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REFLECTIONS ON SOME RECENT CORPORATE GOVERNANCE REFORMS IN GERMANY: A TRANSFORMATION OF THE GERMAN AKTIENRECHT?

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I INTRODUCTION

Several recent academic articles published in English reflected quite negatively on two of the most fundamental and distinctive aspects of the German law relating to public corporations (Aktienrecht),¹ namely the German two-tier board system and the German system of supervisory codetermination.² The focus of these contribu-

¹ I gratefully acknowledge the assistance of the Alexander von Humboldt Stiftung, Deakin University and Prof. Dr. Ingo Saenger's Institut für Internationales Wirtschaftsrecht (Münster, Germany), which enabled me to conduct research in Germany from July-December 2003.

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¹ Aktienrecht is usually translated directly as ‘stock corporations law’ and Aktiengesellschaft as ‘stock corporation’, but as the term ‘stock corporation’ is nowadays not commonly used in traditionally Anglo-American literature, it was decided to use the phrases ‘law relating to public corporations’ and ‘public corporations’ for purposes of this contribution — see generally Martin Peltzer and Anthony G. Hicking-botham German Stock Corporations Act and Co-Determination Act (1999). What is known as private or proprietary companies or close corporations in common law systems is the German Gesellschaft mit beschränkter Haftung (GmbH) or limited liability company — see Hannes Schneider and Martin Heidenhain, The German Stock Corporations Act (2000) 3; and Nico Olbrisch and Jean J du Plessis, ‘Some Structural Differences Between the South African Close Corporation and the German GmbH’ (1997) Journal of South African Law 315 ff.

tions was on the shortcomings of the German system of corporate governance rather than on the remarkable reforms that took place recently and, as Klaus Hopf, one of the leading corporate law experts in Germany observes, it is hardly surprising that academic commentators, commissions and business people would normally conclude that it is their own corporate governance system that is superior to the foreign one. In this contribution the focus will be on recent reforms of the German law relating to public corporations and to consider whether it could be described as a transformation of that area of the German law. It is, however, important to start the discussion with a few important general observations.

When doing comparative corporate governance research, including comparing alternative board structures, one should always keep a few basic things in mind. First, as Paul Davies points out, it is unwise to look for solutions 'in other countries' corporate governance systems simply because one's own economy is doing badly in the current phase of an economic cycle.' Secondly, corporate governance, including the particular board structure used, should be viewed very specifically in context of a country's own tradition, history, culture and own corporate law system. The simple reality that we have different corporations laws for all major economies should tell us that there will always be fundamental aspects distinguishing corporate law systems from each other, irrespective of the so-called theory of convergence. There is nothing wrong in recognising and accepting these differences as was so appropriately illustrated by the excellent recent assessment of different corporate

3 Klaus J Hopf, 'Gemeinsame Grundsätze der Corporate Governance in Europa?' (2000) 29 Zeitschrift für Unternehmens- und Gesellschaftsrecht 779, 784. See further Klaus Pohle and Axel v. Werder, 'Die Einschätzung der Kernthesen des German Code of Corporate Governance (GCCG) durch die Praxis' (2001) 54 Der Betrieb (Zeitschrift) 1101, 1103 ff, 1107 for an interesting survey demonstrating that German public corporations are largely satisfied with the two-tier board system and codetermination, but that modernisation of the system was considered to be imperative.


...
governance systems applicable in the European Union.\(^7\) Thirdly, and perhaps most importantly, it is nowadays misleading to express a preference for "a unitary board" or 'a two-tier board' without clarifying what is meant by these terms. In a corporation where the business of the corporation is not managed by the board, but "under the direction of the directors";\(^8\) with a majority independent (or outside) non-executive directors; a senior independent director; an independent non-executive director as Chair; and several sub-committees\(^9\) it can hardly be said that such a corporation has a "unitary board" comparable to the "unitary board" that was the focus of attention of many studies over many years.\(^10\) It is nowadays beyond dispute that in actual fact the modern, or should we say reinvented, unitary board has much more in common with the traditional two-tier board than many would be prepared to admit.\(^11\) If one looks at the modern unitary board it does not look so single dimensional as some would believe. On the other hand, the modern German two-tier board is not always as two-dimensional as some would make it out to be.\(^12\) Because of the way the traditional unitary board was reinvented, we will probably have a score slightly in favour of the two-tier board system if we really must select a winner in "the unitary board" versus "the two-tier board" contest, but at the end of the day it is perhaps best simply to realise that the so-called "fit-all board structure" does not exist and will probably never exist.\(^13\)

The most significant advantages of comparative corporate governance research lie in the fact that the best characteristics of alternative corporate governance systems should be identified and, if at all possible, to interpose into one's own corporate governance system elements of them taking into consideration tradition, history,


\(^8\) See s 198A(1) of the Australian Corporations Act 2001. See further AWA Ltd v Daniels (Trading as Deloitte Haskins & Sells & Ors) (1992) 10 ACLC 933 and quote in n 15 below.


\(^12\) See Carsten Berr, 'Die zustimmungspflichtigen Geschäfte nach § 111 Abs. 4 AktG im Lichte der Corporate Governance-Diskussion' (2001) 54 Der Betrieb (Zeitschrift) 2181, 2185-2186.

\(^13\) As Davies, above n 4, [137] points out 'there is no "one best" system of corporate governance'. See also Aste, above n 5, 1.
culture and the local corporate law. In other words such research should not have a narrow focus on the relative merits or limitations of the German two-tier board and the Anglo-American unitary board.\textsuperscript{14} Fortunately it seems as if this has been the trend in practice as become so apparent when the mutual influences of corporate governance systems, previously considered to be irreconcilable, are highlighted — a much clearer recognition of the distinction between supervisory and management functions;\textsuperscript{15} adoption of Codes of Good Practices;\textsuperscript{16} the more common use of board committees\textsuperscript{17} ... to name but a few.

II FOCUS ON THE SUPERVISORY BOARD AND A CODE OF BEST PRACTICE

The German corporate governance debate, and in particular the debate on the functions of the supervisory board has for many years been considered to be of academic interest only.\textsuperscript{18} This perception has lately changed significantly. The supervisory board was the focus of attention of the German Government;\textsuperscript{19} it formed


\textsuperscript{15} See AWA Ltd v Daniels (Trading as Deloitte Haskins & Sells & Orr) (1992) 10 ACLC 933 for a rare occasion where a judge was prepared to reflect on the necessity of a distinction between managerial and supervisory functions in large public companies:

The Board of a large public corporation cannot manage the corporation’s day to day business. That function must of necessity be left to the corporation’s executives. If the director of a large public corporation were to be immersed in the details of the day to day operations the directors would be incapable of taking more abstract, important decisions at board level (Dovey v Corp [1901] AC 477, 488; Mitchell Directors’ Duties and Insider Dealings (1982) 45, American Institute, Principles of Corporate Governance: Analysis and Recommendations, Proposed Final Draft 31 March 1992 107–09, 175–6; Jackson ‘The Liability of Executive Officers under Corporations Law’ (1991) 3 Bond Law Review 275, 276).


\textsuperscript{16} The Australian and German Codes (German Code, above n 11; Australian Code, above n 9) are the most recent examples.


\textsuperscript{18} In 1995 it was with frustration that Lutter (Marcus Lutter, ‘Defizite für eine effiziente Aufsichtsratstätigkeit und gesetzliche Möglichkeiten der Verbesserung’ (1995) 159 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 287, 288-289) observed that he had been writing on the rights and duties of the supervisory board members for almost 15 years, but to no avail. See generally Marcus Lutter ‘Der Bericht der Regierungskommission, ‘Corporate Governance’ in Gesellschaftsrecht in der Diskussion 2001 (2002) 47 ff; and Alexander Holl, Die Reform des aktienrechtlichen Aufsichtsrat (2002).

the central theme of discussion of several seminars and symposiums; German industry committed itself to finding solutions; trade unions made recommendations; and eminent German academics participated keenly in this debate.

The recent debate on corporate governance in Germany was closely linked with the relatively difficult economic conditions experienced in Germany during the middle and late 1990s and in particular with the difficulties experienced in the German iron and steel industry. Difficulties experienced in some of the large German industries were blamed upon failure and neglect of management and those overseeing the business of large corporations, particularly the supervisory boards. The effectiveness of supervisory boards received considerable attention in academic literature during the 1990s. The gist of criticism was aimed at the ineffectiveness of supervisory boards generally, but also at the relationship between the supervisory

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24 This fact has been mentioned by quite a few chairmen of management boards in their yearly reports — see Klein-Gunnewyck (Chairman's Statement: PWA AG) 1994.06.24; Fulconis (Oberland Glas AG) 1994.06.23; Holler (Chairman's Statement: Mauser Einrichtungen AG) 1994.05.30; Winkhaus (Chairman's Statement: Henkel AG) 1994.06.06. The financial years, 1993 and 1994 were indeed described by some as the most difficult years after World War II — see Deuss (Chairman's Statement: Karstadt AG) 1995.06.13 and Reuter (Chairman's Statement: Daimler Benz AG) 1994.05.18. See also Carsten P Clausen, 'Aktienrechtsreform 1997' (1996) 41 Die Aktiengesellschaft (Zeitschrift) 481, 481; and Berrar, above note 12, 2181.


26 Clausen, above n 24, 481.

27 Lutter, above n 18, 287 ff; Wolfgang Bernhardt, 'Aufsichtsrat — die schönste Nebensache der Welt?' (1995) 159 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 310, 311 ff; Shearman, above n 2, 123 ff.
and management boards and the defects in the composition of the supervisory board.\textsuperscript{28}

The official reaction to the corporate governance debate of the middle 1990s came in November 1996 with a Ministerial Draft Bill dealing with issues relating to more transparency in corporations and the powers of control of the various organs of public corporations,\textsuperscript{29} also generally known as the \textit{Aktienrechtsreform 1997}.

The Draft Bill dealt with several fundamental aspects pertaining to the duties, responsibilities and liability of members of supervisory boards, proxies, financial statements and disclosure, votes by the Banks on behalf of shareholders and financial instruments and capital markets.\textsuperscript{31} This Draft Bill was widely discussed in 1997.\textsuperscript{32} Several amendments were made to the original Draft Bill before it became law in May 1998.\textsuperscript{33}

The proposed changes were described by some as comprehensive and akin to the reform of the German corporations law in the 1960s.\textsuperscript{34} Others were more sceptical and described the changes as no more than cosmetic,\textsuperscript{35} or rather done piecemeal instead of by way of a comprehensive review of the German corporations law.\textsuperscript{6} Some of the more fundamental questions asked during the reform process was how the German corporations law could be modified to ensure the improvement of the state of businesses in Germany and how to create more jobs.\textsuperscript{37} Nowadays several items, like the role and functions of the management board and general meeting and removing some unnecessary bureaucratic provisions from the corporations law are mentioned as items on the long-term reform agenda of the German corporations law.\textsuperscript{38}

\textsuperscript{28} For a more detailed analysis of the issues at stake, see Jean J du Plessis, "Corporate Governance: Reflections on the German Two-Tier System" (1996) \textit{Journal of South African Law} 20, 41-44.

\textsuperscript{29} \textit{Referentenentwurf eines Gesetzes für Kontrolle und Transparenz im Unternehmensbereich (KonTraG)} — Dokumentation, 1997 (Special Edition) \textit{Die Aktiengesellschaft (AG)}, 7.


\textsuperscript{32} See 1997 (Special Edition) \textit{Die Aktiengesellschaft (Zeitschrift)} 9 ff for detailed commentary by some of the most eminent corporate law academics in Germany.

\textsuperscript{33} \textit{Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG)} — Bundesgesetzblatt Teil I (BGBl. I) 1998 786 ff.

\textsuperscript{34} See Claussen, above n 24, 494.

\textsuperscript{35} Ekkehard Wenger, 1997 (Special Edition) \textit{Die Aktiengesellschaft (Zeitschrift)} 57, 57.

\textsuperscript{36} Ulrich Seibert, "Aktienrechtsreform in Permanenz?" (2002) 45 \textit{Die Aktiengesellschaft (Zeitschrift)} 417, 417. However, at 419-420 the author explains that such piecemeal reform was necessary as comprehensive corporate law reforms take a long time and there was simply not enough time to wait for a comprehensive corporate law reform in Germany.

\textsuperscript{37} Claussen, above n 24, 481.

\textsuperscript{38} Seibert, above n 36, 419.
It was already realised at an early stage of the German corporate governance debate that most of the changes in the Draft Bill could be achieved without the necessity of statutory changes. In other words through voluntary or self-imposed good corporate governance practices. Some commentators warned specifically against the dangers of overregulation by the legislature and that such regulation often causes more damage than advantages that they bring.

Following the changes in 1998 a Government Commission, Chaired by Professor Theodor Baums, was appointed by the German Kanzler on 29 May 2000. The Baums Commission made 150 recommendations in its report released on 10 July 2001.

The work of the Commission was described as follows by the State Minister to the Chancellery, Mr Hans Martin Bury, when the report was delivered to the German Kanzler:

> The work of the Government Panel on Corporate Governance has laid the foundation for a comprehensive reform of German company law. The Panel's recommendations aim to improve corporate management and supervision, transparency and competition. They improve the protection of stockholders and strengthen Germany's financial market. The Government Panel not only has accomplished its mission of formulating recommendations to correct undesirable past trends, but has also developed proposals with well-reasoned future orientation to strengthen the German system of Corporate Governance and eliminate potential shortcomings.

The recommendations dealt with the introduction of a Corporate Governance Code for listed German corporations; intensifying the control over directing the business of the corporation and increasing the powers of supervisory boards; improving the rights of shareholders; improved protection for investors; improved provisions for the disclosure of information; improved accounting standards and financial report-

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41 Regierungskommission 'Corporate Governance — Unternehmensführung — Unternehmenskontrolle — Modernisierung des Aktienrechts'.
44 Translation by Sheaman & Sterling, 'German Government Panel on Corporate Governance' *Summary of Recommendations (Translation)* (2001) 1 — translation kindly provided to me by Professor Theodor Baums
ing; and the use of modern information and communication technology.\textsuperscript{45} For the purposes of this contribution the focus will be on the first two aspects.

It was made known that a group of experts would be appointed to draft a Code of Best Practices for Germany applying to all listed German corporations\textsuperscript{46} and that the Code should follow the "comply or explain"-principle adopted in the UK.\textsuperscript{47} This task was given to a Corporate Governance Commission under the chairmanship of Dr Gerhard Cromme (the Cromme Commission), who was appointed in September 2001.\textsuperscript{48}

One of the Baums Commission's recommendations was that a Standing Commission on Corporate Governance should be formed. It was recommended that such a Commission should consist of a maximum of 12 members and that the members should be selected based on their practical experience and knowledge of managing and overseeing corporations, experience in local and international listed corporations and also knowledge of corporations law, accounting and financial statements.\textsuperscript{49} This recommendation was followed and is currently reflected in the composition of the Cromme Commission's 12 appointed members (with the chairman, there are 13 members). They come from different backgrounds, with the majority of the members holding positions in supervisory and management boards, while there are also two academics (Professor Marcus Lutter and Professor Axel v. Werder) serving on the Commission.\textsuperscript{50}

As a continuation of the Baums recommendations of 2001, the Cromme Commission made several recommendations to change the Aktiengesetz (AktG). These changes became law on 19 July 2002 through a further Act reforming the law relating to public corporations and accounting, transparency and disclosure.\textsuperscript{51} An important part of the amendments dealt with expanding the rights and responsibilities of supervisory boards. The supervisory board can now insist that the management boards must report to it on the extent to which there were deviations from the


\textsuperscript{46} As the Code contains generally applicable good corporate governance practices non-listed companies are also encouraged to follow the Code — Axel v. Werder, 'Der Deutsche Corporate Governance Kodex – Grundlagen und Einzelbestimmungen' (2002) 55 Der Betrieb (Zeitschrift) 801, 802.

\textsuperscript{47} Translation by Shearmn & Sterling, above n 44, 1. See further Lutter, above n 25, 71-72.


\textsuperscript{49} Baums Report, above n 17, 61 para 17.


\textsuperscript{51} Gesetz zur weiteren Reform des Aktien- und Bilanzrecht, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz) Bundesgesetzblatt Teil I (BGBl. I. 2002 2681 ff).
business plan of the corporation during the course of the financial year. The right of a single member of the supervisory board to require further information was specifically introduced by deleting the requirement that at least two members of the supervisory board were required to obtain further information. The 2002 amendments also inserted a specific duty of confidentiality on all members of the supervisory board regarding confidential reports or confidential discussions.

III THE GERMAN CORPORATE GOVERNANCE CODE
(THE GERMAN CODE)

A Overview

In Germany the introduction of a Code of Good Corporate Governance Practices was always seen in context of the broader definition of corporate governance. The approach to such a definition was a realistic one, with two aspects being highlighted. First, corporate governance cannot ignore the stakeholder debate and, secondly, that the concept of corporate governance encompasses more than just the creation of legal structures for decision making and supervising the corporation. It was furthermore realised that because of the peculiarities of German corporations law, in particular the prescriptive nature of the AktG regarding a two-tier board, no international Code would fit the German situation perfectly.

56 Hopt, above n 3, 798-809 focuses on the three most fundamental differences between the UK and German corporate law systems and summarises them as follows: 1. Codetermination of the employees versus shareholder value; 2. Universal banks versus capital markets; and 3. The law relating to company groups versus resignation, fiduciary duties (Treuepflichten) and piercing the corporate veil.
57 Schneider and Strenger, above n 55 107.
Although there were some private initiatives to introduce a Code of Best Practice for Germany in 2000, the official German Code was only adopted on 26 February 2002. One of the main aims with the Code was to improve corporate governance practices relating to managing, directing and overseeing listed corporations. Two basic principles were adopted, namely that it would basically only apply to listed corporations and that it would not be mandatory, but that listed corporations must explain if they do not follow certain specific recommendations of the Code (the "comply or explain" principle). What is, however, different from most other systems where voluntary corporate governance Codes were adopted, is that in Germany the obligation to comply with the German Code or to explain non-compliance was introduced into the German law through a statutory provision, section 161 of the AktG. Section 161 basically puts a statutory duty on supervisory boards and management boards of all listed German corporations to state that they "comply" with the German Code as published electronically by the Standing Corporate Governance Commission or to "explain" if they do not comply with the Code. The "comply or explain"-statement must be prepared on an annual basis and must also be made available to the shareholders at all times.


61 See Seibt, above n 50, 258-259.

62 See discussion below.


64 § 16 of the Gesetz zur weiteren Reform des Aktien- und Bilanzrecht, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz) — Bundesgesetzblatt Teil I (BGBl. L 2002 2681 ff).


68 For the background to the insertion of s 161, see ‘Mehr Transparenz und Publizität im Aktien- und Bilanzrecht’ Press Release ‘6 February 2002.
It was realised at an early stage of the corporate governance debate that such a voluntary corporate governance system would provide the advantage of responding quickly and effectively to constantly changing needs of business, something that could not be achieved if corporate governance practices were formalised through legislation, especially because of the tediousness involved in amending legislation.  

The Cromme Commission amended the original Code with effect from 21 May 2003. These changes deal primarily with the remuneration of the members of the management board, in particular to ensure regular review of the remuneration of management board members by the supervisory board; ensuring that their remuneration must be performance-based and contain risk elements; providing for the possibility that the supervisory board could put a cap on the remuneration for extraordinary unforeseen developments; that the salient features of management board remuneration must be explained in detail in plainly understandable language in the financial statements of the corporation; and the Chairman of the supervisory board must also outline the salient points of the management board remuneration and any changes thereto to the General Meeting.

These changes were introduced primarily due to international developments and in particular developments following the Enron collapse and the introduction of the Sarbanes-Oxley Act of 2002 in the USA. There are some practical difficulties for corporations to comply with these new provisions as no transition provisions were published and the exact wording of the new provisions was not made known until it was published on 21 May 2003. It is suggested that there are situations where there will be a duty on corporations to amend their original “comply or explain”-statement done under the previous Code to reflect the new provisions of 21 May 2003.

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<http://www.bundesregierung.de/Nachrichten/-433/Pressemittelungen.htm> at 1; 'Unternehmensführung – Unternehmenskontrolle – Modernisierung des Aktienrechts' Press Release 3 August 2001 <http://www.bundesregierung.de/Nachrichten/-433/Pressemittelungen.htm> at 2. The authors Semler and Wagner, above n 67, 554 ff explain what aspects the annual statement should contain.


71 German Code, above n 11, article 4.2.2.

72 ibid, article 4.2.3 (1st para).

73 German Code, above n 11, article 4.2.3 (2nd para).

74 German Code, above n 11, article 4.2.3 (3rd para).

75 German Code, above n 11, article 4.2.3 (4th para). See generally Seibt, above n 65, 465-466.


77 Seibt, above n 65, 477. See also Gelhausen and Hönsch, above n 69, 268 ff.

78 Gelhausen and Hönsch, above n 77, 371.
B Parts and layout of the German Code

The Code consists of seven different parts. The first part, namely the foreword, explains the purpose of the Code and how the provisions of the Code should be interpreted. Part 2 deals with shareholders and the general meeting; Part 3 with the cooperation between the management board and the supervisory board; Part 4 with the management board; Part 5 with the supervisory board; Part 6 with information that should be disclosed to ensure transparency; while Part 7 deals with accounting aspects like financial reporting, audits and the financial statements.

In the foreword it is explained that there are basically three types of provisions in the Code. The first group of provisions is identifiable by the use of the word “shall” (soll). These provisions contain the core recommendations of the Code and are the provisions to which the principle of “comply or explain” will apply. The second set of provisions is identifiable by the words “should” (sollte) or “can” (kann). These provisions are considered to be good corporate governance principles, although not really the core ones. Corporations are encouraged to follow them, but no explanation is required if they do not. All remaining provisions in the Code, not identifiable by any one of the words used above, are considered to be provisions confirming the existing legal requirements under the current German law relating to public corporations. In other words, they simply serve as a general and user-friendly way of explaining the most basic existing corporate governance rules under the German corporations law. This serves a so-called communication function. These provisions are quite useful as it is indeed one of the most basic explanations of the German two-tier board system and the relationship among the various corporate organs that exist in the German literature. Almost half of the provisions of the Code are indeed of an explanatory nature.

The duty to comply with the Code or to explain non-compliance extends to basically three groups of people in the corporation, namely the two main organs of the

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79 See generally v. Werder, above n 46, 803.
81 v. Werder, above n 46, 801-802. Whether, as v. Werder seems to suggest (see 802 n 16), the Code will ensure that misunderstandings would stop occurring, is highly unlikely. Misunderstandings, misconceptions and misconceptions about the German corporations law will almost definitely re-occur because of the complexities of the German corporations law; the inaccessibility of the German corporations law (see v. Werder’s sentence immediately before n 16 on p 802; and Hirt, above n 2 (2002) 23 The Company Lawyer, 354)); and the impossibility to enunciate, especially in English, all the subtle aspects of the German corporations law. For a good example of a contribution containing several generalisations, see Mahut Yavas, ‘Shareholding and Board Structures of German and UK Companies’ (2001) 22 The Company Lawyer 47 — at 48 the author, without quoting any sources, states as follows: ‘Accordingly, the German system of corporate governance is peculiar in two respects. First, almost all interested parties in a company are represented on the supervisory boards. Therefore, the shareholders and other parties can make use of control rights over the managers. Secondly, there is no evident social and political opposition to this structure.’
82 See also Ulmer, above n 60, 153.
83 Lutter, above n 25, 73.
corporation (the supervisory board and the management board); some individual members of these organs, and the corporation’s auditors.\textsuperscript{84}

C \textit{Wide endorsement of the Code}

Although there are still several practical difficulties experienced in complying fully with the Code, it seems as if there is a real desire by most German corporations required to comply with the Code to do so.\textsuperscript{85} As part of this process the majority of listed corporations seem keen to appoint corporate governance compliance officers to ensure proper compliance with the Code.\textsuperscript{86}

IV \textbf{ACHIEVEMENTS WITH RECENT CORPORATE GOVERNANCE REFORMS}

The changes to the German law relating to public corporations since 1998 achieved at least the following things. It firstly broadened the rights and duties of the supervisory board considerably.\textsuperscript{87} Secondly, it strengthened the role of the supervisory board as central supervisory and overseeing organ to fulfil its functions on behalf of shareholders, creditors and employees.\textsuperscript{88} Thirdly, it has the potential to ensure that good corporate governance practices are followed in Germany.\textsuperscript{89} Fourthly, it introduced into the German corporations law several modern international best corporate governance practices.\textsuperscript{90} Finally, the German Code provides an ideal instrument for

\textsuperscript{84} Ulmer, above n 60, 154-155.
\textsuperscript{86} Seibt, above n 65, 469. The duty to comply with the German Code could also be achieved through appropriate clauses in the contracts of appointment of supervisory board and management board members; by adding this duty to the articles of incorporation; or by adding it to the directives of the managing board (\textit{die Geschäftsforderung des Vorstand}) — see Semler and Wagner, above n 67, 557-558.
\textsuperscript{89} Schiessl, above, n 54, 594; Lutter, above n 23 ((2001) 30 \textit{Zeitschrift für Unternehmens- und Gesellschaftsrecht), 228.
\textsuperscript{90} Gelhausen and Hönsch, above n 69, 367 and 371; v. Werder, above n 46, 801-802; and Ehrhardt and Nowak, above n 63, 345. An author like Seibt, above n 36, 418 correctly points out that most of the corporate law reforms in Germany over the past 10 years were driven by ‘globalisation’ and ‘digitilisation’.
the German Law to respond quickly and effectively to constantly changing needs of business, in particular regarding best corporate governance practices.\footnote{v. Werder, above n 46, 802.}

V \hspace{1cm} **CONCLUDING REMARKS**

Most of the problems identified and discussed in Germany during the middle and late 1990s were addressed by way of amendments to the AktG or by way of proposals currently taken up in the German Code.\footnote{Lutter, above n 23 ((2001) 30 Zeitschrift für Unternehmens- und Gesellschaftsrecht), 228.} That is why commentators are nowadays prepared to state that the German legislature’s dedication to improve the way in which German corporations are directed and supervised has, at least for the moment, come to an end.\footnote{Semler and Wagner, above n 67, 553.} It could safely be stated that there were such remarkable developments regarding the German two-tier board system, the respective roles of the various corporation organs and the interrelationship amongst these organs that some criticism aimed at the German two-tier board system as recently as 1997 could nowadays be discarded.\footnote{See for instance criticism by Shearman, above n 2, 123.} There is also little doubt that the remarkable reforms that took place in the German law regarding public corporations could be described as far-reaching and irreversible.\footnote{See generally Peltzer, above n 66, 593; and Seibert, above n 36, 420.} It could even be contended that these reforms were on a scale not experienced since the last major corporate law reform in Germany during the 1960s.\footnote{See Claussen, above n 24, 494.}

However, it would be pretentious to say that these reforms transformed the German Aktienrecht. The first problem is of course that views may differ considerably as to what would be considered to be a transformation of any particular area of law in any particular country. Secondly, these reforms did not touch upon the most distinctive and most fundamental aspects of the German law of public corporations, including aspects like the German two-tier board system; the German system of supervisory codetermination;\footnote{Lutter (Lutter, above n 23 ((2001) 30 Zeitschrift für Unternehmens- und Gesellschaftsrecht), 227), without providing any further explanation, refers to the two-tier board system and codetermination as two of the distinctive German corporate governance features, but simply states that they could be noted and explained, but not changed. That is obviously not true, unless there is no desire to change them.} and some other more general distinctive aspects of the German corporations law.\footnote{Hopt, above n 3, 798-809.}

There are also other smaller fundamental aspects of the German law relating to public corporations that need to be affected before one would be able to conclude that a transformation took place. One can think of several such fundamental aspects without much difficulty. The way in which the general duties of supervisory board
members and management board members are defined in the AktG\textsuperscript{99} stands in sharp contrast with comparable statutory duties in some other jurisdictions.\textsuperscript{100} Closely linked to the duties of directors is the issue of instituting actions on behalf of the corporation against supervisory and management board members in breach of their duties.\textsuperscript{101} The German law, clearly because of the two-tier board system, also puts a completely different emphasis on the removal of supervisory and management board members\textsuperscript{102} than in some other jurisdictions.\textsuperscript{103} There is furthermore a very different emphasis on the disqualification of management and supervisory board members on application in Germany than in some other jurisdictions.\textsuperscript{104} Finally, there is also no strong Corporate Regulator comparable with the US Securities and Exchange Commission (SEC) or the Australian Securities and Investments Commission (ASIC) in Germany.\textsuperscript{105}

In short, there were several remarkable corporate governance reforms in Germany since 1998, but it would be pretentious to describe them as a transformation of the

\textsuperscript{99} See 93 and 116 of the AktG.

\textsuperscript{100} Cf ss 180-185 of the Australian Corporations Act of 2001 and ss 131-138 of the New Zealand Companies Act 1993.

\textsuperscript{101} Regarding the huge problems of enforcing breaches of duties against supervisory and management board members - see Michael Adams, 1997 (Special Edition) Die Aktiengesellschaft (Zeitschrift) 9, 10; Theodor Baums, (Special Edition) Die Aktiengesellschaft (Zeitschrift) 26, 27; Lutter, 1997 (Special Edition) Die Aktiengesellschaft (Zeitschrift) 52, 55; Bernhard, above n 27, 314; Michael Adams, 'Die Usurpation von Aktionärsbefugnissen mittels Ringverfluchtung in der "Deutschland AG" ' (1994) 39 Die Aktiengesellschaft (Zeitschrift) 148, 155. The Government announced in a 10-Point Plan on future corporate law reforms to improve the remedies of minority shareholders to institute action against supervisory board and management board members on behalf of corporations (currently s 147 of the AktG); provide third parties with remedies against supervisory and management board members for spreading grossly incorrect information in the capital markets; and further criminal liability for auditors and management boards regarding false financial statements — see Points 1, 2 and 10 of the Maßnahmenkatalog der Bundesregierung zur Stärkung der Unternehmensintegrität des Anlegerschutzes <http://www.bundesfinanzministerium.de/investment-und-vermoegen/aktuell-528.17030/Artikel.html>; and Schiesel, above, n 54, 602.

\textsuperscript{102} As general rule, members of the supervisory board can only be removed by way of a special resolution (75\% majority) - see s 103 of the AktG regarding the shareholder representatives and Marcus Lutter and Gerd Krieger Rechte und Pflichten des Aufsichtsrats (4th ed, 2002), 6-7 paras 11-13 regarding employee representatives. Members of the management board can only be removed for compelling reasons (wenn ein wichtiger Grund vorliegt) — s 84(3) of the AktG. The rationale for making removal of management board members possible only when there are compelling reasons is to ensure that the management board stays independent and cannot be removed by the supervisory board simply because the supervisory board does not agree with the managerial decisions of the management board — see Lutter and Krieger (2002) 146 para 364; Hopf, above n 23, 4.


\textsuperscript{104} There is in actual fact no disqualification provisions in Germany comparable with the UK Company Directors Disqualification Act 1986 or ss 206D-206F of the Australian Corporations Act 2001. The only provisions regarding disqualification of directors for public companies are very basic automatic disqualification provisions contained in ss 76(3) of the AktG — cf s 206B of the Australian Corporations Act 2001.

German Aktienrecht. There is, however, no doubt that they have modernised the German law of public corporations considerably and that they have changed certain aspects of the German law of public corporations irreversibly.