Creating standards in a global financial market – the Sarbanes-Oxley Act and other activities: what Europeans and Americans could and should learn from each other

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Creating Standards in a Global Financial Market

– The Sarbanes-Oxley Act and other Activities: What Europeans and Americans could and should learn from each other –

by

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In the past few years the US and the European Union have had to react to the accounting scandals of Enron, WorldCom and Parmalat. During this process the US has served as a role model for many provisions within the European Union. Several regulations of the Sarbanes-Oxley Act were adopted and the European Union implemented a central information system. The enforcement of legal duties is also influenced by the US model, resulting in civil liability claims gaining more importance. However, the strict criminal sanctions are – in light of the different legal cultures understandably – not adopted. In the future, the US and the EU should cooperate even more, before either passes important laws in this area unilaterally.

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I. US capital markets law – a story of success

In the past few years we have witnessed a series of scandals which have shaken the American stock exchanges: Enron, WorldCom as well as the conglomerate Tyco are among the most famous – or rather infamous examples. Yet, the Americans reacted fast and enacted the Sarbanes-Oxley Act in 2002.[1] Today, companies have to adopt an independent audit committee.[2] The Chief Executive Officer (CEO) and the Chief Financial Officer (CFO) have to certify in writing that reports to the Securities Exchange Commission (SEC) presented the company's economic status correctly and completely.[3] Incorrect reports will be punished with up to 20 years imprisonment.[4] A federal judge sentenced former WorldCom Inc. chief executive *Bernard J. Ebbers* to 25 years imprisonment. The same happened to former Tyco boss, *Dennis Kozlowski*, as well as the company's former financial managing director, *Mark Swartz*.[5] It seems admirable how fast the courts punished those responsible in the WorldCom and Tyco cases so strictly.

Historically, Germany was a well-known model country regarding its bank-based financial system. However, the strong role of state and cooperative banks, as well as corporate governance with its co-determination and the lack of foreign banks, were blamed for causing problems in the financial system.[6] In contrast, in market-based financial systems[7] initial public offerings play a more prominent role. The financing of a company via the stock exchange is

1 Public Accounting Reform and Investor Protection Act, Pub.L. No. 107–204 of Jul. 30, 2002, 116 Stat. 745 (2002), which is named after two of its authors, Senator *Paul Sarbanes* and Member of the House of Representatives *Michael G. Oxley*, "Sarbanes-Oxley Act" (SOX). Online available at www.sec.gov/about/laws/soa2002.pdf and www.thomas-moellers.de/materialien.

2 Sec. 301 SOX Act (fn. 1).

3 For Sec. 302 SOX Act (fn. 1) and Sec. 906 SOX Act as § 1350 U.S.C. see Michael Gruson/Matthias Kubicek, 'Der Sarbanes-Oxley Act, Corporate Governance und das deutsche Aktienrecht', Teil 1, 2, AG 2003, 304, 401 et seq.

4 Sec. 906 SOX (fn. 1) as § 1350 lit. c) (2) U.S.C.

5 In the matter of Enron *Jeffrey Skilling* and *Kenneth Lay* were found guilty on all charges. *Jeffey Skilling* was sentenced to 24 years 4 months imprisonment on Oct. 23, 2006. *Kenneth Lay* died recently.

6 Cf. Jan Krahnen/Reinhard H. Schmidt (Eds.), *The German Financial System*, 2004, see book review Ingo Tschach, Forschung Frankfurt 2/2004, 67; Jeremy S. S. Edwards/Klaus Fischer, *Banks, Finance and Investment in Germany*, 1994.

7 As to the difference between both systems see Franklin Allen/Douglas Gale, *Comparing Financial Systems*, 2000.

far more common than in bank-based financial systems.[8] It has not been decided yet which financial system is more competitive – bank-based or market-based.[9] But it could be argued that even in Germany a pure bank-based system does not exist any more. Banks used to have seats on supervisory boards of outside corporations because of their blocks of shares in those companies. But more recently banks have sold the bulk of their shares and lost a big part of their influence on the supervisory boards – the renowned "Germany Incorporated" (the "Deutschland AG") no longer exists.[10] Other core characteristics of a bank based financial system, such as the state's deficiency guarantee for banks ("Gewährträgerhaftung" and "Anstaltslast"), have been limited under the pressure of the European Union.[11] The investors' interest of saving money in ordinary bank securities is decreasing. Prospective investors now would rather invest directly in companies listed on the stock exchange.[12] If banks are to avoid being put in the back seat with respect to international business, they will have to approach investors and companies actively and act as third party intermediaries between investors and com-

8 See David T. Llewellyn, in: Christopher J. Green/David T. Llewellyn, *Surveys in Monetary Economics*, 2nd Vol., 2002, pp. 210 ff.; Reinhard Schmidt/Andreas Hacketal/Marcel Tyrell, 'The Convergence of Financial Systems in Europe', in: Günter Franken, *German financial markets and institutions*, 2002, p. 7, 16; Axel A. Weber, 'Finanzsysteme im Wettbewerb', 1/2005, See 1, 7, online available at www.bundesbank.de.

9 Cf. Vitor Gaspar/Philipp Hartmann/Olaf Sleijpen (Eds.), *The Transformation of the European financial system, 2002;* ECB*, Report on financial structures*, 2002. The subject is still in dispute. There seems to be no proof of a correlation of growing economy and the prevailing financial system, see Ross Levine, 'Bank-based or Market-based Financial Systems: Which is Better?', 11 Journal of Financial Intermediation, 1 et seq. (2002).

10 Peter Mülbert, Bericht E für den 61. Deutschen Juristentag (DJT), 2000; cf. further Carsten Jungmann, 'The Effectiveness of Corporate Governance in One-Tier and Two-Tier-Board Systems – Evidence from the UK and Germany', ECFR 2006, 426, 434; Alexander Schall/Lilian Miles/Simon Goulding, 'Promoting an Inclusive Approach on Part of Directors: the UK and German Positions', 6 Journal of Corporate Law Studies 299 (2006), at pp. 311, 323 et seq.

11 Germany has come to an agreement with the European Union to replace "Anstaltslast" and to abolish state's deficiency guarantee on Feb. 28, 2002. Thereby, the differentiation between "Anstaltsträger" and "Gewährträgerhaftung" became void in favour of a unitary institution. The relevant German Act (the "Sparkassengesetz" – SpkG) follows this proceeding: The SpkG NRW only allows for a public "ownership" effective from July 19, 2005 pursuant § 6.

12 As to Axel A. Weber, 'Finanzsysteme im Wettbewerb', 01/2005, p. 10, online at www.bundesbank.de.

panies.[13] A few examples of areas where banks can serve as a third party intermediary are transactions on non-performing loans,[14] advice on mergers and acquisitions, private and public takeovers and the IPOs of small companies. Therefore it is a logical consequence that the German and European Market outgrow a bank-based financial system and develop into a hybrid financial[15] system.

While the United States looks back on a long tradition in law in respect of the Securities Act of 1933 (SA) and the Securities Exchange Act of 1934 (SEA),[16] the European capital markets law is only 25 years old.[17] Important transparency rules and regulations in the SA and SEA found their way into European law and from there into the national law of the member states of the European Union. Worth mentioning are regulations regarding insider law, ad-hoc publicity, directors dealing, and transparency on investments.[18] After the massive accounting misconduct of the Italian dairy and food giant Parmalat, the EC also responded with a number of corporate governance initiatives.[19]

13 On the challenges of "global players" cf. Josef Ackermann, 'Geschäftsstrategien im globalen Wettbewerb', Die Bank 2006/05, 38. In theory on this concept Franklin Allen/Anthony M. Santomero, 'The theory of financial intermediation', 21 Journal Banking & Finance 1461 (1998).

14 As to legal questions see recently Stefan Gehrlein, *Asset-backed securities*, Diss. Augsburg 2006.

15 As to this development regarding so called hybrid systems see Jan Krahnen/Reinhard H. Schmidt (Eds.), *The German Financial System*, 2004, p. 486; Axel A. Weber, 'Finanzsysteme im Wettbewerb', 01/2005, p. 1, 7, online at www.bundesbank.de. As to the adherence to traditional structures see Reinhard Schmidt/Andreas Hacketal/Marcel Tyrell, 'The Convergence of Financial Systems in Europe', in: Günter Franken, *German financial markets and institutions*, 2002, p. 7, 20 et seq.; Reinhard Schmidt/Andreas Hacketal/Marcel Tyrell, ZFB 2/2002, 13 ff.

16 Thomas Lee Hazen, *The Law of Securities Regulation*, 4th ed. 2002; Michael Schulte, in: Thomas M.J. Möllers/Klaus Rotter, *Ad-hoc-Publizität*, 2003, § 6. For the legal norms cf. Thomas Lee Hazen, 'Securities Regulation, Selected Statutes, Rules and Forms' and www.sec.gov.

17 Cf. Niahm Moloney, *EC Securities Regulation*, 2002; Eilís Ferran, *Building an EU Securities Market*, 2004; Norbert Horn, *Europäisches Finanzmarktrecht*, 2003; Thomas M.J. Möllers, in: Thomas M.J. Möllers/Klaus Rotter, *Ad-hoc-Publizität*, 2003, § 2 n. 18 et seq.

18 As to the information module cf. Hanno Merkt, *Unternehmenspublizität*, 2001, p. 140 *et seq.*, 421; Thomas M.J. Möllers, in: Thomas M.J. Möllers/Klaus Rotter, *Ad-hoc-Publizität*, 2003, § 2; Stefan Grundmann, 'Aufbau des Informationsmodells im Europäischen Gesellschaftsrecht', DStR 2004, 232.

19 Clyde Stoltenberg/Kathleen A. Lacey/Barbara Crutchfield George/Michael Cuthbert, 'A Comparative Analysis of Post-Sarbanes-Oxley Corporate Governance Developments in the US and European Union: The Impact of Tensions Created by Extraterritorial Application of Section 404', 53 Am.J. of Comp.L. 457, 459, 478 et seq. (2005).

Inasmuch as numerous EC member states appear on their way to a market based financial system, it might make sense to ask whether they should continue to adopt large parts of the American approach. The advantages and disadvantages of adopting such an approach shall now be discussed by looking at three particular issues: first, the European database; second, the responsibilities of financial analysts; and third, the legal enforcement of these responsibilities. Perhaps the best of both of these systems – the legal and financial systems – can be combined.

II. Duties of financial intermediaries

1. Online database for capital markets related information

As a medium for information, the internet has gained a prominent role in capital markets law during the last decade.[20] Unfortunately a central information system providing all disclosure information of quoted companies is still missing. So far only a few national stock exchanges gather information about companies and put them on their internet pages.[21] A common European financial market is still far away since investors are still missing the relevant information on foreign companies.[22] The European Transparency Directive 2004/109/EC aims at creating a common market by means of standardizing the national transparency rules.[23] According to the new directive, quoted companies have to disclose the relevant company information in a way that ensures fast access to the information through media channels. These media channels must dispose of an effective system to disseminate the information

20 For a review on the European and German legislation cf. www.thomas-moellers.de.

21 For instance Norway has introduced a specific company information system, cf. www.oslobors.no.

22 Cf. Art. 14 para. 2 of the EC-Treaty says: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty."

23 Recital Nr. 1 of Dir. 2004/109/EC 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 of Dec. 15, 2004, OJ Nr. L 390, p. 38 (Transparency Directive) says: "Efficient, transparent and integrated securities markets contribute to a genuine single market in the Community and foster growth and job creation by better allocation of capital and by reducing costs. The disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency." The directive must be implemented by Jan. 1st, 2007.

throughout the entire European Community.[24] In addition, the directive commits every member state to set up at least one officially appointed central data base which easily provides information to everyone.[25] In Germany, the implementation of the Transparency Directive has caused the federal government to set up an electronic commercial register ("Unternehmensregister")[26] that will serve as a central information system. The "Unternehmensregister" started its work most recently on January 20, 2007. Next to it, the duty to disseminate the relevant information Europe wide was implemented into German Law in January 2007.[27]

By establishing a duty to inform Europe-wide, the Transparency Directive aims at improving the transparency of company information crucially. This is a big step to merge the by now 27 national financial markets of the European Union into one single market. However this is only halfway gone. Firstly, the duty to inform Europe-wide remains without effect. There is undoubtedly no media channel in Europe which can gather Europe-wide attention. In order to bridge this gap, the directive obliges companies to use different channels of information.[28] This increases transaction costs and puts pressure especially on smaller quoted companies.[29] In a single market with 23 official languages, a publication on only two or three websites or journals will not meet the directive's standard.[30] Secondly, having regard to the wording of Art. 21 para. 2 of the Transparency Directive, the European legislator requires the member states only to install a national information system. As a consequence, in the near future 27 central information systems will be set up, one in each member state.

24 Art. 21 para. 1 of the Transparency Dir. 2004/109/EC (fn. 23); § 3a para. 1 Wertpapierhandelsanzeige- und Insiderverzeichnisverordnung (WpAIV) of Dec. 13, 2004, BGBl. I, S. 3376.

25 Art. 21 para. 2 of the Transparency Dir. 2004/109/EC (fn. 23).

26 § 8b HGB, implemented by Gesetz über elektronische Handelsregister und Genossenschaftsregister sowie das Unternehmensregister (EHUG) of Nov. 10, 2006, BGBl. I 2006, 2533, cf. www.unternehmensregister.de; Thomas M.J. Möllers/Axel Lebherz, *Kapitalmarktrecht*, 2006, Going Public, 2006/05, p. 18 *et seq.* and www.thomas-moellers.de.

27 Cf. § 3a para. 1 WpAIV (fn. 24), modified by Art. 2 Transparenzrichtlinie-Umsetzungsgesetz of Jan. 5, 2007 (Act of Implementing the Transparency Dir. 2004/109/EC), BGBl. I 2007, p. 10.

28 Art. 21 para. 2 says "media". Cf. CESR, Final technical advice on proposals on possible implementing measures of Transparency Dir. 2004/109/EC, June 2005, n. 31.

29 Cf. Barbara Pirner/Axel Lebherz, 'Wie nach dem Transparenzrichtlinie-Umsetzungsgesetz publiziert werden muss', AG 2007, 19, 27.

30 Bulgaria and Rumania joined the European Union on Jan. 1, 2007.

Therefore two issues should be taken into account in order to reach the goal of one single European platform: firstly, it will be necessary to publish at least the relevant information of listed companies in English as lingua franca.[31] This should apply even if the company is listed on the stock exchange of one member state only. This would also give room for hope that some media would gain importance all over Europe. Secondly, looking ahead to the future *one central information system* on an EU-wide scale should be developed to finally satisfy the directive's intention of equal treatment for all investors.[32] The result would be a transparent European capital market allowing information flow with equal opportunities for everyone.

In contrast, the US capital market is further developed because it already has a central information system. All listed companies have to submit their information to the electronic EDGAR-system.[33] In addition, all reports to the EDGAR-system are also submitted to the SEC. These EDGAR-reports are accessible to the public through the Internet and can be retrieved on the SEC's homepage.[34]

2. Stronger supervision of financial analysts' duties

With sec. 501 of the Sarbanes-Oxley Act, a legal code of behaviour for financial analysts has been introduced for the first time.[35] The employer must not influence the employee.[36] Salaries of financial analysts must not be connected with investment business. In addition, obligations to disclose economic association with the analyzed issuer as well as financial interest in the analyzed bond have been set up.[37] However, no requirements on the content of the

31 Under German law ad-hoc disclosures can only be published in English if the company is seated abroad, cf. § 5 para. 2 WpAIV (fn. 24).

32 Recital No. 25 s. 2 of the Transparency Dir. 2004/109/EC (fn. 23) reads: "Investors who are not situated in the issuer's home member state should be put on an equal footing with investors situated in the issuer's home member state, when seeking access to such information."

33 Electronic Data Gathering, Analysis and Retrieval.

34 www.sec.gov.

35 The aims of the new Sec. 15D SEA can be found in the legal text in (a) No. 1: "… to foster greater public confidence in securities research, and to protect the objectivity and independence of securities analysts …"

36 Sec. 15D (a) SEA therefore has the title "Analyst protection".

37 Complementary to Sec. 15D SEA, the Regulation Analyst Certification (RAC) as well as the explanatory Release AC of SEC. Rule 472 of NYSE and Rule 2711 of NASD are two additional rules of professional ethics containing restrictions and disclosure re-

analysis are needed. Furthermore, in the United States journalists are excluded from the rules about financial analyses[38] as long as they are not and even should not be registered at the SEC. By all accounts the reason journalists are excluded is said to be the freedom of the press.[39]

Considering the strong growth of legal duties of investment firms and companies listed on the stock exchange,[40] it is surprising that the responsibilities of financial analysts turn out to be far less stringent. Maybe *Mark Twain* said it best: "Prediction is a very difficult matter, especially if it concerns the future."[41] However financial analysts are the "core institutions that support strong securities markets."[42] In deciding whether to invest in markets, a private investor acts in an economically reasonable manner when trusting a financial analysts' report and not redoing all their research.[43] The market reflects the information of the analysts' report in the stock price.[44] Small investors often trust in analysts' professionalism; however analysts usually do not take into account herd instinct and other irrational behavior – phenomena which have been analyzed within the behavioral finance approach.[45]

quirements for analysts and their employers, see Ulrich L. Göres, *Interessenkonflikte von Wertpapierdienstleistern*, 2004, S. 103 et seq.; Jörg Schilder, *Verhaltenspflichten von Finanzanalysten*, 2005, S. 72; Thomas M.J. Möllers, in: *Kölner Kommentar zum WpHG*, 2007, § 34a n. 40 et seq.

38 17 CFR § 242.505, Release Nos. 33-9193; 34-47384; SEC File No. S7-30-02.

39 Comparable to ratings, cf. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); Husisian, 'What standard of care should govern the world's shortest editorials?', 75 Cornell L. Rev. 411, 427 (1990).

40 As to companies playing a role as monopolists of information see Thomas M.J. Möllers/Franz C. Leisch, 'Die unterlassene Ad-hoc-Mitteilung als sittenwidrige Schädigung gem. § 826 BGB', WM 2001, 1648, 1654; approving Oliver Rieckers, 'Die Haftung des Vorstandes für fehlerhafte Ad-hoc-Meldungen de lege lata und de lege ferenda', BB 2002, 1213, 1217.

41 Others impute this quote to Nils Bohr, Nobel laureate in Physics.

42 Bernard S. Black, 'The legal and institutional preconditions for strong securities markets', 48 UCLA L.Rev. 781, 798 (2001); also Holger Fleischer, Bericht F für den 64. DJT, 2002, p. 131.

43 As to allocative efficiency as well as further theories on efficiency Helmut Kohl/Friedrich Kübler/Rainer Walz/Wolfgang Wüstrich, 'Abschreibungsgesellschaften, Kapitalmarkteffizienz und Publizitätszwang – ein Plädoyer für ein Vermögensanlagegesetz –', ZHR 138 (1974), 1, 16 *et seq.*; As to the duties in general on capital markets information Jörg Schilder, *Verhaltenspflichten für Finanzanalysten*, 2005, S. 39 et seq.

44 See Eugene Fama, 'A Review of Theory and Empirical Work', 25 J. Fin. 25 383 (1970).

45 John Maynard Keynes, *The General Theory of Employment, Interest and Money*, 1936, p. 158: "Worldly wisdom teaches that it is better for reputation to fail conventionally than to succeed unconventionally"; Günter Löffler, *The contribution of financial analysts to the spreading of information*, 1998, p. 39 et seq.

When defining the responsibilities of financial analysts, the European law is very similar to American law.[46] However it is more demanding in two respects. Firstly, unlike in the US, financial analysts' reports published by the press are only allowed to be self-regulated if this self-regulation is comparable to a governmental control.[47] This is appropriate because according to German as well as American constitutional law freedom of speech does not justify the publication of incorrect information.[48] Secondly, the European Commission has started to establish standards with respect to the orderly conduct of financial analysts' reports. Member states have to make sure that information spread publicly by analysts is "fairly presented". This means in particular that the analyst's identity has to be specified. Facts have to be clearly distinguishable from interpretations. All sources have to be clearly indicated. Recommendations must be substantiated as reasonable upon request by the competent authorities.[49] On the opposite, U.S. law has contained the duty that a research report "*provides information reasonably sufficient upon which to base an investment decision*" for a long time.[50] On top of this, information has to be complete, accurate and up-to-date. Lurid financial analyses promising several 100 or 1.000 % price advances are therefore illegal.[51]

46 Dir. 2003/6/EC of Jan. 1, 2003 on insider dealing and market manipulation (Market Abuse Directive), OJ Nr. L 96, 16. For the first time, the Market Abuse Dir. 2003/6/EC contains special rules on the behavior of financial analysts in its Art 6 para. 5. In the course of the Lamfalussy proceeding Art. 6 para. 5 of the Market Abuse Dir. 2003/6/EC was completed by the Dir. 2003/125/EG in order to enforce Dir. 2003/6/EG regarding the appropriate presentation of investment recommendations and the disclosure of colliding interests dated Dec. 22, 2003, OJ L 339, 73 (Enforcement Dir. 2003/125/EC).

47 Art. 3 para. 4, 5 para. 5 Enforcement Dir. 2003/125/EC of Dec. 22, 2003, OJ L 339, 73.

48 As to German law cf. BGH of Sept. 21, 1975, BGHZ 65, 325, 333; BVerfG of Oct. 12, 2000, BVerfGE 107, 347, 360 *et seq.*; Wolfgang Hefermehl/Helmut Köhler/Joachim Bornkamm, *Wettbewerbsrecht*, 24th ed. 2005, § 5 n. 1.65 et seq.; also Helmut Schulze-Fielitz, in: Horst Dreier, GG, 1996, Art. 5 n. 225 *et seq.* As to US law, cf. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, Inc., 425 U.S. 748, 96 Ct. 1817, 48 L. Ed. 2d 346 (1976); *Greater New Orleans Broadcasting Assn. v. U.S.*, 527 U.S. 173, 119 S. Ct. 1973, 144 L. Ed. 2d 161 (1999). Cf. Husisian, 'What standard of care should govern the world's shortest editorials?', 75 Cornell L.Rev. 411 (1990).

49 Art. 2 f Enforcement Dir. 2003/125/EC (fn. 47), continuative Thomas M.J. Möllers, in: *Kölner Kommentar zum WpHG*, 2007, § 34a n. 50 et seq.

50 § 15D (c) (2) SEA also Release Nos. 33-8193; NYSE 472 Definition 10 (2).

51 See in detail Thomas M.J. Möllers, in: *Kölner Kommentar zum WpHG*, 2007, § 34b n. 134 ff.

III. Different ways of legal enforcement

1. The different plaintiffs and objective of claims in the USA

For decades a strong supervising authority for securities markets has existed in the US (the Securities Exchange Commission – SEC). In the US, capital markets law is a federal issue so the SEC is able to control the securities markets all over the country. Prior to Sarbanes-Oxley company law existed only on the state level whereas now it is also subject to federal regulation. In the US private plaintiffs try to recover millions of dollars through class actions and punitive damages or at least to urge the defendant into a settlement. Pre-trial discovery allows lawyers to gain access to information about a defendant. With reason one might argue that the plaintiff could be called a private prosecutor. The SEC has the power to intervene strongly. It is able to ban someone from a profession, to claim damages and impose fines. Even severe imprisonment may be imposed upon infringements of capital market rules.[52]

2. The different plaintiffs and objective of claims in the EU

In Europe, financial regulation on the national scale has so far only been accomplished by the Investment Services Dir. 93/22/EEC.[53] The role of civil law in the regulation of the capital market is fairly underdeveloped. For instance, it is highly controversial if the diverse duties to supply information to the capital market can result in private claims for damages. Nevertheless, on the European level one can find private claims for damages in the latest directives.[54] In Germany, liability for untrue ad-hoc disclosures has been introduced, and the liability for damages due to incorrect information on the capital market is in discussion.[55] In addition, in the matters of Infoma-

52 See above para. I. and fn. 5.

53 Dir. 93/22/EEC on investment services in the securities field of May 10, 1993, OJ L 141, 27.

54 Art. 7 Transparency Dir. 2004/109/EC (fn. 23); Art. 50c Directive 2006/46/EC on annual accounts of Jun. 14, 2006, OJ L 224, 1. From a comparison of laws perspective cf. Klaus J. Hopt/Hans-Christoph Voigt (Eds.), *Prospekt- und Kapitalmarkinformationshaftung*, 2005, reviewed by Thomas M.J. Möllers, JZ 2006, 247.

55 As to §§ 37a, 37b WpHG as well as the discussed Proposal of an Act of Liability for Capital Market Information (Kapitalmarktinformationshaftungsgesetz – KapInHaG) cf. Thomas M.J. Möllers, 'Die Infomatec-Entscheidungen des BGH – Marksteine auf dem Weg zu einem Kapitalmarkt-informationshaftungsgesetz', JZ 2005, 75 *et seq.*; Carsten Schäfer, GesRZ-SH 2005, 25 *et seq.*; Peter Mülbert/Steffen Steup, 'Emittenten-

tec[56] and EM.TV[57] we find the first judgments on defective ad-hoc disclosures in Germany. The Act on representative proceedings of affected investors (Kapitalanleger-Musterverfahrensgesetz – KapMuG)[58] combines the legal remedies of different plaintiffs. And finally, in Germany the criminalisation of market manipulation was broadly extended by the Act for the improvement of investor protection[59] that followed the Market Abuse Directive 2003/6/EC.[60]

3. Conclusions

a) Improvement of public law instruments

When looking at the enforcement of the responsibilities of the market participants, a thorough analysis is necessary to see what is transferable from the American capital markets law. It appears to make sense to further strengthen control by national or even private authorities.

haftung für fehlerhafte Kapitalmarktinformation am Beispiel der fehlerhaften Regelpublizität – das System der Kapitalinformationshaftung nach AnSVG und WpPG mit Ausblick auf die Transparenzrichtlinie', WM 2005, 1633.

56 BGH of Jul. 19, 2004, BGHZ 160, 149 = NJW 2004, 2971 (abbr.) = JZ 2005, 90 with comments of Thomas M.J. Möllers – Infomatec I; BGH of Jul. 19, 2004, BGHZ 160, 134 = NJW 2004, 2664 – Infomatec II; BGH of Jul. 19, 2004, ZIP 2004, 1604 = NJW 2004, 2668 – Infomatec III.

57 BGH of May 9, 2005, ZIP 2005, 1270 = NJW 2005, 2450 reviewed by Thomas M.J. Möllers, 'Das Verhältnis der Haftung wegen vorsätzlicher sittenwidriger Schädigung zum gesellschaftsrechtlichen Kapitalerhaltungsgrundsatz – Comroad und EM.TV', BB 2006, 1637.

58 Gesetz zur Einführung von Kapitalanleger-Musterverfahren – KapMuG of Aug. 16, 2005, BGBl. I 2437, see Burkhard Hess, 'Der Regierungsentwurf für ein Kapitalanlegermusterverfahrensgesetz – eine kritische Bestandsaufnahme', WM 2004, 2329 *et seq*.; Thomas M.J. Möllers/Tilman Weichert, 'Das Kapitalmarkt-Musterverfahrensgesetz (KapMuG)', NJW 2005, 2737 *et seq*. Fabian Reuschle, *Das Kapitalanleger-Musterverfahrensgesetz – KapMuG*, 2006; Christian Duve/Tanja V. Pfitzner, 'Braucht der Kapitalmarkt ein neues Gesetz für Massenverfahren?', BB 2005, 673 *et seq*.; Burkhard Schneider, 'Auf dem Weg zu Securities Class Actions in Deutschland? – Auswirkungen des KapMuG auf die Praxis kapitalmarktrechtlicher Streitigkeiten', BB 2005, 2249 *et seq*.

59 Anlegerschutzverbesserungsgesetz (AnSVG) of Jul. 1, 2004, BT-Drs. 15/3493. Critics complain that so far no punishment as per the rules regarding market price manipulation has taken place, cf. Joachim Jahn, 'Anlegerschutz hat wenig Wirkung', FAZ of May 23. 2006, p. 21. The former CEO of Comroad AG, Bodo Schnabel, was convicted to a prison sentence of seven years by the LG Munich, see LG München I of Nov. 21, 2002, NStZ 2004, 291.

60 See fn. 46.

Turning to public supervision of capital markets in Europe, it is encouraging that a number of European states have established a supreme financial authority with broad powers over the different branches of the finance business.[61] Such an agency is the basis for a level playing field in the European Union because therefore you need strong public authorities in each member state which supervise the capital markets. The idea of a *European Financial Services Supervision Authority* is highly controversial though.[62] Due to the high cost caused by 27 different supervising authorities large banks demand for such a "lead supervisor". The German Government still resists this idea.[63] At the moment national authorities are still more effective because there are no language problems. Certainly a central supervision authority like the Competition Directorate General of the European commission would be "too much" at this stage.[64] It is conceivable though to assign certain supervising powers to the EC commission as per the examination of rating agencies or the supervision of the enforcement according to the International Financial Reporting Standards (IFRS).[65]

Nevertheless small amendments may be added even on the national level. Following the example of the Public Company Accounting Oversight Board[66] which was introduced by the Sarbanes-Oxley Act, Germany has recently set up an audit control commission independent of the market players.[67] Furthermore, public control of the annual reports of listed companies has been established. At the lower level this control is exercised by an "enforcement authority" and in the last instance by the German authority for supervision of financial services (the so-called Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin).[68]

61 Namely Denmark, Norway, Sweden, Finland, Ireland, Austria, Switzerland, England, Germany, Hungary, Estonia, Latvia, Malta, cf. Karl-Burkhard Caspari, Allfinanzaufsicht in Europe, lecture at the centre of European Commercial Law, Nr. 137, 2003, p. 5.

62 Hanno Merkt, Report G at 64. DJT, 2002 pp. 124 et seq.; Jens-Hinrich Binder/Thomas N. Broichhausen, 'Entwicklungslinien und Perspektiven des Europäischen Kapitalmarktrechts', ZBB 2006, 97; Cruickshank, in: Odiath, *The Future for the Global Security Market*, 1996, pp. 267 et seq.

63 FAZ of Jul. 7, 2006, p. 12.

64 European competition law has not been "renationalised" for anything, see Council Regulation (EC) Nr. 1/2003 of Dec. 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 1.

65 Axel Nawrath, 'Rahmenbedingungen für den Finanzplatz Deutschland', ILF Working Paper series No. 2, 2002, p. 25 *et seq.*

66 Cf. sec. 191 ff. SOX Act (fn. 1).

67 Cf. Abschlussprüferaufsichtsgesetz (APAG) of Dec. 27, 2004, BGBl. I 2004, 3846. Cf. Lenz, BB 2004, 1951 *et seq*; cf. now also §§ 37n–37u WpHG.

68 Cf. Bilanzkontrollgesetz (BilKoG) of Dec. 21, 2004, BGBl. I 2004, 3408.

There are also other approaches to enforce market participants' duties. For instance within the *shaming procedure* the supervisory authority is allowed to publish the sanctions taken against a company as a result of the breach of capital market rules after the time for appeal has expired. This threat of adverse publicity acts preemptively to promote the integrity of financial markets.[69] Another popular form of public sanction in England and the US[70] is the *ban of a CEO from his profession* because of the violation of capital market rules. A stronger consideration of these measures by European law is recommended.

b) Enhancing private claims for compensation?

However Europe has pushed the envelope with the enhancement of private claims. Within German law, claims for discovery against the other party are considered illegal. It is a German civil law principle that each party has to show evidence for its claim on its own.[71] Punitive damages are penal in nature and therefore similar to criminal law from the German understanding. That's why they are not suitable for civil law proceedings which are not subject to the principle of investigation. In England punitive damages are the exception; in Germany the Federal Court of Justice has refused to recognize American judgements awarding punitive damages because they are against German public policy.[72] The absence of punitive damages and pre-trial discovery reduces the motivation of private parties to file claims.

69 Art. 14 sec. 4 Market Abuse Dir. 2003/6/EC (fn. 46) and § 40b WpHG; see Thomas M.J. Möllers/Thomas Wenninger, 'Informationsansprüche gegen die Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) und das neue Informationsfreiheitsgesetz (IFG)', ZHR 170 (2006), 455, 458.

70 Thomas M.J. Möllers, 'Interessenkollisionen und Treuepflichten von Vertretern des Bieters bei Übernahme eines Aufsichtsratsmandates der Zielgesellschaft', ZIP 2006, 1615 ff. See also sec. 305 SOX Act (fn. 1).

71 BGH of Jun. 11, 1990, NJW 1990, 3151; BAG of Dec. 1, 2004, BB 2005, 1168, 1169; Heinz Thomas/Hans Putzo, *ZPO*, 27th ed. 2005, § 284 n. 3; Leo Rosenberg/Karl Heinz Schwab/Peter Gottwald, *Zivilprozessrecht*, 15th ed. 1993, § 117.VI, pp. 679 et seq.; in the contrary Rolf Stürner, *Die Aufklärungspflicht im Zivilprozess*, 1976, p. 92, Rolf Stürner, ZZP 98, 237; Hans Schlosser, JZ 1991, 599.

72 BGH of Jun. 4, 1992, BGHZ 118, 312 = NJW 1992, 3096, reviewed by Harald Koch JZ 1993, 261. See also the recent rejection of the introduction of any punitive damages approach into German law by the 66. Deutsche Juristentag 2006 (available at http://www.djt.de/index.php). The discussion was based on the – pro-punitive – written opinion given by Gerhard Wagner, *Neue Perspektiven im Schadensersatzrecht: Kommerzialisierung, Strafschadensersatz, Kollektivschaden,* Gutachten A für den 66. Deutschen Juristentag, Munich 2006.

Although these ways are not passable under German law there are still other means to strengthen shareholders' rights. The new Freedom of Information Act finally enables anyone to gather information from public authorities.[73] Nevertheless, it is still unclear how extensively lawyers are able to retrieve information from BaFin in order to file compensation claims for investors.

In the US, private individuals do not have the right to access information concerning control over financial institutions under the US Freedom of Information Act (FOIA).[74] This exception to the FOIA also applies to the supervision of stock exchanges and consulting firms.[75] The reason for this could be the fact that investors with claims in the United States are able to retrieve lots of information through the pre-trial discovery process which applies to civil claims.[76] Contrary to this, the British Financial Services Agency (FSA) is explicitly part of the British Freedom of Information Act (FIA) 2000.[77] Since January 1st, 2005 sec. 1(1) of the British FIA 2000 has allowed individuals to find out whether an authority has certain information (the so called "right to know"). As per sec. 2 of FIA 2000, this right to information is limited if contrary public interests are concerned. Sec. 21 et seq. of FIA 2000 contain such facts of exclusion. The right to information does not apply under the absolute exclusion for matters of national security and court files.[78] Other public interest considerations require a balance to be found between the public interests arguing for and against a disclosure (so called

73 Informationsfreiheitsgesetz (IFG) of Sept. 5, 2005, BGBl. I 2005, 2722.

74 Freedom of Information Act 5 U.S.C. Sec. 552 (b) (8) says: "This section does not apply to matters that are […] contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions". The FOIA is online available at www.usdoj.gov/oip/foia_updates/Vol_XVII_4/page2.htm.

75 *Mermelstein v. SEC*, 629 F. Supp. 672, 673 ff (D.D.C. 1986); Berliner, 962 F. Supp. at 1352; cf. FOIA Guide 2004 Edition Exemption 8.

76 The pre-trial discovery-process commits the party without evidence for the prosecution to clarify the facts, F.R.C.P. 65 as well as § 21 D(b)(3)(B) Securities Exchange Act. In detail Peter Hay, *US-Amerikanisches Recht*, 2000, n. 162 *et seq.*; Stefan H. Elsing, *US-amerikanisches Handels- und Wirtschaftsrecht*, 1985, pp. 44 ff.; Hans-Viggo von Hülsen, 'Gebrauch und Mißbrauch US-amerikanischer "pre-trial discovery" und die internationale Rechtshilfe', RIW 1982, 225; Alexander Mentz, 'Das "Pre-Trial Discovery" Verfahren im US-amerikanischen Zivilprozessrecht', RIW 1981, 73; Abbo Junker, *Discovery im deutschen-amerikanischen Rechtsverkehr*, 1987, p. 39 *et seq.*; Rieckers, 'Europäisches Wettbewerbsverfahren und US-amerikanische Discovery', RIW 2005, 19 *et seq.*

77 Compare Freedom of Information Order 2003 (Stat. Instrument 2003 No. 1882), Sched. 1 Art. 2.

78 Sec. 23 FIA und Sec. 32(1) FIA 2000.

"public interest test"). So far the German BaFin has been reluctant to address requests for information under the new German Freedom of Information Act. Yet, the British experience may be helpful in these cases.[79]

c) Americanisation of corporate criminal law?

It is debatable to what extent criminal proceedings against corporate CEOs should be increased. Even in Germany members of the management board have recently been convicted of criminal charges when knowingly abusing their position of power to impair shareholders. America has had WorldCom, Enron and Tyco, Germany has had Comroad,[80] Infomatec,[81] and EM.TV.[82] In Germany even in the past the management board had the civil responsibility for the correctness of the annual reports.[83] In addition to this civil liability a CEO could get a maximum of three years imprisonment under sec. 311 no. 1 Commercial Code (HGB). According to sec. 400 para. 1 sentence 1 of the Stock Corporation Act (AktG) he is liable for an incorrect presentation of the annual account. The requirement of a CEO to certify the annual report is not only valid in the United States but also exists in the European Union as per Art. 50b of the Transparency Directive 2006/46/EC.[84] Although the directive does not require it, Germany punishes wrongful certifications of annual re-

79 For more details see Thomas M.J. Möllers/Thomas Wenninger, 'Informationsansprüche gegen die Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) und das neue Informationsfreiheitsgesetz (IFG)', ZHR 170 (2006), 455, 464 *et seq.*

80 The former CEO of Comroad AG, Bodo Schnabel, was convicted to a prison sentence of seven years by the LG Munich, see LG München I of Nov. 11, 2002, NStZ 2004, 291.

81 LG Augsburg of Nov. 27, 2003, NStZ 2005, 109; see BGH Mar. 30, 2005 – 1 StR 537/04. The judgement of the second CEO by the LG was not made public.

82 Against the Haffa brothers see BGH of Dec. 16, 2004, NJW 2005, 445 – EM.TV; approving the finality of § 400 AktG, BVerfG of Apr. 27, 2006, ZIP 2006, 1096 – EM.TV.

83 § 823 para. 2 BGB in connection with § 400 AktG, BGH of Sept. 19, 2001, BGHZ 149, 10, 20 *et seq.* – Bremer Vulkan. For the ad-hoc publicity BGH of Dec. 16, 2004, NJW 2005, 445, 449 – EM.TV.

84 Art. 50b Dir. 78/660/EEC in the version of the Dir. 2006/46/EC of Jun. 14, 2006, OJ L 224, 1, says: "Member States shall ensure that the members of the administrative, management and supervisory bodies of the company have collectively the duty to ensure that the annual accounts, the annual report and, when provided separately, the corporate governance statement to be provided pursuant to article 46a are drawn up and published in accordance with the requirements of this Directive and, where applicable in accordance with the international accounting standards adopted in accordance with Regulation (EC) No. 1606/2002."

ports with up to three years imprisonment in a special section of the Commercial Code.[85]

However it is not justified to export the penalties of the Sarbanes-Oxley Act with up to 25 years of imprisonment to Europe.[86] The principle of proportionality[87] prevailing in Germany and all other European legal systems is crucial. The degree of a penalty must fit in with the principle of proportionality[88]. As well as the death penalty is unthinkable in Europe,[89] imprisonment of 25 years or more contravenes the European understanding of a fair verdict in cases where "only" financial damages are at stake.[90] In the "Mannesmann" proceedings, the public prosecutor charged six leading German managers and unionists with betrayal of confidence against the company they chaired. One of the accused was Deutsche Bank chairman *Josef Ackermann* who was a member of the Mannesmann supervisory board. *Ackermann* approved a bonus in the amount of 57 million Euro to Mannesmann's executive committee after British cellular phone company Vodafone has taken over the German Mannesmann Group. The district court closed the proceedings against the payment of 3, 2 million Euro,[91] even though the German Federal Court of Justice had considered it as illegal that such a bonus is arranged after the successful takeover of the company.[92] The real reason for absolving *Ackermann* may have been proportionality. Without any doubt the United States authorities would not have opened criminal proceedings at all.

85 § 331 Sec. 3a HGB; Cordula Heldt/Sascha Ziemann, 'Sarbanes-Oxley in Deutschland?', NZG 2006, 652 *et seq.*; Holger Fleischer, 'Der deutsche "Bilanzeid" nach § 264 Abs. 2 Satz 3 HGB', ZIP 2007, 97 *et seq.*

86 Sec. 301 SOX Act (fn. 1).

87 Art. 1 of the Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, as amended by Protocol No. 11.

88 Cf. BVerfG of Feb. 26, 1969, BVerfGE 25, 269, 286; BVerfG of Jan. 16, 1979, BVerfGE 50, 125, 133; BVerfG of Jun. 15, 1989, BVerfGE 80, 244, 255; BVerfG of Jun. 3, 1992, BVerfGE 86, 288, 313; Schulze-Fielitz, in: Dreier, GG, 20, Art. 20 n. 180; Roland Hefendehl, 'Corporate Governance und Business Ethics: Scheinberuhigung oder Alternativen bei der Bekämpfung der Wirtschaftskriminalität?', JZ 2006, 119, 120.

89 Schwarze, *European Administrative Law*, 1992, pp. 685 ff.; Paul Craig/Gráinne de Búrca, *EU Law*, 3rd ed. 2002, pp. 371 ff.

90 Human dignity protected by constitutional law in Germany foresees that even the murderer has a right to retrieve his freedom, BVerfG of Jun. 21, 1977, BVerfGE 45, 187, 229 *et seq.* and § 57a StGB.

91 FAZ No. 279 of Nov. 30, 2006, p. 13.

92 BGH of Dec. 21, 2005, NJW 2006, 522.

IV. Searching for a common standard in corporate governance and capital markets law

1. What Europeans and Americans could learn from each other

This paper also intends to make a few observations on the comparison of laws. European capital market law has been strongly influenced by American law. This applies particularly to the model of how information is handled: quoted companies have numerous duties to inform investors so that they can make well-informed investment decisions. The EDGAR-system in the US has, without doubt, advantages. A central European information system in one single language as in the US is still a dream.[93] Sanctions such as shaming and the banning of CEOs seem to make sense due to their deterrent effect. Audit control commissions independent from the market-players secure a differentiated quality control.[94] The requirement that the CEO has to certify the annual report is not only valid in the United States but also in Germany and soon in all member states as per Art. 50b of the Directive 78/660/EEC.[95] There are, however *differences in the respective cultures of law* so that a blind adoption of all American legal rules will not make sense at all. In particular, this applies to the stiff punishment within the Sarbanes-Oxley Act. There is severe criticism of the Sarbanes-Oxley Act. Companies' expenses are notably higher than before.[96] According to the view held here, the Sarbanes-Oxley Act has advantages and also disadvantages. Furthermore, certain regulations are not new for many European states, for example the institution of audit committees. According to German law, supervisory boards have been able to set up such audit committees. The independence of auditors from the managing board has also been guaranteed by law, so in this field German law has proven to be more progressive than US law.[97] Sec. 404 SOX forces the companies to implement internal controls.[98] In contrast, Art. 46a Directive

93 See above II.1.

94 See above III.3.a).

95 See III.3.a).

96 For a more detailed survey cf. Roberta Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance', 114 Yale L.Rev. 1520 (2005).

97 For comparison § 107 para. 3 AktG as well as German Corporate Governance Kodex Sec. 5.3.2.; cf. Eberhard Scheffler, 'Aufgaben und Zusammensetzung von Prüfungsausschüssen (Audit Committees)', ZGR 2003, 236, 245 *et seq.*; Holger Altmeppen, 'Der Prüfungsausschuss – Arbeitsteilung im Aufsichtsrat', ZGR 2004, 390 *et seq.*; Uwe Hüffer, *AktG*, 6th ed. 2004, § 107 n. 16.

98 Clyde Stoltenberg/Kathleen A. Lacey/Barbara/Crutchfield George/Michael Cuthbert, (above fn. 19), 53 Am.J. of Comp.L , 459, 464 *et seq.*

78/660/EEC is much more flexible because it gives companies the right to "comply or explain" if they depart from a corporate governance code.[99]

Compared to European law the American Generally Accepted Accounting Principles (GAAP) and the duty of ad-hoc publicity are unsatisfactory.[100] In the past the publication of information related to rates and stock prices was quite permissive for companies. The issuer was granted four business days to issue a report. Saturdays, Sundays and holidays had explicitly been excluded.[101] Sec. 409 Sarbanes-Oxley Act now introduces a general duty of ad-hoc publicity (Real Time Issuer Disclosures) under sec. 13 (1) Securities Exchange Act.[102] There is no norm about the immediateness of disclosures. In this field the US law could learn from the stricter European standard.[103] Moreover, the balance of the obligation of well-grounded and clearly formulated financial analyses and the freedom of speech is still unsatisfactory.[104]

Comparing both cultures, US law seems to grant more freedom to market participants than European law but breaching the US rules may lead to strict and sometimes even draconian punishment. In contrast, the European path

99 Art. 46a lit. (b) Dir. 78/660/EC (fn. 84) says: "To the extent to which a company, in accordance with national law, departs from a corporate governance code referred to under points (a)(i) or (ii), an explanation by the company as to which parts of the corporate governance code it departs from and the reasons for doing so. Where the company has decided not to apply any provisions of a corporate governance code referred to under points (a)(i) or (ii), it shall explain its reasons for doing so".

100 For an overview cf. Holger Fleischer, Bericht F für den 64. DJT, 2002; Thomas M.J. Möllers, 'Changing European Capital Market Law – Newest Developments under a comparative law perspective', 30 N.C.J.Int'L. R. & Com. Reg., 279–334 (2004).

101 The relevant provision for Form 8-K Current Report states: "Unless otherwise specified, a report is to be filed or furnished within four business days after occurrence of the event. If the event occurs on a Saturday, Sunday or holiday on which the Commission is not open for business, then the four business day period shall begin to run on, and include the first business day thereafter." Cf. Form 8-K Current Report, Pursuant to Section 13 or 15 8d) of the Securities Exchange Act of 1934. Online available at http://www.sec.gov/about/forms/form8-k.pdf.

102 Sec. 409 SOX Act (fn. 1) says: "Each issuer reporting under sec. 13 (a) or 15 (d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest."

103 Cf. Thomas M.J. Möllers, 'Zur „Unverzüglichkeit" einer Ad-hoc-Mitteilung im Kontext nationaler und europäischer Dogmatik', in: Festschrift Norbert Horn, 2006, pp. 473 et seq.

104 See II.2.

could be to articulate further legal duties and supervision as well as to adopt enforcement standards strictly along the principle of proportionality. The proceedings in re *Ackermann* show this very clearly.

2. Cooperation in commercial law questions

a) Cooperation within Europe

Harmonisation of law in Europe is a process of continuous mutual learning. Some European directives are primarily influenced by English law,[105] others are dominated by the German approach.[106] This forces every member state to deal with so far unknown concepts of law. In addition, the process of harmonisation within the EU will facilitate enforcement by creating better and more uniform law. The most important example is comitology. Comitology stands for a close cooperation of the national authorities at the level of creating and implementing European rules.[107] Comitology proceedings have been used for creating technical standards for years. Same counts for the field of international accounting.[108] Now, the European legislator started using external expertise in the area of capital market law systematically. Regular meetings of the Committee of European Securities Regulators (CESR), the European Securities Committee (ESC) and the Committee of European Bank-

105 Cf. Dir. 2004/25/EC on takeover bids of Apr. 21, 2004, OJ L 142, 12 or Dir. 93/22/EEC on investment services in the securities field of May 10, 1993, OJ L 141, 27.

106 Cf. Dir. 86/653/EEC on self-employed commercial agents of Dec. 18, 1986, OJ L 382, 31, 17 and Second Directive on Company Law Dir. 77/91/EEC of 13.12.1976, OJ Nr. L 26, 1; see Thomas M.J. Möllers, *The Role of Law in European Integration*, 2003, pp. 73 ff.; Klaus J. Hopt, 'Company law in the European Union: Harmonization and/or Subsidiarity', 1 International & Comp.Corporate L.J., 41 (1999); Oliver Remien, 'Über den Stil des Europäischen Privatrechts – Versuch einer Analyse und Prognose', 60 RabelsZ 1, 7 (1996).

107 Cf. Report of wise men of Feb. 15, 2001 by Baron Alexandre Lamfalussy, online at http://europa.eu.int/comm/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_de.pdf; see Eilís Ferran, *Building an EU Securities Market*, 2004; Hans Ulrich Schmolke, 'Der Lamfalussy-Prozess im Europäischen Kapitalmarktrecht – eine Zwischenbilanz', NZG 2005, 912.

108 By IFRS Regulation (EC) No. 1606/2002 of Jul. 19, 2002 concerning the use of international accounting standards, OJ EC No. L 243, 1 the commission refers to rules of private law, so for instance the International Financial Reporting Standards (IFRS). Cf. Martin Wulf/Michael Klein/Karim Azaiz, 'Umstellung des Konzernabschlusses auf IFRS', DStR 2005, 260, 263; Thomas M. J. Möllers, 'Gesellschafts- und Unternehmensrecht, kleinere und mittlere Unternehmen', in: Reiner Schulze/Manfred Zuleeg, *Handbuch der Europäischen Rechtspraxis*, 2006, § 18 n. 75 *et seq.*

ing Supervisors (CEBS) facilitate the harmonisation and making of European Union-wide rules. Now a strong coordination of the interpretation and execution must follow so that the adopted rules will not fall apart again.[109]

b) Cooperation between the US and Europe in multinational or binational organisations

Most recently Germany's Chancellor *Angela Merkel* has demanded a stronger cooperation between Europe and the United States and even expressed the idea of creating structures similar to a domestic market between the European Union and the US.[110] Europeans and Americans are working together in numerous supranational institutions, such as the WTO, World Bank or the G8 summits. Bilateral agreements exist on taxation and there is close cooperation in antitrust issues.[111]

On this basis we *will be able to learn from each other*. The European IFRS rules[112] have been adopted in Switzerland and in Australia.[113] In Europe, the duties of financial analysts and regulations of ad-hoc disclosures seem to be further developed than in the US.[114] The US may reconsider the certification requirement for annual reports especially regarding the high penal sanctions.[115] Same counts for the obligations according to sec. 404 SOX since

109 It is controversial between the different member states how fast ad-hoc disclosures have to be delivered, if for instance a week-end service can be required from the companies listed on the stock exchange, see Thomas M.J. Möllers, 'Zur "Unverzüglichkeit" einer Ad-hoc-Mitteilung im Kontext nationaler und europäischer Dogmatik', in: Festschrift Norbert Horn, 2006, pp. 473 et seq.

110 See FAZ No. 22 of Jan. 26, 2007, p. 17 (report from the World Economic Forum in Davos); before, the so-called association of German industry (BDI) asked for the same.

111 Cooperation between the American and European cartel offices makes it clear that transatlantic cooperation is by all means fruitful. As to US-EU Merger Working Group see for instance "Best practices on cooperation in merger investigations", europa.eu.int/comm/competition/mergers/othersen_us.pdf; Parisi, 'Enforcement Cooperation Among Antitrust Authorities'; ftc.gov/speeches/others/ibc99059911update.htm#EC-US.

112 See fn. 108.

113 Georg Dreyling, 'Bedeutung internationaler Gremien für die Fortentwicklung des Finanzplatzes Deutschland', ILF Working Paper series No. 4, 2002, p. 10.

114 As to the duty of ad-hoc disclosure see fn. 100 and 103. As to financial analysis see Thomas M.J. Möllers, in: Kölner Kommentar, zum WpHG, 2007, § 34b n. 40 et seq.

115 See fn. 3. The EU demands a statement about the adherence to basic principles of Corporate Governance in its management report. So far this is only a proposal, without

today many companies are reluctant to be listed[116] on a US Stock Exchange or even plan on delisting.[117] We also find a policy of convergence between the two legal systems regarding civil damages. The US are about to limit punitive damages.[118] The evidence standard for damages regarding liability claims due to wrongful information on the capital market has recently been strengthened by the Supreme Court in order to solve the problem caused by abusive legal actions of investors.[119]

Cooperation within the International Organization of Securities Commissioners (IOSCO) is inevitable, although – or even because – the USA and Europe go different ways. The joint development of new standards, for instance for rating agencies, appears to be just as important. The IOSCO-principles[120] and the Code Fundamentals[121] contain regulations about how to deal appropriately with conflicting interests as well as the duty to notify the issuer before the disclosure of a rating. These are important first steps.[122] The US as well as the European Union[123] should soon follow with legally binding regulations,[124] especially due to the fact that the meaning of ratings on the capital

penal sanctions, see Art. 46a of the proposal of a directive for the amendment of the 4th and 7th directive on company law of Oct. 27, 2004, COM (2004), 725 final.

116 Smaller enterprises nowadays list on London's Alternative Investment Market instead on NASDAQ as in the past, see The Economist of 22nd–28th April 2006, p. 10 *et seq.*

117 See the studies of the Deutsches Aktieninstitut (DAI), AG 2006/6 R 118; online at www.dai.de; Clyde Stoltenberg/Kathleen A. Lacey/Barbara/Crutchfield George/Michael Cuthbert, (above fn. 19), 53 Am.J. of Comp.L. 457, 470 *et seq.*

118 *BMW of North America, Inc. v. Ira Gore, Jr. (Supreme Court)*, 134 L.Ed.2d 809, 64 USLW 4335, 96 Cal. Daily Op. Serv. 3490, 96 Daily Journal D.A.R. 5747; *State Farm v. Campbell*, 123 S.Ct. 1513 (2003); *Romo v. Ford*, 113 Cal. App 4th 738, 6 Cal. Rptr3d 793, Prod. Liab. Rep. (CH) P 16, 832.

119 *Dura Pharmaceuticals, Inc. et al. v. Michael Broudo et. al.*, 125 Sct. 1627, 2005 WL 885109; for this Klöhn, RIW 2005, 228 et seq.

120 IOSCO, Statement of Principles regarding the Activities of Credit Rating Agencies, September 2003; online at www.iosco.org.

121 IOSCO, Code of Conduct for Credit Rating Agencies, See also BT-Drs. 15/2815 of Mar. 30, 2004. For both see Gudula Deipenbrock, 'Aktuelle Rechtsfragen zur Regulierung des Ratingswesens', WM 2005, 261, 264.

122 The IOSCO-principles and the Code Fundamentals are not legally binding.

123 Unfortunately the EU has so far decided against the regulations of Ratings, see recital 10 of the Enforcement Dir. 2003/125/EC (fn. 46); Green paper on Financial Securities Policy (2005–2010), COM (2005) 177, p. 11; White Paper on Financial Securities Policy (2005–2010), p. 13 no. 4.3.

124 On the discussion about legal policy see Holger Fleischer, Bericht F für den 64. DJT, 2002, p. 135; Jürgen Witte/Boris Hrubesch, 'Rechtsschutzmöglichkeiten beim Unternehmens-Rating, ZIP 2004', 1346; Eberhard Vetter, 'Rechtsprobleme des externen Ratings', WM 2004, 1701 *et seq.*; Gudula Deipenbrock, 'Aktuelle Rechtsfragen zur

market is higher than that of certain financial analyses.[125] In the last few years Europe and the US have already started a "Regulatory Dialogue" to check the effects of the rules taken into consideration already at the beginning of the law making process.[126] It should be discussed in this context how and to what extent the Sarbanes-Oxley Act will be adopted in the course of an eventual merger of the New York Stock Exchange (NYSE) and Euronext.[127]

The IOSCO is also a model for the development of international standards. In comparison to the prevailing dominance of one single legal system, the competition of different legal systems has made some considerable headway. With national markets growing closer and closer, common standards of law become indispensable. Therefore, creating standards in a cooperative way should become the normal law making procedure.[128]

Regulierung des Ratingswesens', WM 2005, 261, 263; Mathias Habersack, 'Rechtsfragen des Emittentenratings', ZHR 169 (2005), 185, 194.

125 On scandals regading Parmalat (see Robert Rieg, Rating – 'Objektive Urteile oder rituelle Orakelsprüche', BC 2004, 57) and the dispute between Fitch and German insurances, see FAZ of Jun. 17, 2006, p. 23. This applies against the background of financial authorities in the United States and Europe referring to ratings in order to differentiate credit risks, see Holger Fleischer, Bericht F für den 64. DJT, 2002, p. 135; Gundula Deipenbrock, 'Aktuelle Rechtsfragen zur Regulierung des Ratingswesens', WM 2005, 261, 264.

126 See Hans-Jürgen Hellwig, 'Der Financial Markets Regulatory Dialogue zwischen EU und USA', in: Festschrift Völker Röhricht, 2005, pp. 181 et seq.

127 More details on this problem in Handelsblatt of Jul. 6, 2006, p. 22; Klaus J. Hopt, FAZ No. 262 of Nov. 9, 2006, p. 24.

128 On the convergence debate see Klaus J. Hopt/Hideki Kanda/Mark J. Roe/Eddy Wymeersch/Stefan Prigge (Eds.), *Comparative Corporate Governance*, 1998; Henry Hansmann/Reinier Kraakman, 'The End of History for Corporate Governance', 89 Geo.L.J. 4399 (2001); John C. Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implication', 93 Nw. Univ.L.Rev. 641 (1999); Ronald J. Gilson, 'Corporate Governance and Economic Efficiency: When do Institutions Matter?', 74 Wash. Univ.L.Q. 327 (1996); Douglas M. Branson, 'The very Uncertain Prospect of "Global" Convergence in Corporate Governance', 34 Cornell Int'l L.J. 321 (2001).