

Recent developments in European Corporate Governance

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5 / 2007

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I. Introduction

The domain of European Corporate Governance (CG) is in constant motion. Not a month passes without new conferences, proposals or even regulations. Occasionally one cannot help the unpleasant feeling of losing track of current issues and developments. So from time to time it seems to be worthwhile to pause for a moment and assess the present situation.

For that aim I will take a look at the recent European past that especially centres on the year 2006. Naturally it only can be a fairly superficial glance at some selected topics that might be of special interest. Three different planes will be touched on in the following: The European level itself, where the Commission of the European Union (EU-Commission) as the main player is involved in several initiatives at currently different stages (II.). Climbing one step down to the national level the most recent changes in Corporate Governance Codes of member states will be shown. The protagonists here are Germany, Great Britain and Italy (III.). Continuing a little farther still in the sense of narrowing down the scope, the topic of “Corporate Social Responsibility (CSR)” will receive some extra attention, as it recently is pursued on global, European, national and enterprise level (IV.).

II. Progression on the European level

Initiated by the EU-Commission a comprehensive study of European Corporate Governance Codes was published in January 2002¹. It compared 35 Codes and the like originating from 1991 to 2001 showing similarities and differences of CG practices on the European level. Drawing on this extensive pool of information in November of the same year the so-called

¹ *Weil, Gotshal & Manges*, Comparative Study of Corporate Governance Codes relevant to the European Union and its Member States (ETD/2000/B5-3001/F/53), 2002.

“Winter-group” issued its report that contained 16 detailed recommendations for “good Corporate Governance”².

Based on those two publications³ the EU-Commission in May 2003 finally put forward its pivotal CG project that came to be known as the “Action Plan”, officially entitled “Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward”. Its main political goals were the strengthening of shareholder rights, the improvement of rights of third parties as well as the promotion of efficiency and competitiveness of European companies. To achieve these aims the EU-Commission prepared a plan that included short term (2003-2005), medium term (2006-2008) and long term (2009 onwards) actions⁴. A crucial part of those measures concerns the further development of CG⁵.

Whereas the EU-Commission already has accomplished some of the short term “non legislative” actions⁶, for example the recommendations on the role of independent directors⁷ and on directors’ remuneration⁸, as well as the founding of the European Corporate Governance Forum⁹, “legislative” measures that require EU directives are somewhat behind schedule. A directive to enhance CG disclosure requirements, accounting transparency and affirm collective responsibility of board members for financial statements has just been finished (1.). As to the strengthening of shareholder rights at the moment still only a proposal exists (2.). Medium term legislative actions concerning several topics of enhanced CG are actually still at consultation level; moreover, opposition already is noticeable (3.).

² *Winter-Group*, Final Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, 4.11.2002, http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf.

³ *EU-Commission*, Communication from the Commission to the Council and the European Parliament, COM(2003) 284 final of 21.5.2003 (Action Plan), p. 11.

⁴ *EU-Commission*, Action Plan (Fn. 3), Annex I, p. 24 ff.

⁵ For a more comprehensive overview of developments in European Company Law based on the “Action Plan” see *Baums, Theodor*, Aktuelle Entwicklungen im Europäischen Gesellschaftsrecht, Die Aktiengesellschaft 2007, p. 57 ff.

⁶ Compare the list of “Results delivered during the first phase of implementation of the Action Plan”, *EU-Commission*, Consultation on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union”, 20.12.2005, Annex 2, p. 15 f.

⁷ *EU-Commission*, Commission Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, OJ L 52, 25.2.2005, p. 51.

⁸ *EU-Commission*, Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies, OJ L 385, 29.12.2004, p. 55.

⁹ *EU-Commission*, Commission Decision 2004/706/EC of 15 October 2004 establishing the European Corporate Governance Forum, OJ L 321, 22.10.2004, p. 53.

1. Accounting Directive¹⁰

With the overall goal in mind to “build confidence in EU markets and reduce malpractice” the EU-Commission in 2004 launched an expansive consultation. Four key revisions of the EU accounting directives were to be tackled in one go¹¹, concerning (a.) establishment of collective responsibility of board members for financial statements, enhanced transparency through disclosure of (b.) related party transactions, (c.) off-balance sheet arrangements and introduction of (d.) corporate governance statements in the annual report.

Consultation responses were generally in favour of collective board responsibility, as far as it only applies in relation to the company itself and does not cover third parties. There was no consensus in regard to the more specific disclosure issues. Publication of a corporate governance statement following the “comply or explain” principle was supported, including information about a company’s risk management system¹².

Accordingly the EU-Commission took up those four issues in the proposal for a directive, building on the findings of the consultation and suggesting appropriate amendments to the 4th (78/660/EEC) and 7th (83/349/EEC) Council Directive¹³. In regard to the corporate governance statement a new Article 46a was to be inserted into the 4th directive, including a catalogue of the minimum data to be disclosed. Trying to counter fears of the emergence of a “European Corporate Governance Code” – which had been unanimously rejected in earlier consultation responses in 2002 to the Action Plan itself – the Commission stressed that it merely followed the outline of the Action Plan that already contained a similar suggestion, that only listed companies were to be affected and that there was no attempt for a “one size fits all” approach¹⁴.

¹⁰ There is no “official” title for this directive, but “Accounting Directive” seems appropriate as its four main topics all are concerned with different aspects of corporate accounting.

¹¹ As then Internal Market Commissioner *Frits Bolkestein* put it: “We want to kill four birds with one stone [...]”, see press release IP/04/1318, 28.10.2004, p. 1.

¹² *EU-Commission*, Synthesis of the Interactive Policy Making (IPM)-consultation, 2004.

¹³ *EU-Commission*, Proposal for a Directive of the European Parliament and of the Council amending Council Directive 78/660/EEC and 83/349/EEC concerning the annual accounts of certain types of companies and consolidated accounts, COM(2004) 725 final, 27.10.2004.

¹⁴ *EU-Commission*, FAQ, MEMO/04/246, 28.10.2004, p. 5.

It took nearly two years for the final directive to be finished, it did not appear before mid 2006¹⁵. As regards content changes to the proposal were only few. According to the new Art. 46a of the 4th Directive listed companies now have to include a corporate governance statement in their annual report. As minimum information it shall contain a reference to the Corporate Governance Code to which the company is subject, the one which it may have voluntarily decided to apply and relevant information about corporate governance practices applied beyond national legal requirements. Following the “comply or explain” principle¹⁶ a company then has to explain deviations from the Code. In addition, further information is required about the internal control and risk management system, composition and operation of company organs and finally about special shares and shareholdings¹⁷.

Thus two important changes have to be noted: The directive now makes it compulsory for companies to issue a corporate governance statement, at least when the member states have transformed the regulation into national law. Up to now it still was a recommendation, and to my knowledge only two countries, Germany and the Netherlands, had already included the corporate governance statement in their respective company laws. The second change concerns the fact that the contents of the statement now are comprehensively prescribed and no longer are at the discretion of a Code or even a company itself.

2. Proposal on the exercise of voting rights

Another central issue of the 2003 Action Plan is the exercise of – especially cross-border – voting rights by shareholders. To facilitate these rights and to overcome existing barriers the EU-Commission conducted two consultations in September 2004 and May 2005. Results showed a general consensus for the introduction of minimum standards concerning share-

¹⁵ Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings, OJ L 224, 16.8.2006, p. 1 ff.

¹⁶ In its prior statement of 22.02.2006 the *European Corporate Governance Forum* again “strongly and unambiguously” supported the “comply or explain” approach. However, for the principle to be effective it also stressed the need for a real obligation to comply or explain a high level of transparency and a way for shareholders to hold company boards ultimately accountable for their decisions. The new directive seems to go some way down that road.

¹⁷ Part of the latter is included by reference to Art. 10 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ L 142, 30.4.2004, p. 12 ff.

holder voting rights¹⁸. Consequently a proposal for a corresponding directive was put forward early in 2006¹⁹.

Regarding the fact that an increasing number of shareholders does not reside in the issuer's home member state, which makes voting more difficult, and in addition that comprehensive disclosure of information by the issuer so far is only to be made available in its very home state²⁰, a new initiative seemed in place. Its main objective is to "remove key obstacles" to the cross-border voting process and thus to ensure that all general meetings are convened sufficiently in advance, to make "blocking" of shares unnecessary, to remove all legal restraints to electronic participation in general meetings and to offer non-resident shareholders simple means of voting without attending the meeting. All of these measures had received substantial support in the consultations' responses.

Accordingly the directive's proposal contains a wide array of recommendations only a selected few of which shall be noted here: Shareholders shall be invited at least 30 days before a general meeting takes place and comprehensive information is to be published simultaneously – also via the internet, to enable shareholders to cast "informed votes" (Art. 5). Member states may not impose any constraints to electronic participation of shareholders (Art. 8), whereas there is no obligation for issuers to host a "virtual general meeting", i.e. solely on an electronic basis, as technology does not seem to be advanced enough to satisfy security issues and implementation costs may be prohibitive²¹. Regardless shareholders are to be empowered either to vote by proxy (Art. 10) or by mail in absentia (Art. 12).

¹⁸ See *EU-Commission*, Synthesis of the Comments on the Consultation Document of the Services of the Internal Market Directorate-General: "Fostering an Appropriate Regime for Shareholders' Rights", April 2005 and *EU-Commission*, Synthesis of the Comments on the Second Consultation Document of the Internal Market Directorate-General: "Fostering an Appropriate Regime for Shareholders' Rights", September 2005.

¹⁹ *EU-Commission*, Proposal for a Directive of the European Parliament and of the Council on the exercise of voting rights by shareholders of companies having their registered office in a Member State and whose shares are admitted to trading on a regulated market and amending Directive 2004/109/EC, COM(2005) 685 final, 5.1.2006.

²⁰ Following Art. 17 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 38 ff.

²¹ *EU-Commission*, FAQ, MEMO/06/3, 10.1.2006, p. 2.

The proposal at the moment still is in discussion²². It successfully passed the first reading in the European Parliament on February 15th this year²³, the further course it takes remains to be seen.

3. Consultation on future priorities for the Action Plan

From the EU-Commission's point of view the first, "short term" phase of the 2003 Action Plan now is accomplished – even if some loose ends actually still have to be tied together. In any case, before entering the second, "medium term" stage a consultation was deemed appropriate. The political background is formed by the "New Lisbon Strategy" of 2005²⁴ centring on efforts to make European industry more competitive and thereby "giving top-priority to the completion of the internal market and to improving the regulatory environment"²⁵. The consultation starting early in 2006 had three main objectives: listening to stakeholders' opinions on the strategy for future priorities for the Action Plan, assessing the continued relevance of the intended medium and long term measures and – last but not least – the opportunity of modernising and simplifying European Company Law²⁶.

Responses to the consultation show an inconsistent picture, in general enthusiasm seems to have suffered a bit, as a certain "regulatory fatigue" cannot be denied and calls for a stabilisation period were raised²⁷. Specific questions were many, the answers to only three of them shall be highlighted further: disclosure of institutional investors' voting policies (question 5), board structure (question 8) and modernisation and simplification of European Company Law in general (question 14).

²² See for example amendment suggestions of the *European Corporate Governance Forum*, June 2006 concerning Art. 13 on chains of security intermediaries, as well as critical statements by the *German Federation of Employers ed.al. (BDI/BDA/DAI/DIHK/GDV)*, *Neue Zeitschrift für Gesellschaftsrecht* 2006, p. 300 or *Noack, Ulrich*, *ibid.*, p. 321 ff.

²³ According to Internal Market Commissioner *Charlie McCreevy*, IP/07/193.

²⁴ *EU-Commission*, Communication to the Spring European Council: Working together for growth and jobs – A new start for the Lisbon Strategy, COM(2005) 24, 2.2.2005.

²⁵ *EU-Commission*, Consultation on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union, 20.12.2005, p. 3.

²⁶ *EU-Commission*, Consultation (Fn. 25), p. 4.

²⁷ *EU-Commission*, Consultation and Hearing on Future Priorities for the Action Plan on Modernising Company Law and Enhancing Corporate Governance in the European Union, Summary Report (after the hearing in Brussels, 3.5.2006), p. 2.

Regarding the first issue opinions were almost evenly split. Supporters stressed the possibility of further harmonisation throughout the EU together with the chance of reinforcing confidence in cross-border investments. The opposition pointed at the difficulty of finding an appropriate measure of disclosure (too general versus too precise, e.g. uninformative versus burdensome), questioned the value of such a regulation in the light of comparable initiatives on international and national level, and finally doubted if any EU measures were feasible because of the wide variety of ownership structures in EU member states²⁸.

EU action concerning board structures was not considered high priority, taking into account the subsidiary principle and already existing possibilities for choice, for example via establishing a *Societas Europaea* (SE). Only some praised organisational freedom and flexibility that would follow a free choice of board structure²⁹.

As much as respondents supported the idea to simplify European Company Law, reasons against EU action were many: The added value of such probably non-ending exercise was seen as highly questionable in comparison with the huge work necessary, company law users referred to national transposition acts rather than the EU legislation, such action might imply re-opening delicate compromises and balances and finally, as company law does not stand still, further amendments would be needed³⁰.

These examples already show that at the moment there is not much enthusiasm in the stakeholder community in regard to EU measures and regulations. This is not a particularly good sign for further substantial initiatives on the European level. Perhaps we are well advised to rest a little while and allow ourselves for a consolidation period including an assessment of the practical goals reached in the passed four years since the emergence of the Action Plan.

III. National Corporate Governance Codes

A completely different affair is regulation on the national level, speaking, to be precise, of “soft law” Codes, not statutory Company Law. As was already mentioned elsewhere, almost all EU member states by now have adopted their own Corporate Governance Code. They still

²⁸ *EU-Commission*, Summary Report (Fn. 27), p. 12 f.

²⁹ *EU-Commission*, Summary Report (Fn. 27), p. 19.

³⁰ *EU-Commission*, Summary Report (Fn. 27), p. 27.

vary some – especially in make-up and system – but in general similarities prevail. Also many of the Codes have been subject to revision, some of them multiple times already, and in the light of recent developments on the European level the Codes themselves as the next link in the “chain of command” (besides statutory law of course) deserve a short glance. The most recent changes have taken place in Germany, Great Britain and Italy.

1. Germany

The “German Corporate Governance Code” originally was established 2002 by a governmental commission lead by Gerhard Cromme, chairman of the supervisory board of ThyssenKrupp. Revised in almost annual rhythm its latest version dates from June 2006³¹. At its heart lie around 80 recommendations, in addition German corporate law is displayed in summarized form and some further non-binding suggestions are given. The single topic regulated most thoroughly concerns control of management by the supervisory board. The recommendations are subject to the “comply or explain” principle that is incorporated in Art. 161 of the Corporation Code.

Changes are very few and largely concern directors’ remunerations. As a consequence of newly enacted legislation every management board member’s remuneration now has to be disclosed in detail³². In addition, Code regulations recommend preparing a remuneration report, detailed description of stock option programs and “golden handshake” agreements³³.

2. Great Britain

The British “Combined Code on Corporate Governance” has been issued by the independent Financial Reporting Council (FRC) in a revised version in June 2006³⁴ following a long-lasting development with the final stage being almost three years past. Its structure is similar to the OECD Principles on Corporate Governance, 17 “Main Principles” are in turn followed

³¹ *Regierungskommission DCGK*, Deutscher Corporate Governance Kodex (DCGK), 12.6.2006, http://www.corporate-governance-code.de/ger/download/D_CorGov_Endfassung_Juni_2006.pdf.

³² Gesetz über die Offenlegung der Vorstandsvergütungen (VorstOG), 3.8. 2005, BGBl. I 2005, p. 2267, referred to in German Code Nr. 4.2.4.

³³ German Code Nr. 4.2.5.

³⁴ *Financial Reporting Council (FRC)*, The Combined Code on Corporate Governance, June 2006, <http://www.frc.org.uk/documents/pagemanager/frc/Combined%20code%202006%20OCTOBER.pdf>.

by several “Supporting Principles”. An annex contains several special “Schedules” and further suggestions. The main body of recommendations concerns the board of directors, institutional investors are provided with a separate chapter. The London Stock Exchange Listing Rules are to be applied to this new version of the Code “from some time in the second quarter of 2007”³⁵.

However, despite the three year gap since the last version of the Code, changes are rather microscopic: provisions on proxy voting now contain a duty for after-voting disclosure of information on numbers of related shares having taken part and votes for, against and withheld³⁶. The schedule on disclosure of Corporate Governance arrangements now copies the associated paragraph of the Listing Rules concerning the “comply or explain” principle as compulsory element of the annual report of listed companies³⁷.

3. Italy

The recently revised version of the Italian “Corporate Governance Code” was published by the Corporate Governance Committee of the Borsa Italiana in March 2006³⁸. It has changed profoundly compared to the earlier version of 2002, although more concerning the inner structure than the regulated issues. It now contains 12 “Articles” consisting of up to five “Principles” in turn followed by several “Criteria”, both usually in form of recommendations and without discernible hierarchical order. They are supplemented by “Comments” largely taken from the Preda Report 1999. By far the biggest part of the regulations relates to the board of directors, shareholder or stakeholder interests are only touched on briefly.

A comparison to the 2002 version of the Code is very difficult as one gets the impression that all regulations have been put into a box, shuffled vigorously, jumbled out again and put wherever they fell. Consequently many of them are rather hard to find. However, changes concerning the contents of regulations do seem less significant. Thus only the most substantial changes will suffice: The internal control system now receives a very thorough treatment³⁹,

³⁵ *FRC*, Combined Code (Fn. 34), Preamble, p. 1.

³⁶ Combined Code Provision D.2.2.

³⁷ Combined Code Schedule C refers to Paragraph 9.8.6 of the Listing Rules.

³⁸ *Committee for the Corporate Governance of Listed Companies*, Corporate Governance Code, March 2006, http://www.borsaitaliana.it/chisiamo/ufficiostampa/comunicatistampa/2006/codiceautodisciplina.en_pdf.htm.

³⁹ Italian Code Article 8.

provisions regarding directors' interests and transaction with related parties also had to be laid out more precisely following new additions to the Italian Civil Code⁴⁰ and finally the question of adopting a one or two tier board system is regulated regarding the resulting consequences⁴¹.

Revisiting the recent Code changes in Germany, Great Britain and Italy it is impossible to discern a common denominator, as the alterations have been too different: forced adjustment to legal reform, subtle fine-tuning on a cosmetic level versus total renovation. In any case the EU-Commission actions mentioned above have not yet been fully mirrored in the Codes.

IV. Corporate Social Responsibility

Turning from regulations on a more general stage to a single issue that only recently has received an enormous amount of attention, leads us to "Corporate Social Responsibility". Especially under the influence of the heated debate about climatic change companies have come under closer scrutiny as one of the alleged major culprits. What is behind all this?

1. The Idea of CSR: Meaning and scope

There is not one unanimous "definition" of "Corporate Social Responsibility", as almost every Code or proposal comes with its own version. The EU-Commission "Green Paper" on CSR states: "Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."⁴² Very similar reads the description of the International Organisation of Employers (IOE): "Initiatives by business voluntarily integrating social and environmental concerns in their business operations and in their interaction with their stakeholders."⁴³

However, even if different sources might offer different definitions, the main elements do not vary greatly. On a general level they can be identified as "sustainable development", "human

⁴⁰ Italian Code Article 9, see Comment *ibid*.

⁴¹ Italian Code Article 12.

⁴² *EU-Commission*, COM(2001) 366 final, 18.7.2001 [Green Paper: Promoting a European framework for Corporate Social Responsibility], S. 7.

⁴³ *International Organisation of Employers (IOE)*, Corporate Social Responsibility, 21.3.2003, S. 2.

rights” and “fundamental labour standards”. Some additional keywords also are often to be found that contrast with “traditional” obligations of companies: “stakeholder interests”, “triple bottom line” and “corporate citizenship”. A few words of explanation are in order, as all these terms are very popular, but often misunderstood⁴⁴:

2. Terminology

a. Sustainable development

Protection of the environment and sensible use of quickly depleting resources is widely seen as one of the main responsibilities of enterprises. The most fashionable phrase used in this context is “sustainable development” which again is most popularly quoted in the so-called Brundlandt Report 1987: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴⁵ This includes thoughts like promoting greater environmental responsibility and development of environmentally friendly technologies. The initiative was taken up five years later by the UN Rio Declaration on Environment and Development 1992, which, however, was mainly addressed at governments, not companies.

b. Human rights

Acknowledgment of human rights as it is promulgated in most of the CSR documents is based on the Universal Declaration of Human Rights 1948. Companies are basically asked to “support and respect” those rights as far as they are involved and to refrain from any form of abuse.

c. Fundamental labour standards

⁴⁴ For a deeper look into the terminology see *Loew, Thomas ed.al.*, Bedeutung der internationalen CSR-Diskussion für Nachhaltigkeit und die sich daraus ergebenden Anforderungen an Unternehmen mit Fokus Berichterstattung, Endbericht, Münster 2004, p. 70 ff.

⁴⁵ *United Nations World Commission on Environment and Development (WCED)*, Our Common Future, 1987, chapter 2, 1.

In its 1998 “Declaration on Fundamental Principles and Rights at Work” the International Labour Organization (ILO) identified four key areas of significance, and demanded from enterprises to grant their employees the freedom of association and the right to collective bargaining, to abolish forced as well as child labour and finally to eliminate any discrimination concerning employment and occupation⁴⁶.

d. Stakeholder interests

Following conventional understanding, companies are chiefly responsible towards their owners, i.e. their shareholders. Consequently the main goal of companies is seen in maximising the so-called “shareholder-value”. For some time now this view has faced rising criticism. Many want to supplement or even replace it with the interests of the “stakeholders”⁴⁷. These are all the people that in some way are affected by the workings of a company. Thus it does not only include the shareholders, but also employees, business partners, consumers, neighbours etc. The bigger a company’s impact, the bigger this group is becoming. Its members’ individual interests are to be taken into account by company management, an idea that is already put forward in many Corporate Governance Codes.

e. Triple bottom line

Like the “stakeholder interest” the “triple bottom line” contrasts with the regular accounting “bottom line”, which shows the overall net profitability of a company as a money figure, as now the account balance is not only to demonstrate the financial output of the company, but shall include economic, environmental and social data. That means companies are not only to strive for profit, but are to monitor and even establish goals of their own concerning their economic, environmental and social progress⁴⁸.

⁴⁶ *International Labour Organization (ILO)*, Declaration on Fundamental Principles and Rights at Work, 1998, Nr.2 (a) to (d).

⁴⁷ For a recent contribution to the shareholder and stakeholder debate from a legal point of view see *Forstmoser, Pete.*: Gewinnmaximierung oder soziale Verantwortung?, in: Kiesow, Rainer Maria e.al. (ed.): Summa – Dieter Simon zum 70. Geburtstag, Frankfurt am Main 2005, p. 210 ff.

⁴⁸ Cf. *Henderson (Fn. 1)*, p. 51 ff.

f. Corporate citizenship

Finally, there are not few that demand from companies behaviour comparable to “a good citizen”. In other words, enterprises are expected to leave their mere private sphere and become “corporate citizens”, representing a form of public entity bound by laws of the society⁴⁹. In a “soft” form this particular idea just means a kind of philanthropic approach: companies are to engage in socially beneficial activities. However, in a more “explicit” understanding it is not far away from the notion that feels the need for a “grant of society” for companies to be allowed to conduct their business⁵⁰.

Seeing that CSR carries a meaning which usually embodies the topics just mentioned it is obvious that it must not be confused with either “corporate compliance” or “business ethics”, terms that also are to be found in the vicinity. Corporate compliance is of a more limited scope and indicates that a company more or less strictly adheres to legal regulations. Many larger enterprises have their own compliance officer or department. The term “business ethics” on the other hand is more difficult to grasp as its outlines are often slightly fuzzy and it is open to various interpretations. Also it mainly addresses a company’s employees – especially members of management – rather than the company itself. Usually it denotes behaviour that satisfies generally accepted moral standards. Again, many corporations have developed their own “Code of Conduct” regarding this issue.

3. European level: the role of the EU-Commission

The ambivalent relationship between CSR and economic, especially competition policy can be seen quite clearly when following the development of the EU-Commission’s strategical papers on the European level.

According to the presidency conclusions of the Lisbon council in march 2000, the European Union set itself a „new strategic goal“ for the next decade: „to become the most competitive

⁴⁹ Cf. *Bassen, Alexander/Jastram, Sarah/Meyer, Katrin*, Corporate Social Responsibility – Eine Begriffserklärung, *Zeitschrift für Wirtschafts- und Unternehmensethik (zfwu)* 2005, p. 234.

⁵⁰ Cf. *Dine, Janet*, *Companies, International Trade and Human Rights*, Cambridge 2005, p. 233 f. See further IV.3. below.

and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion“⁵¹.

In its “Green Paper: Promoting a European framework for Corporate Social Responsibility“, issued roughly a year later, the Commission stated the importance of CSR “as it can be a positive contribution to the strategic goal decided in Lisbon”⁵². It was also suggested that companies “are increasingly aware that corporate social responsibility can be of direct economic value. Although the prime responsibility of a company is generating profits, companies can at the same time contribute to social and environmental objectives, through integrating corporate social responsibility as a strategic investment into their core business strategy, their management instruments and their operations.”⁵³ Here again, the alleged economic value of adhering to CSR principles is stressed. The topics covered mainly are human rights, labour and environment⁵⁴.

On June 29th 2004, the “European Multistakeholder Forum on CSR (EMS)”, initiated by the EU-Commission in 2002, published its final reports and recommendations. By means of four theme based “Round Tables” the EMS did discussion-based research on several aspects of CSR and identified certain determining “drivers, obstacles and critical success factors”⁵⁵. Based on the committees’ findings the Forum made three recommendations: Raising awareness and improving knowledge on CSR, developing the capacities and competences to help mainstreaming CSR and ensuring an enabling environment for CSR⁵⁶. This catalogue shows that the Forum actually “meant business” in the direction of diffusing CSR wherever possible.

The most recent step the EU-Commission has taken is based on the aforementioned initiatives and aims via a “European Alliance for CSR” at achieving a “Sustainable Market Economy”. In its own words: “The Commission offers close partnership, with Member States, with business and with all stakeholders involved to make Europe a pole of excellence on CSR since

⁵¹ Lisbon European Council 23. and 24. March 2000, Presidency Conclusions, Nr. 5. Sorry to say, not all expectations came true and a new strategy was required, see COM(2005) 24 (Communication to the Spring European Council: Working together for growth and jobs - A new start for the Lisbon Strategy), 2.2.2005.

⁵² *EU-Commission (Fn. 2)*, Executive Summary, Nr. 6, S. 7.

⁵³ *EU-Commission (Fn. 2)*, Executive Summary, Nr. 11, S. 8.

⁵⁴ For reactions to the “Green Paper” refer to *EU-Commission*, COM(2002) 347 final (Communication from the commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development), 2.7.2002.

⁵⁵ *European Multistakeholder Forum on CSR (EMS)*, Final results & recommendations, 29.6.2004, part 2, p. 7 ff.

⁵⁶ *EMS (Fn. 20)*, part 3, p. 12 ff.

CSR mirrors the core values of the EU itself.”⁵⁷ This on the one hand reflects a certain shift in the Lisbon strategy from competition to sheer sustainability, on the other hand shows how, by way of top-level policing, CSR meanwhile has “risen to a seat of honor” and now is placed at the heart of economic development.

4. National level: implementation through Corporate Governance Codes

Another possibility to implement CSR ideas might be by way of inclusion into – primarily national – Corporate Governance Codes. Compared to general standardization this procedure has the advantage of making use of an already widely accepted system of “soft law” regulation. Concerning the ideas themselves, especially human rights, labour standards and environmental protection, they would be arranged besides several other rules of appropriate financial, economical and legal governance, and thus making it easier especially for sceptical managements to internalize them. In addition, the common procedure of “comply or explain” for disclosure of Code adherence could then also be used as a monitoring device for CSR issues. Even the Codes’ addressees are fairly congruent with those of CSR: both primarily concern listed or multinational companies.

However, as of now, none of the Codes mentioned above contains any specific CSR-related suggestions. Just a “faint hint” can be seen in the German Code concerning the management’s obligation to increase the company’s value in a “sustainable way”⁵⁸ – which, by the way, is an idea already present in the interpretation of Art. 76 of the German Corporation Code: management is not allowed to act regardless of the “common welfare”. We simply may have to wait for further development or leave CSR to be regulated at enterprise level, pursuant to usual practice.

Furthermore, CSR does not remain without criticism, quite a few problematic issues are too easily forgotten in the general approval of saving earth and mankind: For example to really make “sustainable development” the key principle of corporate conduct would afford a thorough change of the world economy and might lead to drastic consequences only few do wish for. Also the problem of realisation costs for companies is mentioned only occasionally.

⁵⁷ *EU-Commission*, COM(2006) 136 (Implementing the Partnership for Growth and jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility), 22.3.2006, conclusion, p. 9.

⁵⁸ German Code (FN. 31) Nr. 4.1.1.

Moreover there are people that demand a “concession by society” for enterprises to be allowed to start business which raises the question of economical legitimacy. Finally the impact of company size has to be thought over again as not only multinational conglomerates but increasingly small and medium sized enterprises (SME) too are regarded as potential addressees of CSR. Thus enough food for thought remains.

IV. Conclusion

Driven by a seemingly inexhaustible EU-Commission, consultations, recommendations and directives on the European level continue unabated. They might in time only be somewhat slowed by the increasing “regulatory fatigue” felt by many of the other parties involved that crave for a little time to digest new regulations. Concerning the goals achieved, most of the short term measures of the 2003 Action Plan have by now been realized in some way or other. The most important recent change is the consolidation of accounting and disclosure recommendations, including the now compulsory basis for the already widely accepted “comply or explain” principle. Amendments of shareholder cross-border voting rights will have a certain impact, at least if the EU-Commission’s proposal is followed by a corresponding directive. In contrast future developments of the Action Plan especially regarding further simplifications of European Company Law yet have to be waited for as opposition still is strong and quite a few issues are rather questionable.

Developments on national level are difficult to put into general perspective: concerning Corporate Governance Codes most EU member states have remained quiet. Recent changes in Germany and Great Britain are rather subtle, which cannot be said of the Italian approach. However, as was already mentioned above, changes there not so much seem to have occurred on a material plane but on the compositorial one.

The idea of CSR as one of the “hot topics” at the moment is a complex matter. The ongoing debate helps to draw attention to urgent social and environmental issues and might in the long run enter the common conscience and change mankind’s behaviour from the inside. However, having a good idea and putting it to practical use are two entirely different games. As we have seen above, there is no lack of suggestions concerning CSR on the European level alone. The difficulties of implementation nevertheless are not easy to solve. A “top down” approach as it

is apparently favoured by many does not seem to be the correct way, as it may lead to several problems like restraints for profit and competition, the question of legitimacy and unwanted levelling of healthy differences that have to be taken seriously.