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

Thomas M. J. Möllers*

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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* Professor of Law at the University of Augsburg, Managing Director of the Institute for European Legal Systems, Chair for Civil Law, Economic Law, European Law, Conflicts of Law and Comparison of Laws, Jean Monnet-Professor of European Union Law. The article is based on a lecture given to the Deutsche Bundesbank (Frankfurt) and Mallesons Stephen Jaques (Sidney).
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’ initial public offerings play a more prominent role. The financing of a company via the stock exchange is

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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 Gruzon/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. Jeffrey Skilling was sentenced to 24 years 4 months imprisonment on Oct. 23, 2006. Kenneth Lay died recently.
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.\textsuperscript{8} It has not been decided yet which financial system is more competitive – bank-based or market-based.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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-


\textsuperscript{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.

panies. A few examples of areas where banks can serve as a third party intermediary are transactions on non-performing loans, 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 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), the European capital markets law is only 25 years old. 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. After the massive accounting misconduct of the Italian dairy and food giant Parmalat, the EC also responded with a number of corporate governance initiatives.

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


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. 1\(^{\text{st}}\), 2007.
throughout the entire European Community.\textsuperscript{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.\textsuperscript{25} In Germany, the implementation of the Transparency Directive has caused the federal government to set up an electronic commercial register (“Unternehmensregister”)\textsuperscript{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.\textsuperscript{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.\textsuperscript{28} This increases transaction costs and puts pressure especially on smaller quoted companies.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{24} Art. 21 para. 1 of the Transparency Dir. 2004/109/EC (fn. 23); § 3a para. 1 Wertpapier-handelsanzeige- und Insidervorzeichnisverordnung (WpAIV) of Dec. 13, 2004, BGBl. I, S. 3376.
\textsuperscript{25} Art. 21 para. 2 of the Transparency Dir. 2004/109/EC (fn. 23).
\textsuperscript{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.
\textsuperscript{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

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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.
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-


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


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).


\(^{49}\) 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).

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.\(^\text{52}\)

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.\(^\text{53}\) 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.\(^\text{54}\) 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.\(^\text{55}\) 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.


and EM.TV\textsuperscript{57} we find the first judgments on defective ad-hoc disclosures in Germany. The Act on representative proceedings of affected investors (Kapitalanleger-Musterverfahrensgesetz – KapMuG)\textsuperscript{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\textsuperscript{59} that followed the Market Abuse Directive 2003/6/EC.\textsuperscript{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.


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.\textsuperscript{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 \textit{European Financial Services Supervision Authority} is highly controversial though.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{65}

Nevertheless small amendments may be added even on the national level. Following the example of the Public Company Accounting Oversight Board\textsuperscript{66} which was introduced by the Sarbanes-Oxley Act, Germany has recently set up an audit control commission independent of the market players.\textsuperscript{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).\textsuperscript{68}

\textsuperscript{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.
\textsuperscript{63} FAZ of Jul. 7, 2006, p. 12.
\textsuperscript{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.
\textsuperscript{66} Cf. sec. 191 ff. SOX Act (fn. 1).
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.

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\(^ {69}\) 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.


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. 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). This exception to the FOIA also applies to the supervision of stock exchanges and consulting firms. 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. Contrary to this, the British Financial Services Agency (FSA) is explicitly part of the British Freedom of Information Act (FIA) 2000. 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. Other public interest considerations require a balance to be found between the public interests arguing for and against a disclosure (so called

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.
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.
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.\textsuperscript{85}

However it is not justified to export the penalties of the Sarbanes-Oxley Act with up to 25 years of imprisonment to Europe.\textsuperscript{86} The principle of proportionality\textsuperscript{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.\textsuperscript{88} As well as the death penalty is unthinkable in Europe,\textsuperscript{89} imprisonment of 25 years or more contravenes the European understanding of a fair verdict in cases where “only” financial damages are at stake.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{86} Sec. 301 SOX Act (fn. 1).

\textsuperscript{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.


\textsuperscript{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.

\textsuperscript{91} FAZ No. 279 of Nov. 30, 2006, p. 13.

\textsuperscript{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).
\(^98\) 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.\textsuperscript{99}

Compared to European law the American Generally Accepted Accounting Principles (GAAP) and the duty of ad-hoc publicity are unsatisfactory.\textsuperscript{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.\textsuperscript{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.\textsuperscript{102} There is no norm about the immediateness of disclosures. In this field the US law could learn from the stricter European standard.\textsuperscript{103} Moreover, the balance of the obligation of well-grounded and clearly formulated financial analyses and the freedom of speech is still unsatisfactory.\textsuperscript{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

\textsuperscript{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”.


\textsuperscript{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.

\textsuperscript{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.”


\textsuperscript{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, others are dominated by the German approach. 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. Comitology proceedings have been used for creating technical standards for years. Same counts for the field of international accounting. 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-


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.\footnote{109}

\textit{b) Cooperation between the US and Europe in multinational or binational organisations}

Most recently Germany’s Chancellor \textit{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.\footnote{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.\footnote{111}

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

\footnote{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.

\footnote{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.

\footnote{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.

\footnote{112} See fn. 108.


\footnote{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.

\footnote{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\textsuperscript{116} on a US Stock Exchange or even plan on delisting.\textsuperscript{117} We also find a policy of convergence between the two legal systems regarding civil damages. The US are about to limit punitive damages.\textsuperscript{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.\textsuperscript{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\textsuperscript{120} and the Code Fundamentals\textsuperscript{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.\textsuperscript{122} The US as well as the European Union\textsuperscript{123} should soon follow with legally binding regulations,\textsuperscript{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 4\textsuperscript{th} and 7\textsuperscript{th} directive on company law of Oct. 27, 2004, COM (2004), 725 final.

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

\textsuperscript{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.


\textsuperscript{119} Dura Pharmaceuticals, Inc. et al. v. Michael Broudo et. al., 125 Sct. 1627, 2005 WL 885109; for this Klöhn, RlW 2005, 228 et seq.

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

\textsuperscript{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 Regelung des Ratingswesens’, WM 2005, 261, 264.

\textsuperscript{122} The IOSCO-principles and the Code Fundamentals are not legally binding.

\textsuperscript{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.

market is higher than that of certain financial analyses.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{128}

\textsuperscript{125} On scandals regarding 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.


\textsuperscript{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.