

РАЗДЕЛ 1
НАУЧНЫЕ ИССЛЕДОВАНИЯ
И КОНЦЕПЦИИ

SECTION 1
ACADEMIC
INVESTIGATIONS
& CONCEPTS



ON THE WAY TO “GOOD” CORPORATE GOVERNANCE?
A CRITICAL REVIEW OF THE GERMAN DEBATE

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Abstract

Corporate governance was widely debated in recent years, in Germany as elsewhere. The question what “good” corporate governance constitutes and how it should be achieved stands in the centre of all those discussions. This paper critically draws on the German case. It tries to identify the key issues as well as recent changes in the character of this debate. It is argued that the reform spirit in Germany stands at the edge and needs some considerable refreshment in the near future.

Key words: Germany, “good” corporate governance, public debate, corporate governance code

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Introduction

In recent years corporate governance has become one of the key topics, both of management research and of practitioners' discussions (Keasey, Thompson and Wright, 1999; Lazzari et al. 2001). This was especially promoted by several cases of firm crisis (e.g. Enron, Parmalat) and management misconduct (e.g. leaving compensations for ABB's Percy Barnevik or Mannesmann's Klaus Esser) undermining the taken-for-granted US concept. In this context normative aspect of corporate governance - what is “good” corporate governance

and how should it look in practice? - has once more moved to the center of public interest.

This discussion also takes place in Germany. On one hand there is a broad debate about needed reforms of the traditional German system (Heinze, 2001; Höpner and Jackson, 2001), on the other normative and moral aspects deserve a growing role in the public discussion (Hartz and Steger, 2004). In this paper, we draw a critical review of the ongoing German debate about „good“ corporate governance thus starting with a short description of the German institutional background, then highlighting the specific characteristics of the discussion and

identifying the main approaches for potential future developments.

The Institutional Background

The German corporate governance system is both, deeply rooted in German history since 1945 and incorporated in German company and capital market law (Bernhardt, 2002; BDI/PWC, 2002). It can be sharply characterized by four main aspects:

Firstly, the *two-tier board organization* comprises a management board (Vorstand) with the chief task to direct the company and a supervisory board (Aufsichtsrat) assigned to appoint and control it. Cross-memberships are excluded by law.

Secondly, the mandatory *co-determination* created in the early 50s and enacted in the current form in 1976 reserves half of the seats on the supervisory board of large corporations for employees representatives (Peck and Ruigrok, 2000). To avoid impasses the chairman of the supervisory board who is elected by the shareholders is granted with a double vote. Moreover, co-determination is widely dispersed in smaller corporations and subsidiaries thanks to the largely developed information, consultation and co-determination rights of works councils.

Thirdly, the large German banks, usually *universal banks* engaged in both investment banking as well as commercial banking, hold a key position in the German system. This is based on their blocks of shares, the proxy votes which they command and their traditional role as lenders. Moreover, the numerous seats top bankers have on supervisory boards of large German corporations is a source and manifestation of their power (Hackethal, Schmidt and Tyrell, 2002).

Fourthly, among many of the largest German corporations large shares of stocks are held by other corporations (Schilling, 2001). Those are, moreover, often strongly connected with each other on the personal level and through interlinking directories. This traditional network is often addressed ironically as the "*Deutschland AG*".

Consequently, the German corporate governance system has a clear stakeholder orientation – Vitols (2003: 44) speaks about "bargained shareholder value" – and is targeted to ensuring stability and growth rather than maximizing shareholder value (Hackethal, Schmidt and Tyrell, 2002).

The Code Development

Although some initiatives to fix principles for „good“ corporate governance have already been launched during the 90s (e.g. Werder 1996) they were only poorly reflected in the public opinion. It was in the aftermath of the publication of the OECD principles (OECD 1999) that also in Germany some diverse expert groups – based on private initiatives – started to think about respective regularities. The

collapse of the internet bubble and the following downward spiral even catalyzed those activities.

In January 2000, the Frankfurt commission published its principles (Grundsatzkommission, 2000) while the Berlin commission (Werder, 2001) and the first corporate governance scorecard (DVFA, 2000) followed in June. In the same time the federal government appointed a commission which accomplished their work in July 2001 (Baums, 2001).

Among numerous recommendations the commission claimed for a code of best practice. Consequently the Federal Minister of Justice appointed a second governmental commission (hereafter: the code commission) which established the German Corporate Governance Code in February 2002 (Cromme, 2002).

Although not having the force of law, the new Transparency and Publicity Act which became effective nearly at the same time lends the code additional force: Each listed company is obliged to declare whether it has complied and to explain where it has not (principle of comply or explain) (Hutter, Devlin and Burkard, 2002).

The results of this reform are fairly heterogeneous: On one hand, the implementation of the code by the large corporations is quite well (Towers Perrin, 2004; Werder, Talaulicar and Kolat, 2004).

Moreover, several authors reported some slight indicators for the change of corporate governance practices in Germany, namely an increase in the legal protection of minority shareholders, the evolution of more offensive takeover regulation and a reconsidering among major blockholders of their monitoring approach (Beyer and Hassel, 2002; Hackethal, Schmidt and Tyrell, 2003).

On the other hand, however, there still remains a clear reluctance among the large corporations, e.g. with respect to key topics such as the transparency about board salaries (DSW, 2003). If one enlarges the focus of analysis on registered SMEs the level of implementation considerably decreases (Ergo Kommunikation, 2003; Oser, Orth and Wader, 2003). Moreover, several commentators frankly question whether the code and the reform process really hold their promises (e.g. Bernhardt, 2002).

Research Design

This paper is based on three sets of data: Firstly, a thorough review of the existing *literature* has been done. Secondly, more than 500 articles of the most relevant German *newspapers* ranging from 1998 to the present were analyzed and interpreted. Thirdly, we conducted 31 qualitative open-ended *expert interviews* between March 2003 and April 2004 (Figure 1) which were all tape-recorded and transcribed.

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Bernhardt, W.	Member of Berlin Commission / Co-Editor Frankfurter Allgemeine Zeitung
Breuel, B.	Former CEO, Treuhandanstalt / former Minister of Economy, Lower Saxony
Breuer, R.-E.	Chairman of supervisory board / former CEO, Deutsche Bank / Member of Code Commission
Buchheim, A.	Public relations officer, Lintec AG
Dallas, G.	Leading expert, Standard&Poors
Dornaus, K.	Member of management board, PriceWaterhouseCoopers (Dresden location)
Dreyling, G.	Leading expert, Bundesanstalt für Finanzdienstleistungsaufsicht (BAFin)
Gosch, I.	Leading expert, ver.di
Grimm, R.	CEO, Sparkasse Chemnitz
Grosse, G.	CEO, Komsa AG
Horezky, J.	CFO, PCWare AG
Keußen, T.	Accountant
Köstler, R.	Leading expert, Deutscher Gewerkschaftsbund (DGB)
Mebus, O. / Müller, J.	Leading experts, Sparkasse Leipzig
Poggemann, N.	Investor relations officer, Fielmann AG
Reuter, E.	Former CEO, Daimler-Benz AG
Ringleb, H.M. / Kremer, T.	Executive assistants, Code commission / Legal experts, Thyssen-Krupp AG
Rosen, R.v.	CEO, Deutsches Aktien-Institut (DAI) / Member of Frankfurt Commission
Rotter, K.	Attorney-at-law
Schneider, K.	CEO, Schutzgemeinschaft der Kapitalanleger e.V. (SdK)
Schneider, S.	Investor relations officer, Jenoptik AG / DEWB AG
Schöttler, J.	CEO, Intershop AG
Stoecker, W.	Member of management board, Sparkasse Dresden
Strenger, C.	Member of supervisory board / former CEO, DWS Investment / Member of Governmental Commission and Code Commission
Voigt, R.	CEO, Ostdeutscher Sparkassen- und Giroverband
Wenger, E.	Professor of Banking and Finance / Shareholder activist
Werder, A.v.	Head of Berlin Commission / Member of Code Commission / Professor of Management
Wiesner, P. / Wulfetange, J.	Leading experts, Bundesverband der Deutscher Industrie e.V. (BDI)
Witzleben, A.v.	CEO, Jenoptik AG

Figure 1. Persons interviewed

Findings

To answer the main questions of this paper - What is the German discussion of „good“ corporate governance about? What are the main characteristics of the current and what are the main features of the future discussion? – some five propositions based on our data should be formulated and discussed hereafter:

Proposition 1: The German debate about corporate governance is very heterogeneous including a broad variety of different actors and positions.

Heterogeneity was not only found in the literature and media analysis – what would nobody surprise – but impressively occurred during the expert interviews as well. To make it better visible all interviewees were classified along six main attributes on a 5-point-scale, namely the power of the institution standing behind them (from 1 = very powerful to 5 = nearly powerless), the amount of public perception of their opinion and accounts (high

– low), the strategy they follow (offensive – defensive), the assessment of the corporate governance code (positive – negative), of the role of the media (positive – negative) and of the future developments (optimistic – pessimistic) (cf. Figure 2 and 3).

It becomes obvious that the variation in all attributes is considerably high reflecting the large diversity of the experts included as well as the German corporate governance debate in general. Furthermore, when the correlation between the different attributes is focused (cf. Figure 4), there is strong interrelationship between the assessment of the code and of future developments (0,72) which points out the key role of the corporate governance code. Moreover, correlation is also high between public perception and both, institutional power (0,70) and strategy (0,64), which stresses the character of the corporate governance debate as a “power game”.

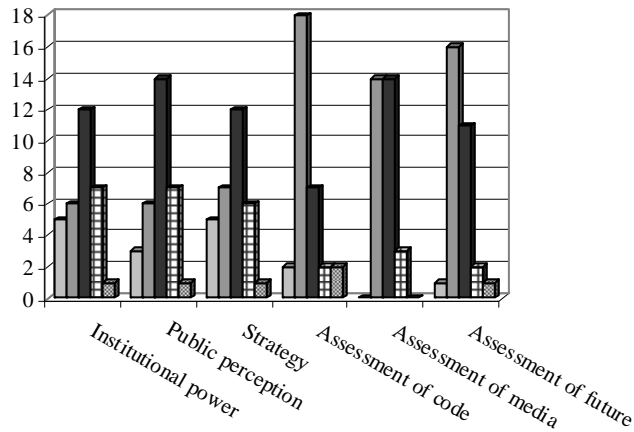


Figure 2. Distribution of interviewees' attributes

	Institut. power	Public perception	Strategy	Assessm. of code	Assessm. of media	Assessm. of future
Average	2,77	2,90	2,71	2,48	2,65	2,55
Stand. dev.	1,09	0,98	1,07	0,96	0,66	0,81

Figure 3. Average and Standard deviation of attributes

The only remarkable negative correlation could be found between institutional power and assessment

of the media which can be taken as an indicator of the “counter power” of German media.

	Institut. power	Public perception	Strategy	Assessm. of code	Assessm. of media	Assessm. of future
Institut. power						
Public perception	.70					
Strategy	.26	.64				
Assessm. code	.46	.33	.24			
Assessm. media	-.30	.05	.37	.28		
Assessm. future	.45	.20	-.08	.72	.19	

Figure 4. Correlation between attributes

Considering all attributes we can identify four clusters of persons in the field: Firstly, the so called “pacemakers” (about 20% of the experts) who are the key players of the German corporate governance debate. They most often represent some very powerful institution (e.g. large corporation) and are in the focus of public interest. Consequently, they had remarkable influence on the process of code development and, therefore, perceive it very positive and so they think about future developments too. Secondly, the “followers” (about 40%) constitute the circle around the former group. They are similarly structured but slightly less “perfect” compared to the “pacemakers” (e.g. their institution is not that powerful or their public perception is less developed) but most often they are in close contact with the pacemakers and with the main road of the debate.

Thirdly, the “active outsiders” (about 20%) are somewhat disadvantaged for the ongoing debate (e.g. through the lack of powerful institution). This group is characterised by a majority of critical people who try to actively engage in the debate although they often fail with their ideas. And fourthly, the “passive outsiders” (about 20%) are often not fully inclined in the corporate governance debate. Even when they represent some considerable power (e.g. larger companies) they renounce on taking a more active role. Moreover, some fairly different perceptions and assessments can found here compared to the main stream opinion, however, this “hidden” voices do not really count at all.

Proposition 2: The collapse of the internet bubble and the massive decline of the stock market prices provoked a significant change of the German corporate governance

debate. While it was highly influenced by neo-classical ideas before, the debate is now characterized by a clear focus on traditional values.

The media analysis shows two public debates that completely differ from each other, the former taking place between 1998 and 2000, the latter from the year 2001 on. Due to the massive economic decline, the year 2000 marked a turning point. From 1998 until 2000 the public debate about „good“ corporate governance was dominated by the quest for a transformation of the German system of Corporate Governance. Diverse features of the German system (e.g. co-determination, two-tier system) were criticized for not meeting anymore the requirements of the international capital markets. At the same time, a certain “americanisation” – regarding the postulated concepts (e.g. unitary board, strict shareholder orientation) – could be identified. Consequently, the Old Economy was put in sharp opposition to the New Economy which stood as a symbol and model for the required corporate Governance.

"If there is a symbol for the often cited decline of the Rhine Capitalism, then it is the New Market." (Die Welt, 9 March 2000)

Moreover, in this context some new “heroes” occurred, namely the new type of a brave manager, who represented entrepreneurial spirit, innovation and imagination.

"It seems, that this land awakes like Sleeping Beauty from a long deep sleep, as someone with a sword smashed the network under which the entrepreneurial spirit of the Germans had slumbered." (Süddeutsche Zeitung, 3 May 2000)

With the end of the hype of share prices, the numerous profit warnings and some dramatic company breakdowns during 2000, the dominant characteristics of the public debate were changing as well. Although some commentators tried to keep watching the “great trend” a turnaround became more and more visible.

"It is by no means everything great just because it is decorated with the name 'New Economy'. But this does not change the overall trend." (Die Welt, 30 December 2000)

The new debate which was put through until spring 2001 was dominated by harsh critics about the “false” behaviour of managers, analysts, banks and start-up companies cumulating to a veritable confidence crisis.

"The former heroes have become the bad guys." (Tagesspiegel, 24 June 2002)

Moreover, the weaknesses of the Anglo-Saxon model were remarked in the debate. Consequently, a renaissance of traditional values such as modesty, trustworthiness and hard work – sketched in the concept of the “honourable merchant” – took place.

"There are basic rules, which are valid for a 'honourable merchant' – and exactly these rules have to be re-established." (Handelsblatt, 21 July 2002)

Proposition 3: The German debate about „good“ corporate governance is dominated by a broad, although

unofficial, coalition of actors who share the common will to keep the discussion under control and to prevent it from gaining broader relevance or even from producing some “extensive fire”.

The coalition members (i.e. the “pacemakers” supported by certain “followers” as discussed above) represent some fairly different institutions, such as large corporations, employer-friendly private institutions, trade unions, saving banks and expert commissions. The coalition’s behavior is characterized by five main strategies: Firstly, they promote a clear pragmatism which becomes obvious through the current, fairly moderate corporate governance code or the coalition representatives’ attempts to downgrade the (formerly) emotional topics and to deny urgency for reforms.

„In minimum, we already did a great step, and that other thing will have to be the topic of the next round. I mean, the life experience tells me that we should not tackle certain things too ambitiously.

From my point of view I must say it is better that the commission reached what they have instead of entering a clinch they could have never won...” (Interview 1)

Secondly, the coalition members try to exclude some potential problems points from the discussion or even to make them taboo. The debate about co-determination, for example, just takes place in the media and looks more like a mock fight, while this topic remains officially excluded from the discussions of the code commission.

„The task the commission received from the minister of justice, Ms. Däubler-Gmelin, was to develop a code in the given framework of the current law. Without any democratic legitimation the commission is well advised not to create any further rules. So far the question about co-determination did not exist...” (Interview 5)

Thirdly, the coalition members show a fairly specific scapegoating argumentation. To prevent the corporate governance discussion from touching at fundamental questions they use to declare the occurring scandals and examples of inappropriate behavior as single cases. Consequently, they recommend some traditional recipes as valuable solution to improve corporate governance.

„I treat them as single cases and not as symptoms for a general epidemic. (...) There is no need for a discussion that I consider highly dangerous. Certain critics argued that those were examples of a system illness, that the capitalism as we understand it would not be okay, the market economy as we carry it on would not be okay. These criticisms are misplaced...” (Interview 4)

Fourthly, some potential problems are denied or in minimum declared to be special cases. A typical example for this can be found in the discussion about the need of a corporate governance discussion or even a corporate governance code for small and medium sized enterprises. This still remains more or less an academic discussion (e.g. (Steger, 2004; Strenger, 2004) while many practitioners and practitioners’ representatives openly reject this topic (Bernhardt, 2003).

Fifthly, the coalition members downplay the discussion about alternative models of corporate governance. By just qualifying the respective strengths and weaknesses, on one hand they stabilize the current German model while on the other they prevent any transfer of the own model or its characteristics abroad from taking place.

„Well, the foreign countries should be careful about that. With the ban to sit on the management and the supervisory board at the same time we are miles ahead of them...” (Interview 3)

Proposition 4: The German discussion about „good“ corporate Governance has ceased to be a broad reform debate. It is rather an ongoing discussion clearly reflecting the key aspects of the structural inertia of the economic and political system in Germany.

The end or just the non-existence of an intensive reform debate is marked by several different patterns: Firstly, there is a nearly complete lack of claims for rigid and spectacular steps to be taken in the corporate governance code. Although in sharp contrast to numerous earlier statements – e.g. regarding competitors on supervisory board, more independent directors, disclosure about compensations (Peck and Ruigrok, 2000) – consensus orientation dominates the current code discussion.

„The economy will discuss it and will do it as far as possible. That’s why, I think, one will be able not until two or three years to measure this and to say if we have reached what we had intended. Either we will say, all in all, we reached it and we just need some minor revisions or it has not been realized and then we have to decide about whether we need a law. But we can’t say that yet.” (Interview 2)

Another example are the rights of minority shareholders which are usually just treated on a rhetorical level. Claiming rights remain strictly limited and even rejected by several prominent experts. The same is true for shareholder activism in general which reminds at Sisyphus work as long as the majority of the large investment funds remain under control of banks and insurance companies. It is just logical, therefore, that minority shareholders are scarcely represented on the code commission.

„Private investors attending the General Meeting with their own shares may sum up at maybe 1% of the total votes present. The rest are shares of banking depots and of any investment funds. And now you must ask, why do these people vote completely different than those whose money it is in the end. That’s the basic question... And, from here we only advance when a completely different reasoning occurs among the public prosecutors, that they prosecute this voting behaviour as disloyalty.” (Interview 8)

Even the disclosure of salaries of managers and supervisory board members, although some further recommendations was published by the code commission, is far from being self-understandable. Rather than this there regularly occur some new and sometimes bizarre arguments to keep the traditional secrecy.

“I am the boss of a small company, if compared internationally. But I have to live on the spot. And my

salary of a few hundred thousands of Euro is just a peanut for international top managers, but here on the spot it is incredibly much. It is not enough to live in Zurich and to come over here by airplane. But in a region with a unemployment rate of 18% this is incredibly much. And I do not want to run the gauntlet here because of a relatively slight salary if compared internationally.” (Interview 27)

Secondly, some typical corporatist arrangements (do ut des!) between representatives of capital and labour even strengthen the traditional power balance at the costs of some underprivileged groups (e.g. minority shareholders) and prevent some fundamental reforms from taking place.

„...then the company lawyers said, it must be prevented that each shareholder can come along and claim. Thus we said: No, no, we can talk about this (...) but if so, they have to agree about some supervisory board affairs that need the employees’ approval. It must be included in the law that the supervisory board must have such a list of affairs.” (Interview 9)

Thirdly, no clear opposition of management and supervisory board (Interview 8)

Last but not least, in spite of numerous claims for (independent and unaffected) self-curing processes of business corporations and actors several indicators show that we are still far away from that kind of improvement process: A prominent example can be found in the current Mannesmann trial against some former supervisory board members who decided and agreed about veritable payments in favor of former management board members and, partly, of their own pocket as well. On one hand, the longer the trial proceeds the more people recognize that a criminal court is not supposed and, therefore, can not judge about decency and good practice. On the other, the accused persons, from both the employers and the employees side, do not seem to feel as having done anything wrong. One of the accused persons, the Deutsche Bank CEO Joe Ackermann, even entered the courtroom showing the victory sign. Another example for this lack of self-criticism was recently given by Hilmar Kopper, chairman of the supervisory board of DaimlerChrysler.

“DaimlerChrysler is one of only few German companies that is registered at the Big Board in New York (...). The respective transparency and density of supervision and control in accounting and corporate governance (...) will remain unique in Germany and Europe for a long time.” (Kopper, 2004: 16)

Proposition 5: The future discussion about „good“ corporate governance in Germany will most probably be characterized by three basic trends, namely pragmatization, professionalization and codification. All three clearly highlight some specific German traditions in the field of economy and politics.

Against the background of the above mentioned developments it seems widely unrealistic to expect a thorough reform debate about „good“ corporate governance to occur in the near future. Much more probable is the continuation and reinforcement of the current pragmatic discussion. Consequently, this will

include a) a clear decline of emotional and moralizing topics and aspects, b) the prevention of real, structural reforms of the German corporate governance and c) the protection of some taboo topics.

„... Mr. Baums and his friends, and the people in the ministry, in the commissions, they consider the claiming minority shareholder as the main trouble maker. And the Frankfurter Allgemeine Zeitung even supports them by transporting their distorted perception to the public.“ (Interview 8)

The professional handling of any problematic topic by selected experts within corporatist arrangements is a highly acknowledged German tradition.

Most probably we will face this pattern of behavior in the discussion of „good“ corporate governance as well. This meets together with the above mentioned will to prevent “extensive fire”. Moreover, it is supported by a declining public interest in the topic which is reflected by the media.

Last but not least, it is to be reminded that a non-legal agreement as problem solution – such as the German code of corporate governance – is fairly untypical in the German context.

„I think you would strain yourself if you expect any private persons to act ethically where there is no respective regulation. In fact, this would be desirable but who should, let's say, how would you implement this?“ (Interview 3)

So, we can expect that the process to transfer the key points of the code into the federal company law will be continued and intensified in the future. Moreover, this process will even clarify the picture from above. While some commentators will probably argue that through this the principles of „good“ corporate governance might be objectified and stressed, some others will claim it another hurdle where real reform steps could be stopped or at least be watered down.

Conclusions

Finally, it is just modest and necessary to come up with the “so what”-question here. Moreover, it should be questioned hereafter whether the findings presented above may also deliver some value for further action in this field, both for practitioners and for management researchers.

Our paper so far should have provided some critical insights of an important process, namely the ongoing public discussion about „good“ corporate governance in Germany, the largest economy in Europe. In more detail, it has accentuated several important points: Firstly, it presented a picture of the micro-political arena in which the development of „good“ corporate governance is going on and of how several individual and institutional strategies impact on this. Thus, it became obvious that socio-economic events and processes (as the development of „good“ corporate governance) and the discourse about it do not always proceed on parallel lines but undergo

some specific “legacies”. Secondly, it was clearly pointed out how the institutional and historical framework of a country influence the development process of „good“ corporate governance as well as the discussion about it. What currently happens so far in Germany can hardly be understood without the knowledge of this constitutive framework. Thirdly, the importance and close connection of individual perceptions and action – as described by several theoretical approaches – was stressed – not only perceptions about current and future problems or partners and adversaries but also about organizational and societal norms and values that in the end constitute what „good“ corporate governance means.

Against the background of our paper, several features for future action in this topic may be identified that might be taken as lessons for other countries as well: Firstly, since the media generally play an important role in public discussions of any kind it seems important that they took over a more active role in promoting „good“ corporate governance. This could be done for example by making more transparent the respective practice of companies even for small shareholders which could improve the information situation and, thus, would enable the broad market to react. Secondly, the group of people dedicated with the task to create and develop further a national corporate governance code takes over a great responsibility and, therefore, will largely impact on the further process. However, these kind of institutions must be carefully safeguarded from becoming “over-politicized”. If they do not fairly include all important actors they risk to loose their power balance and, furthermore, their legitimacy in the public opinion. Thirdly, one should assume that often the situative national framework can hinder or prevent needed corporate governance reforms from going on. Consequently, external multi-national institutions, such as OECD, EU or the Basel council, receive an important role in promoting and sometimes even subtly pushing forward national reform agendas. As our paper clearly detected this might be true not only for developing or emerging economies but also for some saturated, traditional market economies as well.

Last but not least, some opportunities for future research should be mentioned here: Firstly, it seems promising to more closely investigate the processes of implementing and putting through of „good“ corporate governance instead of stopping at the moment when a certain code is created. In other words, it is important not just to watch the “norming” but also the following “performing” phase. Secondly, since corporate governance crisis and reform are definitively cyclical (Clarke, 2004), this topic does merit to be focused from a larger historical perspective. Quality and know-how in this respect might also be found in the past. Finally, some pure descriptions of „good“ corporate governance development processes must not be the end of the

way. Some strong efforts should be made here to find out and develop further some economic and sociological theories that help us to understand and explain what is going on around here.

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