or not or to what degree the board of directors should be given discretionary powers to define what is in the interest of the shareholders. This issue is well known, as is illustrated in the debate on the American anti-takeover statutes.

## II. Corporate Governance: Norms and Reality Within the Company and Beyond

## 1. Company Law and Corporate Governance: New Wine in Old Bottles?

Corporate governance, still unknown some years ago, is of universal concern nowadays.<sup>15</sup> Corporate governance codes have mushroomed. One of my American graduate students at New York University's Global Faculty counted well over forty codes throughout the world, and they are marked by substantial convergence.<sup>16</sup> Corporate governance commissions, public or private, are emerging everywhere. Corporate governance is even the slogan used by some reformers in order to promote classical board reform. Comparative corporate governance seems to be the newest cry in universities on both sides of the ocean.

More traditionally minded national company lawyers take a critical look at this. After all, control of the boards, shareholders' rights, and investor and creditor protection have been the concern of company law ever since the public company emerged in the first half of the 19<sup>th</sup> century when capital-intensive railways were built and early modern industries were formed. And indeed, much of what we read in some of the corporate governance codes is already part of the company law statutes or can be found in company law doctrine and practice. This debate is rather bitter because it is actually about turfs to defend.

Without going into this debate, I shall just mention three major contributions of corporate governance to company law. First, corporate governance is a holistic concept. It is the overall effect that counts rather than whether it derives from this or that norm or legal area, such as company law or securities regulation. In other words, inside control as well as outside control must be kept in mind. Second, corporate governance has forced lawyers to take a fresh look at some venerable company law concepts and institutions and to face the fact that they are a far cry from reality. Directors' liability, for example, has been more theory than practice in Germany and some other European countries. Only lately have things begun to change. Third, corporate governance has helped to make the public and—with the usual delay—also the legislators aware of the competitive nature of the country's laws and institutions. But it is still not yet commonly understood that deficient corporate governance may become a distinct handicap in European and global competition for investments and investors.

## 2. Inside Control: The Board, Labor Co-determination, and the Role of the Banks

Let me now just hint at some elements or—as we called them in our 1998 book *Comparative Corporate Governance* published by Oxford University Press—“building blocks” of inside and outside control of management and companies.<sup>17</sup> The key element of inside control is, of course, the board. Board reform poses many important questions of detail. Board structure, on the other hand, is usually kept as it has always been, i.e., one- or two-tier or in a hybrid form. Practitioners and academics alike tend to be convinced that the system at home is the best. This is true in London as well as in Frankfurt. Only recently an interesting debate has started as to the functional costs and benefits of the various systems. Marcus Lutter and Paul Davies had a friendly and intelligent dispute on this question at my birthday colloquium in Mayence last September.<sup>18</sup> The debate relates to influence, information, and independence. Members of the German supervisory board are by definition outside, but are they independent? How well informed are they? How do they deal with conflicts of interest? What about directors in groups of companies?

Labor co-determination<sup>19</sup> is a pet topic of mine, but it is on your program and I shall not touch it. My own position lies in between the traditional German pro-co-determination view and the negative view of most American economists. The attempts to approve or disapprove co-determination by theoretical arguments alone are not convincing. The evaluation depends instead on microeconomic empirical data and experiences and on whether macroeconomic impacts are also considered or left beside. It might be that labor co-determination contributes to a solution of labor conflicts and functions as an early warning system for social unrest. There is anecdotal evidence for this in Middle and Eastern Germany after German reunification.

The role of the banks is not mentioned specifically in the agenda of the conference. From a German perspective this is surprising because of the influence of the German universal banks on industry. But I know that things are different in other countries. From a comparative corporate governance point of view, however, a distinction must be made between market-based systems such as the United States and Great Britain and bank-based systems such as Germany, Switzerland, Austria, and some other countries. The crucial question is which system is superior. Some claim that “[i]n the end, there is today little question that ‘the battle of the systems’ will be won by Anglo-American corporate governance...”<sup>20</sup> Yet the answer might be different—that is, that no system is superior, but each depends on its country’s historical development and institutional set-up.<sup>21</sup>



### 3. Outside Control: Capital Markets, the Market for Corporate Control, Disclosure, and Auditing

Capital markets, and particularly the market for corporate control, are the outside control devices par excellence. There is no need to say more to an international audience. Even if the answer before was path-dependence, the future seems to belong not to institutional control, but rather to market control. The German example is telling in this respect, both as to the development of the capital markets which is moving ahead steadily,<sup>22</sup> and as to the emergence of public takeovers, for which the hostile takeover of Mannesmann by Vodafone marked an irreversible tide. Hopefully the 13<sup>th</sup> Directive on Takeovers will finally be enacted more or less in the version of the Common Standpoint of the Council as of 19 June 2000,<sup>23</sup> without the watering down proposals of the European Parliament, in particular as to the prohibition of frustrating action.<sup>24</sup> But regardless of the fate of the 13<sup>th</sup> Directive, Germany will have its own takeover act by the end of 2001.

Disclosure<sup>25</sup> and auditing are considered by the legislators of the reform Act of 1998<sup>26</sup> to be the cornerstone of future German corporate governance. Surprisingly enough, the American corporate governance discussion in academia (not in practice) tends to neglect disclosure and auditing as a major means of corporate governance. It would be interesting to speculate about the reasons: efficient capital market hypothesis; distrust of regulation and regulatory agencies (including the SEC); public choice arguments; or federal-state issues, including the modern conviction that competition of company laws leads to a race to the top instead of Carey's race to the bottom, a thesis that is very controversial indeed and to which the answer may vary for the United States and for Europe.<sup>27</sup>

### 4. Consequences for Law-Making and the Study of Law

The consequences of comparative corporate governance for law-making and for the study of law are evident. Unfortunately, it is true that in many of our countries company law is still studied and taught primarily or even exclusively as a merely national, dogmatic matter. It suffices to look at leading company law treatises in France or Germany, for example. Yet this approach is dated. What is really important to know in an internal market is not company law

in the books, but how company law functions within the company, on the market, and beyond the frontiers. This is true for law-making as well as for teaching and studying company law.<sup>28</sup>

### III. Enforcement

#### 1. Institutional and Private Investors

Enforcement by private investors works poorly because of their rational disinterest in monitoring a single company. Institutional investors are becoming more and more numerous and influential, not only in the United States and Great Britain, but also in continental Europe. Institutional investors monitor by entry and exit (the venerable Wall Street rule), but to a certain degree also within the company.<sup>29</sup> In the meantime, the influence of CalPERS on European companies has been felt. Yet the interest of institutional investors in monitoring inside the company is and will remain limited.

This should draw our attention again to the private investors, the general assembly, and the chances of making use of private attorneys general. As to the general assembly,<sup>30</sup> the rapid development of modern technology is bound to fundamentally change traditional thinking about the role of the shareholder, the scope and time of company reports, and possibly even the nature of the company.<sup>31</sup>

#### 2. Self-Regulation

Codes of conduct, deontology, and self-regulation are booming in corporate governance practice. On the other side, the German Insider Trading Guidelines have failed miserably. The experience made with the voluntary German Takeover Code has been better, but not good enough. It will be replaced by a takeover statute. Even self-regulation British style has had its drawbacks as the Financial Services and Market Act 2000 bears witness. The conventional distinction between countries with a tradition of self-regulation and others without gets blurred. On a theoretical level, the discussion of the pros and cons of self-regulation continues.<sup>32</sup> Finding the right mixture between self-regulation and the “big stick” seems as promising as it is difficult. It is possible that self-regulation will keep spreading in some legal areas but not in others. Path-dependence and international imitation play opposing roles. But

the phenomenon of legal fashion can also be observed. An important legal side of this discussion is subsidiarity both under the EU Treaty and national constitutional law.<sup>33</sup>

### 3. Litigation and Courts

Continental European lawmakers and academics tend to underestimate the role of litigation and courts. This is in striking contrast to the United States. Treble damages suits, class actions, quorum litis, discovery, and many other instruments of American law are unknown or not well regarded in many European countries, certainly in Germany. As to the role of the individual shareholder as private attorney general, things are changing, though rather slowly. The German Lawyers' Association (Deutscher Juristentag) addressed this problem at its biannual meeting in Leipzig in September of this year.<sup>34</sup> As mentioned above, liability suits against directors are still rare because only the supervisory board or a five per cent minority can bring such a suit. The outcome of the vote in Leipzig was telling. A strong minority pleaded for introducing the individual shareholder action, such as in Switzerland and elsewhere. Yet the majority continued to shy away from such a far-reaching reform and condoned only the lowering of the requirements for the minority necessary to bring a suit. The fear of strike suits still prevails. German experience shows indeed that rights and suits in rescission of company resolutions have been abused rather frequently and with stunning publicity. In comparative law the data are mixed. The most recent company law reform proposal was made in Great Britain by the Law Commission. It is in favor of rather broad individual rights to sue.

### 4. Regulatory Agencies

Company law is considered by some as a common domain of company practice, interpretation, and sometimes interference by courts; in some countries such as my own, this includes the considerable influence of company law professors. Yet one must realize that, to a certain degree, company law is also administered and created by regulators. This is true for securities and exchange commissions such as the American SEC, the Commission bancaire et financière in Belgium, the Commission des Opérations de Bourse in Paris, or the CONSOB in Rome. But the banking supervisory agencies also have a certain influence on company law. In Germany, for example, establishing a system of internal control and early warning within the company was made a legal requirement by the Company Law Reform Act of 1998.<sup>35</sup> Yet a

similar requirement has long existed for banks and is enforced by bank supervision. It is obvious that some of the experiences and requirements made by the German bank supervisory agency in Bonn will spill over to company law.

#### IV. Looking Beyond the Frontiers

##### 1. Comparative Company Law: Learning from the Neighbor's Experiences

Looking beyond the frontiers is what is needed today in company law. Today's conference is the best example for realizing this need and going ahead with this task. Yet learning from your neighbor's company law experiences is not as new as it might seem to some. The legislators in the 19<sup>th</sup> and early 20<sup>th</sup> century were already living up to this wisdom when they prepared their company law statutes on the basis of thorough comparison of the laws and experiences of other countries. The major company law codifications in the second half of the 19<sup>th</sup> century, when European countries moved away from the state concession system, testify to this. Before the German Company Act of 1937 was drafted, many preparatory comparative law opinions were commissioned with the Kaiser Wilhelm Institute in Berlin, the predecessor of today's Max Planck Institute in Hamburg. One of the most impressive opinions dealing with American and English company law was written by Walter Hallstein, the late president of the European Commission, while he was still an assistant at the institute in Berlin and *referendar* at the Berlin Court of Appeals, the *Kammergericht*.

Most recently there has been renewed interest in comparative company law, partly because of the emergence of European company law and partly because of a sense of competition sharpened by the corporate governance movement. The German ministries of justice and finance have commissioned several comparative law studies by the Max Planck Institutes and others in the process of preparing their reform works.<sup>36</sup> After all, company law must concern itself with reality, not just with concepts and dogmas.

##### 2. Harmonization or Convergence of Company Law in Europe and Beyond?

Harmonization or convergence: this is the question. As usual, the answer is neither yes nor no. Both harmonization and convergence can be observed in the real world. The forces of convergence are strong, in my opinion stronger than those of harmonization. This is true at

least in commercial and company law, where the international market forces are the best drivers.

Yet harmonization is not superfluous as some American theorists want to make us believe. The creation of the European internal market requires at least some core harmonization of the market laws, but also of company law. Unfortunately, we do not have the time to take a close look at the European Commission's agenda for achieving its financial markets plan and its financial services priorities. Quite a few company law reform measures can be found therein. I dealt with the question of convergence and/or harmonization in the EU, and particularly between Germany and Great Britain, at the Clifford Chance Millennium Lectures in London in 2000.<sup>37</sup>

### 3. The Role of European and National Courts in Company Law

Company law was long the domain of national courts in the EU. But this is no longer true. The European Court of Justice has rendered quite a number of important decisions in the field of company law and accounting. For a long time, national courts have been rather reluctant to refer questions concerning harmonized company law and accounting to the European Court of Justice. In the meantime, the relationship between the judiciaries has become more relaxed. Most recently, one of the landmark cases in company law and conflicts of law is the *Centros* decision of the European Court.<sup>38</sup> Some think that this decision amounts to the end of the German seat theory and allows free incorporation in any of the EU member states with binding effect in all member states under the incorporation theory. Whether this is really true is highly controversial. Several referrals from Germany are pending at the European Court of Justice. If the court declares the seat theory to be in violation of European law, be it primary or secondary European law, then the international company law of Germany and all states that follow the seat theory will have to be reformed from top to toe.

Of course, the relationship between the European and the national company law judiciary is not an easy one. Part of the problem stems from the fact that national company law is highly professionalized, usually under the scrutiny of specialized commercial or company law courts or senates, while the European Court of Justice is without such specialization. Sooner or later this gap must be bridged.<sup>39</sup> For this task, the courts must rely on the preparatory work of the

lawyers who practice in their courtrooms, and first and foremost on comparative company law research and exchange such as ours today.

#### 4. Exchange and Cooperation Between Regulators

I have mentioned already the role played also by the regulators in company law. It follows that in a European and even global context there is a definite need for exchange and cooperation between regulators.<sup>40</sup> This is well known for antitrust, banking law, and securities regulation. But it will soon be felt also in company law. The OECD might be taking a lead also in this field.

Let me finish with a last remark. In the last decades, some academics in the United States and Europe have considered company law to be antiquated and boring, and have instead looked at modern fields like securities regulation, bank supervision, and accounting and auditing. Yet things have changed back. Company law is again one of the most modern and challenging areas of the law.

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<sup>1</sup> E. Wymeersch, Current Reform Initiatives: Challenges and Opportunities, *infra* in this volume at p. #.

<sup>2</sup> OECD Principles of Corporate Governance, SG/CG (99)5, also in: OECD Financial Market Trends No. 73, June 1999, p. 129. These principles were prepared by the *Millstein Report*, see Corporate Governance: Improving Competitiveness and Access to Capital in Global Markets. A Report to the OECD by the Business Sector Advisory Group on Corporate Governance, Ira M. Millstein, Chairman, Paris, April 1998. These principles have attracted attention worldwide.

<sup>3</sup> See P. L. Davies, The Board of Directors: Composition, Structure, Duties and Powers, *infra* in this volume at p. #; K. J. Hopt, The German Two-Tier Board (Aufsichtsrat), A German View on Corporate Governance, in: K. H. Hopt/E. Wymeersch, eds., Comparative Corporate Governance – Essays and Materials, Berlin/New York 1997, p. 3; *idem*, The German Two-Tier Board: Experience, Theories, Reforms, 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. 227.

<sup>4</sup> T. Abeltschauser, Leitungshaftung im Kapitalgesellschaftsrecht, Zu den Sorgfalts- und Loyalitätspflichten von Unternehmensleitern im deutschen und im US-amerikanischen Kapitalgesellschaftsrecht, Cologne et al. 1998; K. J. Hopt, Die Haftung von Vorstand und Aufsichtsrat – Zugleich ein Beitrag zur corporate governance-Debatte –, in: Festschrift für E.-J. Mestmäcker, Baden-Baden 1996, p. 799.

<sup>5</sup> R. La Porta/F. Lopez-De-Silanes/A. Shleifer, Corporate Ownership Around the World, The Journal of Finance LIV (1999) 471.

<sup>6</sup> R. La Porta/F. Lopez-De-Silanes/A. Shleifer/R. Vishny, Investor protection and corporate governance, The Journal of Financial Economics 58 (2000) 3.

<sup>7</sup> A still valid, critical description of the group law in the German 1965 Stock Corporation Act is H. Wiedemann, The German Experience with the Law of Affiliated Enterprises, in: K. J. Hopt, ed., Groups of Companies in European Laws, Berlin/New York 1982, p. 21.

<sup>8</sup> See, e.g., C. M. Schmitthoff/F. Wooldridge, eds., Groups of Companies, London 1991; E. Wymeersch, ed., Groups of Companies in the EEC, Berlin/New York 1993; I gruppi di società, Atti del convegno internazionale di studi, Venezia 16-18.11.1995, a cura di P. Balzarini, G. Carcano, G. Mucciarelli (Rivista delle Società), Milano (Guiffrè) 1996, 3 vols.

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<sup>9</sup> *Forum Europaeum Konzernrecht*, Corporate Group Law for Europe, Stockholm 2000; also in: *European Business Organization Law Review (EBOR) I (2000) 165-264.*

<sup>10</sup> See, e.g., *C. Windbichler*, "Corporate Group Law for Europe": Comments on the Forum Europaeum's Principles and Proposals for a European Corporate Group Law, *European Business Organization Law Review (EBOR) I (2000) 265*; *J. Kluver*, European and Australian proposals for corporate group law: a comparative analysis, *European Business Organization Law Review (EBOR) I (2000) 287*; *U. Blaurock*, Bemerkungen zu einem Europäischen Recht der Unternehmensgruppe, in: *Festschrift für O. Sandrock*, Heidelberg 2000, p. 79; *J. Lübking*, Ein einheitliches Konzernrecht für Europa, Baden-Baden 2000.

<sup>11</sup> *F. Kübler*, *Aktie, Unternehmensfinanzierung und Kapitalmarkt*, Cologne 1989, p. 59 et seq.; *idem*, The rules on capital under the pressure of the securities markets, and *E. Ferran*, Legal capital rules under the pressure of the securities markets – the case for reform, as illustrated by the UK equity markets, in: *G. Ferrarini/K. J. Hopt/E. Wymeersch*, eds., *Company Law and Capital Market Law, The impact of the securities markets on companies and their regulation*, Siena Conference March 30-31, 2000 (in press); *L. Enriques*, As Simple As It May Be: The Case Against the Second Company Law Directive Provisions on Legal Capital, Manuscript, Bologna 2000. As to economic and financial theory, see *S. Myers*, *Capital Structure: Some Legal and Policy Issues*, *infra* in this volume at p. #.

<sup>12</sup> See, e.g., *W. Schön*, *Gesellschafter-, Gläubiger- und Anlegerschutz im Europäischen Bilanzrecht*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2000*, 706 at 725 et seq.

<sup>13</sup> *F. Kübler*, *loc.cit.* (in press), at p. 11.

<sup>14</sup> Cf. *F. Kübler*, *Shareholder Value: Eine Herausforderung für das Deutsche Recht?* in: *Festschrift für W. Zöllner*, Cologne 1998, vol. I, p. 321; *P. O. Mülbert*, *Shareholder Value aus rechtliche Sicht*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 1997*, 129.

<sup>15</sup> Cf. *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; *J. W. Cioffi*, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, *The American Journal of Comparative Law* 48 (2000) 501-534; *K. Keasey/S. Thompson/M. Wright*, eds., *Corporate Governance*, Cheltenham, UK 1999, 4 vols (reprints).

<sup>16</sup> *C. S. Harrison*, *Global Corporate Governance: An Empirical Study of International Corporate Governance Guidelines*, New Haven, Manuscript, June 2000.

<sup>17</sup> See *K. J. Hopt/H. Kanda/M. J. Roe/E. Wymeersch/S. Prigge*, eds., *Comparative Corporate Governance*, *loc. cit.*

<sup>18</sup> *M. Lutter*, *Corporate Governance rechtsvergleichend – die deutsche Sicht*, und *P. Davies*, *Comparative Corporate Governance – an English and Market Perspective*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2001*, 3d issue (in press).

<sup>19</sup> Cf. *K. J. Hopt*, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 *International Review of Law and Economics* 203 (1994); *K. Pistor*, *Codetermination: A Sociopolitical Model with Governance Externalities*, in: *M. Blair/M. J. Roe*, eds., *Employees and Corporate Governance*, Washington 1999, p. 163; *T. Baums/B. Frick*, *The Market Value of the Codetermined Firm*, in: *Blair/Roe*, *loc. cit.*, p. 206; *D. Sadowski/J. Junkes/S. Lindenthal*, *Gesetzliche Mitbestimmung in Deutschland: Idee, Erfahrungen und Perspektiven aus ökonomischer Sicht*, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2001*, 110. As to the Swedish experiences, see *A. Victorin*, *Employee Participation on the Company Board: The Swedish Experience*, *infra* in this volume at p. #.

<sup>20</sup> *I. Walter*, *Capital markets and control of enterprises in the global economy*, in: *S. S. Cohen/G. Boyd*, eds., *Corporate Governance and Globalization, Long Range Planning Issues*, Cheltenham U.K. 2000, p. 95 at 123.

<sup>21</sup> *Europäische Zentralbank*, *Charakteristika der Unternehmensfinanzierung im Europäischen Währungsgebiet*, *Monatsberichte*, Februar 2001, p. 41 at p. 56: "Es ist zu betonen, dass eine von Bankkrediten geprägte Finanzierungsstruktur nicht mehr und nicht weniger effizient als die Finanzierung über Wertpapiermärkte ist. Vielmehr wird die Wirtschaftlichkeit dadurch gefördert, dass sich die unterschiedlichen Finanzierungsmöglichkeiten gegenseitig ergänzen." *G. Gorton/F. A. Schmid*, *Universal banking and the performance of German firms*, *Journal of Financial Economics* 58 (2000) 29 at 70; *R. H. Schmidt/A. Hackethal/M. Tyrell*, *Angleichung der Finanzsysteme in Europa*, *Manuskript Frankfurt* Februar 2001.

<sup>22</sup> See *Deutsches Aktieninstitut*, *DAI-Factbook 2000, Statistiken, Analysen und Graphiken zu Aktionären, Aktiengesellschaften und Börsen*, Frankfurt 2000.

<sup>23</sup> O.J.E.U. C 23/1, 24.1.2001. As to theory and policy, see *G. Ferrarini*, *Corporate Ownership and Control Law: Reform and the Contestability of Corporate Control*, *infra* in this volume at p. #.

<sup>24</sup> Cf. *K. J. Hopt*, *The Duties of the Directors of the Target Company in Hostile Takeovers – German and European Perspectives*, in: *G. Ferrarini/K. J. Hopt/E. Wymeersch*, eds., *Capital Markets in the Age of the Euro, Cross-Border Transactions, Listed Companies and Regulation*, The Hague (Kluwer International) (in press); *G. Ferrarini*, *Le difese contro le O.P.A. ostili: Analisi economica e comparazione*, *Rivista delle società XLV (2000) 737*; *P. Mülbert/M. Birke*, *In Defense of Passivity – on the Proper Role of a Target's Management in Response*

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to a Hostile Tender Offer, *European Business Organization Law Review (EBOR) I* (2000) 445; contra *C. Kirchner/R. W. Painter*, *European Takeover Law – Towards a European Modified Business Judgment Rule for Takeover Law*, *European Business Organization Law Review (EBOR) I* (2000) 353; *P. Câmara*, *Defensive Measures Adopted by the Board: Current European Trends*, *infra* in this volume at p. #.

<sup>25</sup> See most recently the comprehensive study by *H. Merkt*, *Die Publizität von Unternehmen*, Tübingen 2001; see also *K. J. Hopt*, *Disclosure Rules as Primary Tool Fostering Party Autonomy – Observations From a Functional and Comparative Legal Perspective –*, in: *S. Grundmann/M. Andenas/W. Kerber*, eds., *Party Autonomy for the Internal Market – the Role of Information* (in press).

<sup>26</sup> Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (so-called KonTraG) of 27.4.1998, Official Gazette 1998 I 786. See the statements in the parliamentary reform hearings in: *Die Aktienrechtsreform 1997, Die Aktiengesellschaft Sonderheft August 1997*.

<sup>27</sup> For the U.S., see *R. Romano*, *The Genius of American Corporate Law*, Washington D.C. 1993. For Europe, see *H. Merkt*, *Das Europäische Gesellschaftsrecht und die Idee des „Wettbewerbs der Gesetzgeber“*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 59 (1995) 545; *K. J. Hopt*, *Gestaltungsfreiheit im Gesellschaftsrecht in Europa – Generalbericht –*, in: *M. Lutter/H. Wiedemann*, eds., *Gestaltungsfreiheit im Gesellschaftsrecht*, Berlin/New York 1998, p. 123.

<sup>28</sup> Cf. *M. Ruffner*, *Die ökonomischen Grundlagen eines Rechts der Publikumsgesellschaft, Ein Beitrag zur Theorie der Corporate Governance*, Zürich 2000; *B. R. Cheffins*, *Teaching corporate governance*, 19 *Legal Studies* 515 (1999).

<sup>29</sup> *T. Baums/R. M. Buxbaum/K. J. Hopt*, eds., *Institutional Investors and Corporate Governance*, Berlin/New York 1994, p. 695.

<sup>30</sup> See *T. Baums*, *General Meetings in Listed Companies: New Challenges and Opportunities*, *infra* in this volume at p. #.

<sup>31</sup> *E. Wymeersch*, *The Use of ICT in Company Law Matters*, in: *G. Ferrarini/K. J. Hopt/E. Wymeersch*, eds., *Capital Markets in the Age of the Euro*, loc. cit. (in press);

<sup>32</sup> *J. Holland*, *Self Regulation and the Financial Aspects of Corporate Governance*, (1996) *Journal of Banking Law* 127; *B. R. Cheffins*, *Company Law: Theory, Structure and Operation*, Oxford 1997, p. 364 et seq.; *J.-B. Zufferey*, *Regulation of Trading Systems on Financial Markets*, London 1997, p. 248 et seq.; *K. J. Hopt*, *Self-Regulation in Banking and Finance – Practice and Theory in Germany –*, in: *La Déontologie bancaire et financière/The Ethical Standards in Banking & Finance*, Brussels 1998, p. 53.

<sup>33</sup> Cf. *K. J. Hopt*, *Company Law in the European Union: Harmonisation and/or Subsidiarity?* in: (1999) 1 *International and Comparative Corporate Law Journal (ICCLJ)* 41.

<sup>34</sup> *63d Deutscher Juristentag*, *Empfiehl sich eine Neuregelung des aktienrechtlichen Anfechtungs- und Organhaftungsrechts, insbesondere der Klagemöglichkeiten von Aktionären?* Leipzig 2000 (in press).

<sup>35</sup> Section 91 subsection 2 of the Stock Corporation Act and Section 317 subsection 4 of the Commercial Code. Cf. *C. Orth*, *Abschlussprüfung und Corporate Governance, Vom Financial Audit zum Business Audit vor dem Hintergrund der Erwartungslücke*, Wiesbaden 2000.

<sup>36</sup> E.g., as to stock exchange law reform, *K. J. Hopt/B. Rudolph/H. Baum*, eds., *Börsenreform – Eine ökonomische, rechtsvergleichende und rechtspolitische Untersuchung –*, Stuttgart 1997; as to class actions, *J. Basedow/K. J. Hopt/H. Kötz/D. Baetge*, eds., *Die Bündelung gleichgerichteter Interessen im Prozeß – Verbandsklage und Gruppenklage –*, Tübingen 1999.

<sup>37</sup> *K. J. Hopt*, *Common Principles of Corporate Governance in Europe?* in: *B. S. Markesinis*, ed., *The Clifford Chance Millennium Lectures, The Coming Together of the Common Law and the Civil Law*, Oxford 2000, p. 105.

<sup>38</sup> European Court of Justice, Decision of 9 March 1999, C 212/97, *Europäische Zeitschrift für Wirtschaftsrecht* 1999, 216. In the meantime there have been more than fifty comments on this decision, mostly in Germany.

<sup>39</sup> As to the European Court of Justice reform, see *Bericht der Reflexionsgruppe über die Zukunft des Gerichtssystems der Europäischen Gemeinschaften*, Sonderbeilage zu Heft 9 der *Europäische Zeitschrift für Wirtschaftsrecht* 2000; see also *J. Sack*, *Zur künftigen europäischen Gerichtsbarkeit nach Nizza*, *Europäische Zeitschrift für Wirtschaftsrecht* 2001, 77. As to the American experiences, see *E. N. Veasey* (Chief Justice, Delaware Supreme Court), *The Role of the Judiciary in Corporate Law, Corporate Governance and Economic Goals*, *infra* in this volume at p. #.

<sup>40</sup> Cf. *A. Althaus*, *Principles of Cross-Border Supervision: The Swiss Approach to Enhanced Co-operation in International Financial Services Supervision*, (1999) 1 *International and Comparative Corporate Law Journal (ICCLJ)* 125.



