

Germany Inc. Eroding? - Board Structure, CEO and Rhenish Capitalism

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A. Introduction

[1] On May 22, Mr Rolf-Ernst Breuer, until then speaker of the managing board of Deutsche Bank AG („Bank“), stepped aside to let Mr Josef Ackermann take his place in the small circle of leading managers of Europe's biggest banking institution. Mr Breuer takes the chair of the Bank's supervisory board, as is often practice for the departing Speaker in German stock corporations. This would – in and by itself – be less noteworthy were it not marking, at the same time, possibly a fundamental change in German company structure. The French newspaper, *Le Monde*, asked already ahead of time whether the event ought to be seen as a cultural revolution (1) and other commentators are readily applying likewise vocabulary.(2) Mr Ackermann has, for some time now and under immense press coverage, been ventilating his strong desires to change the inner workings and structure of the Bank's managing board and it is all but easy to decipher whether or not he ultimately will succeed in doing so and which other changes his initiatives eventually will bring about. The structural overhaul inside the Bank certainly takes place at a time where the Bank is facing financial pressure.(3)

B. Tertium Non Datur? Reaching beyond the Two-Tier System

[2] Mr Ackermann has, since long, ventilated his aspirations to roll back the board's collective and consensual structure in favour of establishing a more unitarily organized, personalized governance structure – with, as critics claim, an American style *Chief Executive Officer* (CEO) at the centre of a new body, called *Executive Committee*. The Executive Committee will be accompanied by a smaller Managing Board (reduced in size from 8 to 5 members) and will consist of a core of 7 managers, most of which are Investment bankers from the Bank's London office. The members of the Executive Committee will be in charge of those fields that Mr Ackermann – in line with common thinking in international banking and finance these days – considers central to the Bank's tasks: predominantly CIB (corporate investment banking) and PCAM (Private Clients Asset Management). The new board structure, which was approved by the *Aufsichtsrat* in the beginning of this year, reflects a drastic change of organizing principles under German Stock corporation law. Accordingly, the *Vorstand* (Managing Board) is in charge of operative management and acting as the agent of the Corporation.(4) The Managing directors as members of the Managing Board are appointed by and report to the *Aufsichtsrat* (Supervisory Board). They are appointed for a Five-year term, with unlimited possibility of reappointment.(5) The members of the Management Board take their decisions on a consensual basis and sign collectively responsible (§§ 77, 93 AktG). The *Aufsichtsrat* consists of shareholders and – according to the size of the company – an up-to-equal number of employee representatives. The members of the *Aufsichtsrat* are elected by the *Hauptversammlung* (General Assembly of Shareholders) for a maximum of roughly five years, the exact length of their appointment being dependent on the General Assembly's voting on the board's relief for the fourth business year.(6) The *Aufsichtsrat*, whose task it is to control the operative business of the *Vorstand* (§ 111 para. 1 AktG), has the right to be informed by the *Vorstand* on request about the financial situation of the firm, the current and prospective business decisions including human resources, investment and other financial issues.(7) Surely, against the background of a series of fatal financial downfalls of big economic actors without a sufficiently informed *Aufsichtsrat*(8), there has been – for some time now – a vivid debate about muscling up this body of the corporation.(9) It comes as no surprise, then, that recently published recommendations from the Industry and financial players lay particular emphasis on strengthening the *Aufsichtsrat's* information rights.(10) The initiative taken by Josef Ackermann, however, appears to be going into a different direction, as the managers sitting on the Executive Committee – after having been appointed by the Management Board (not the Supervisory Board!) – are expected to report only to Ackermann - not to the Supervisory Board. The Management board's accountability towards the Supervisory Board must be - in one way or the other, then, - extended to the Executive Committee in principle if the Executive Committee is not to become an isolated organ at direct and exclusive disposition of the Management Board's Spokesperson. It can be expected, that even the most powerful CEO will not be able to maintain certain members of the Executive Committee if these fail. Whether or not it is in the Supervisory Board's discretion and power to remove unsuccessful members (managers) from the Committee - as is the case for the Supervisory Board's relationship to the Management Board - or whether this only is possible by way of exerting pressure upon the CEO - this remains to be seen.

[3] The ‚relativization‘ of the Management board by a new management body, the Executive Committee, has provoked quite varied reactions. Apart from the promptly made references to current German law, which knows no such third body alongside Managing and Supervisory Board (11), it is almost as if we were witnessing a strange convergence of interest between management and employees. From the side of organized workers' representation, leading figures of the German Union Association (*Deutscher Gewerkschaftsbund*) immediately drew attention to the allegedly free-floating nature of the Executive Committee vis-à-vis the claims to control from the Supervisory Board.(12) On the other side, leading bankers, former members of the Bank's Management Board have seen their positions weakened substantially, as Mr Ackermann had scheduled them neither for a longer stay on the Managing

Board nor offered a seat on the Executive Committee.(13)

[4] While proclaimers of shareholder value, that is the approach to corporate governance which places prime emphasis on the returns to shareholders' investments in the corporation, seem to welcome Mr Ackermann's proposals, others fear and moan the end of 'Rhenish capitalism'.(14) Latter has become the term for circumscribing a system characterized by extensive cross holdings in industrial sectors, long-term investment of banking institutions in corporations and, thus, a close network between creditor and industry institutions and among industrial actors themselves,(15) but also by a strong presence of institutional bargaining between collective actors of Industry and employees.(16) The up-to-now absence of a market for corporate control (17) results from the fact that for one - until into the Nineties - comparatively little capital had actively been traded and also, that there is still a comparatively high degree of protection measures available to German Management Boards vis-à-vis hostile takeover bids.(18) Furthermore, as banks hold equity, the focus has for a long time been on long-term involvement in companies. Banks hold seats in Supervisory Boards and exercise - alongside extensive proxy voting capacities - a large degree of influence on the management's doings.(19) Unlike in the U.S. or the UK, the German capital market is not - yet - characterized by a great degree of liquidity and a wide dispersion of shareholders.(20) The still characteristic, concentrated ownership structure accounts for a whole set of ensuing characteristics marking the German and, as is sometimes held, more widely a 'continental' or 'European' approach to corporate governance.(21)

[5] Among the most important and seemingly stable features of German corporate governance one certainly has to count the role played by employees within the governance structure of big capital companies. The two-tier structure of *Vorstand* (Managing Board) and *Aufsichtsrat* (Supervisory Board) allows for a substantial degree of workers' representation and participation in the political decisions of the company. The system of co-determination, currently in force in Germany, foresees that - in capital companies with more than 2.000 employees - there shall be a fifty percent quota of their representatives on the Supervisory Board.(22) The tenacity of this workers' representation regime became explicitly visible when - at last - it seemed to have been overcome at the EU Nice Summit where, after some three decades of struggling over the right formula, finally a compromise was struck which cleared the way for the adoption of a statute of the European Company (*Societas Europaea*). (23) While critics were prompt in denouncing the toothlessness and other problems of the European wide agreement (24) , the adoption of the statute as such must be seen as a decisive moment in European company law. Latter continues to be ridden - say some -, characterized - say others - by pressing divergences of company law systems in force in the Member states, and the *Societas Europaea* might, against this background, be and prove in many ways symbolic.

C. Pressures of Convergence and National Particularities

[6] That national divergences remain pertinent - despite a vivid, contemporary debate concerning allegedly world wide convergences of corporate governance systems (25) - is clearly reflected by another 'European' company law event. Last summer's failure of pushing the European Takeover directive through the European Parliament (26) must be seen as a clear expression, or 'defense' of particular company law features. A major point of conflict concerned the question of defensive measures the management should or should not be allowed to take against hostile takeover bids, and the German position had and has been one of granting substantial discretion to a target firm's management. This met with the opposition of a number of other Member states that were ready to espouse a more market-oriented model, denying the management these rights of defense. While there has been considerable movement on the European level with regard to reviving the company law harmonization programme, for the time being, the prospects for a market for corporate control in the European Union are slim.(27)

[7] But, at least partially, the tides may be changing as the German system of corporate governance itself appears to be undergoing substantial changes. Restructurings such as those taking place on Deutsche Bank's Management level are reflective of a growing trend towards other-than-continental understandings of company law and corporate governance. The German two-tier-structure prevalent in Joint Stock Companies lies at the centre of the particular system of corporate governance which allows for the closely intertwined holding and control structure which has so readily been termed 'Germany Inc.'. (28) Recent tendencies to loosen the ties between financial intermediaries and industry by retreating both from long-term investments as well as by giving up the Supervisory Board presence in a great number of companies seem to imply gradual shiftings away from Rhenanian capitalism. The moves induced by Mr Ackermann at Deutsche Bank must therefore be seen always with regard to the general development of capital and financial markets and the repercussions therefrom for company structure and firm organization. It is far from evident that the recent miseries of the 'Neuer Markt' should toll the bell for German companies' further opening up to financial markets. Recent legislative efforts such as the Transparency and Control Legislation and the Corporate Tax Reform may well indicate a promising reform of, rather than a farewell bid to 'Germany Inc.'. Contemporary activities concerning the reform of corporate governance, predominantly undertaken by private experts at their own and at the invitation of the government reflect, however, the limits - as yet - of possible reform.(29) Codetermination, characterized by foreign observers as being the defining mark of German corporate governance, has so far remained untouched. Whether or not this is telling of a sense of certainty towards preserving its core features - in light of political reflection and commitment - or, possibly, a reflection of insecurity as to the immense difficulties any attempt

to further unravel the system would inevitably face, is hard to say. Mr Ackermann's Board restructuring seems to attempt to strengthen the lead management's role not only in relationship to the Supervisory Board but also to the former, complex interplay between Supervisory and Management Board. A welcome opportunity to reconsider and reflect defining features of (German) corporate governance.

(1) Ricard, La Deutsche Bank s'éloigne du modèle rhénan de "gouvernance", available at <http://www.lemonde.fr/article/0,5987,3234--261011-,00.html> (last visited 28 May 2002).

(2) See Europartnership, 4 March 2002: „Shift in corporate funding threatens European consensus management model", available at: <http://www.europartnership.com/news/02mar04.htm> (last visited 28 May 2002); Vorstände entscheiden meist im Team, in: Die Welt, 18.1.2002, stressing the importance of professionalizing the Supervisory Board in order to exercise control of the management more efficiently.

(3) Deutsche Bank baut weitere Stellen ab, Handelsblatt, 29 April 2002, Web Archive.

(4) §§ 76 para. 1, 78 para. 1 Stock Corporation Law (*Aktiengesetz*), available at: <http://jurcom5.juris.de/bundesrecht/aktg/index.html> (German language), last visited 30 May 2002.

(5) See § 84 para. 1 sentence 1, 2 Stock Corporation Law (*Aktiengesetz*), available at: <http://jurcom5.juris.de/bundesrecht/aktg/index.html> (German language), last visited 30 May 2002; see for details Kübler, Gesellschaftsrecht, pp. 182 ff.

(6) See § 102 para. 1 Stock Corporation Law (*Aktiengesetz*), available at: <http://jurcom5.juris.de/bundesrecht/aktg/index.html> (German language), last visited 30 May 2002; cf. Hüffer, Aktiengesetz, § 102, Annotation 2.

(7) See § 90 Stock Corporation Law (*Aktiengesetz*), available at: <http://jurcom5.juris.de/bundesrecht/aktg/index.html> (German language), last visited 30 May 2002.

(8) Mülbert, Stellung der Aufsichtsratsmitglieder, 100, and Pahlke, Risikomanagement, 1680, mention the famous-infamous cases of Schneider, Balsam/Procedo and Metallgesellschaft; Lambsdorff, Überwachungstätigkeit des Aufsichtsrats, 217, mentions Metallgesellschaft.

(9) See, e.g., Lutter, Vergleichende Corporate Governance, 227 ff., 232, arguing for the adoption of an 'information order' (*Informationsordnung*), laying down the Managing Board's information duties vis-à-vis the Supervisory Board. The „KonTraG" legislation of 1998 (*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich* of 27 April 1998, published in: BGBl. I (1998), p. 786, available at: <http://217.160.60.235/BGBl/bgb11f/b198024f.pdf>) has brought about a substantial change: the newly inserted § 91 para. 2 AktG requires the Management Board to establish a surveillance system ("*Überwachungssystem*") in order to recognize early on developments likely to endanger the future of the firm. See, for a critique of the vaguely formulated provision: Hüffer, Aktiengesetz, § 91 annotations 5-9; see also Pahlke, Risikomanagement, pp. 1680 ff.; cf. Baums, Corporate Governance in Germany, 41 with reference to the (then still) comparatively infrequent meetings of the Supervisory Board. The KonTraG of 1998 has changed the relevant provision, see § 110 para. 3 AktG (Stock Corporation Law); see hereto Hüffer, Aktiengesetz, § 110 annotation 10. Accordingly, Supervisory Boards in listed companies must convene twice per half calendar year and ought to convene once every quarter, in unlisted companies, the law requires one half-yearly meeting and recommends one meeting per quarter year.

(10) See German Corporate Governance Code, submitted to the German Ministry of Finance by the Government Commission „Corporate Governance", chaired by Mr Gerhard Cromme, Spokesman of the Supervisory Board of ThyssenKrupp AG, in February 2002, e.g., sub 3.4. (information Managing Board – Supervisory Board), available at: http://www.corporate-governance-code.de/eng/download/CorGov_Endfassung_E.pdf (last visited 1 June 2002); see, for the debate on reforming the Supervisory Board under German Stock Corporation Law, already Lambsdorff, Überwachungstätigkeit des Aufsichtsrats; Hopt, Two Tier Board.

(11) See §§ 76 ff. and §§ 95 ff. Stock Corporation Law (*Aktiengesetz*), available at: <http://jurcom5.juris.de/bundesrecht/aktg/index.html> (German language), last visited 30 May 2002; see the critical observations by Baums, Interview CEO.

(12) See the statement by the Union's Vice President, Mrs U. Engelen-Käfer, as cited in Ricard (supra note 1); see also Lebert, Deutsche Bank: Fischer unterliegt im Machtkampf, in: Financial Times Deutschland, 31 January 2002,

Web Archive, in: Financial Times Deutschland, 18 January 2002, Web Archive, available at: <http://www.ftd.de/ub/fi/13841907.html?nv=rs> (last visited 30 May 2002).

(13) Rolf Lebert, Deutsche Bank: Ackermann auf dem Weg zum Allmächtigen, in: Financial Times Deutschland, 18 January 2002, Web Archive, available at: <http://www.ftd.de/ub/in/10228963.html?nv=rs> (last visited 30 May 2002); Lebert, Deutsche Bank: Fischer unterliegt im Machtkampf (supra note 12).

(14) See, again, Ricard (supra note 1); see fundamentally the treatment by Albert 1991.

(15) See Albert 1991, 117 ff.; Streeck, German Capitalism, 36-7.

(16) Streeck, German Capitalism, 35.

(17) See hereto, e.g., Höpner/Jackson, Markt für Unternehmenskontrolle (analysis of the Mannesmann-Vodafone takeover).

(18) This continues to be the case under the recently adopted German Takeover Law (*Wertpapiererwerbs- und Übernahmegesetz* [WpÜG] of 20 December 2001, published in: BGBl. I (2001), p. 3822, available at: <http://www.bundesfinanzministerium.de/wwwroot-BMF/BMF-.336.5505/.htm> - last visited 1 June 2002), see § 33 WpÜG; see, for an analysis of the Law, the contributions in *DIE AKTIENGESELLSCHAFT* 2002, pp. 114-190 (e.g. by Assmann, Schneider, Krause, Aha and Busch). There is a particular sting to this legislation as it evolved during the direct aftermath of the European failure in July 2001 to adopt a long awaited Thirteenth Directive on Takeover measures: see, e.g., the press release under <http://www.union-network.org/UNIENewsEU.nsf/f883670a51012647c125681100363a47/bb083f5aefab537c1256a8f003ff677?OpenDocument> (last visited 1 June 2002); see also Pluskat, Scheitern der Übernahmerichtlinie; for a critical account of the European attempt to regulate Takeovers, see Baums, Unternehmensübernahmen in der EG, and Kirchner/Painter, European Takeover Law.

(19) Ziegler, Corporate Governance.

(20) Id.

(21) See, e.g., Rhodes, Apeldoorn, Capital Unbound; see also Buxbaum, Leitung von Gesellschaften, 66, for a discussion of investor capitalism-related developments in the US and their eventual spreading in Europe.

(22) See § 1 para. 1 No. 2, § 7 para. 1 No. 1 *Gesetz über die Mitbestimmung der Arbeitnehmer* of 4 May 1976 [*Mitbestimmungsgesetz*], published in: BGBl. (Official German Bulletin) I (1976), 1153; cf. Mülbart, Stellung der Aufsichtsratsmitglieder, 101, with reference to the Stock Corporation Reform law (*Gesetz für kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts* of 2 August 1995, published in: BGBl. I (1995), p. 1961) and the ensuing restriction of codetermination (*Mitbestimmung*) to companies with more than 500 employees.

(23) Baudisch, From Status to Contract, Hopt, Europäische Aktiengesellschaft, Thoma/Leuering, Societas Europaea.

(24) See, e.g., Hopt, Europäische Aktiengesellschaft, 1; Jahn/Herfs-Röttgen, Europäische Aktiengesellschaft, 637-8, arguing that negotiation duties related to workers' codetermination as set out in the statute are likely to create reluctances among those market participants from countries without a system of codetermination.

(25) See, e.g., Hansmann/Kraakman, End of History; Jacoby, Corporate Governance in Comparative Perspective; Gilson, Globalizing Corporate Governance; Rhodes, Apeldoorn, Capital Unbound; Teichmann, Corporate Governance in Europa.

(26) See, hereto the references, supra note 18.

(27) See, e.g., Deakin, Two Types of Regulatory Competition; Wouters, European Company Law.

(28) See, for a very comprehensive discussion, Cheffins, Executive Pay.

(29) See, Baums, Interview: Reforming German Corporate Governance; see the Government Commission's Report: Baums, Bericht der Regierungskommission.

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