

INTRODUCTION

When remarking the headword “Corporate Governance“ one associates it automatically with Enron, WorldCom, Arthur Andersen etc and the accountancy scandals in the US in 2001. Managers in key management positions abused the companies for their personal advantage in different ways: fraudulently pushing the turnover in order to gain share value related remuneration, falsifying financial statements, forcing client-dependent accountants and auditors to cooperate, insider-trading, taking company opportunities, using company resources for private purposes, making business without sufficient disclosure and enlarging the business strategy without shareholders’ approval.

To avoid such fraud and misuse of managers’ powers the US Congress has enacted the so-called Sarbanes-Oxley-Act this year. But what is incorporated in this act is not a very new idea in the context of Corporate Governance. In 1992 the Committee on the Financial Aspects of Corporate Governance published the Code of Best Practice (Cadbury Code). After that there came some more codes, as well in the UK¹ as in other European countries².

There is no code on the European level yet, but there are some recommendations by certain committees that the Commission will take into account after issuing consultations.

After over 30 years of negotiations³ the Council finally adopted the European Company Statute in October 2001. There are provisions in the regulation dealing with the field of Corporate Governance. In this essay these provisions are examined and compared with those in Corporate Governance Codes of different European Countries, in particular the UK, France, the Netherlands and Germany.

The aim of governance provisions is preventing fraud and so to protect shareholders and creditors. In this way the companies can attract new capital and continue or even expand business. It has also to be effective to run the business and to be able to react to changing circumstances.

¹ Hampel Code, Combined Code.

² Comparative Study, executive summary.

³ V. Edwards, EC Company Law, P. 13; ECS Recital (9).

OPINION

A. Definition of Corporate Governance

There are many definitions of the term “Corporate Governance” as well in some Corporate Governance Codes⁴ as in scientific articles⁵, which differ in some respects. The core is similar relating to its aim. The aim is forcing the company’s organs to act diligently in order to protect the shareholders and creditors. Improving of the company’s business to maintain the value helps also to attract investors with a reliable and transparent structure. The integrity of the directors and the corporate reputation⁶ are therefore important factors.

In this essay Corporate Governance is understood as a system of checks and balances between the company’s organs. It is based on fair principles in order to establish a reliable and disclosed administration.

⁴ Comparative Study p.28.

⁵ Wymeersch p. 485.

⁶ Greenspan p.5.

B. Governance provisions in the ECS

I. Internal structure of the SE

Because of the two different types of board structures in the Member States the ECS has to provide rules for both models.

1. Division of directors' functions

a.) ECS

aa.) Two-tier system

aaa.) Functions

According to Art. 39 (1) the management organ runs the day-to-day business of the SE. The supervisory organ is excluded from managing the SE⁷. It shall control the management organ. It is forbidden that any person be simultaneously at the same time a member of both organs⁸. If a supervisor is nominated to act as a manager, he is suspended from his supervisory tasks, so that at no time any person may control his own conduct.

Only the supervisory board elects a chairman, not the management board⁹.

Certain transactions executed by the management organ require approval by the supervisory board. These transactions are determined either by the shareholders through the general meeting¹⁰ or after being enabled by national law by the supervisory body itself¹¹. Member States may determine kinds of transactions that are subject to authorization¹².

bbb.) Directors

All directors shall keep confidentiality¹³. The number of members of both organs is laid down in the statutes. Member states may fix a minimum and maximum number¹⁴.

Member states may provide that one or more managing directors are responsible for day-to-day management¹⁵. The supervisory organ consists of at least two persons, "members"¹⁶. In

⁷ Art. 40 (1).

⁸ Art. 39 (3).

⁹ Art. 42.

¹⁰ Art. 48 (1) sub 1.

¹¹ Art. 48 (1) sub 2.

¹² Art. 48 (2).

¹³ Art. 49.

¹⁴ Art. 39 (4), 40 (3).

contrast to that could there be only one person in the management body, “member or members”¹⁷.

At any time there is more than one supervisor to ensure control.

bb.) One-tier system

aaa.) Functions

The administrative organ manages the corporate affairs of the SE¹⁸. There is no particular provision dealing with the separation of functions.

In recital (14) it is stated that there are the two different functions: management and supervision. These responsibilities should be clearly separated.

For these certain transactions taken by the board is an express decision necessary. Unless the statutes provide other instructions, the default rules (Art. 50) apply. So at least one quarter of the members have to agree.

bbb.) Directors

Member states may provide that one or more managing directors are responsible for day-to-day management¹⁹. Here is a chairman²⁰.

The number of members is laid down in the statutes. Member states may fix a minimum and maximum number²¹. According to Art. 43 (3) there may be in theory only one person, “member or members”. This is contradictory to the wording “those” and the aim of recital (14), which requires at least two persons.

It is to examine whether this provision is necessary relating to the Twelfth Council Company law directive that ensures the legal recognition of single-member private limited liability companies. In accordance with Art. 3 (2) it is possible to establish a subsidiary SE with one shareholder.

The twelfth directive shall help single persons to incorporate their business²². So they will be the only shareholder, director and executive of this company. Art. 3 (2) deals with subsidiary SEs whose only shareholder is the parent SE and this has no impact on the number of directors.

¹⁵ Art. 39 (1).

¹⁶ Art. 40 (2).

¹⁷ Art. 39 (2).

¹⁸ Art. 43 (1).

¹⁹ Art. 43 (1).

²⁰ Art. 45.

²¹ Art. 43 (2).

²² Schampel Codeuit, P. 10.

So, the provision of Art. 43 (3) is contradictory to recital (14). It would allow one person being a director in the administrative organ who should do business and supervise himself.

b.) Codes

All the codes demand a clear separation of the two different functions in company's administration as well in an one-tier as a two-tier board structure²³.

aa.) Two-tier system

aaa.) Functions

The supervisory board monitors and independently advises the management board²⁴.

It should establish different committees to deal with specific complex tasks. For these tasks is certain knowledge and independent expertise required so that the committees can work efficiently²⁵. Committees prepare decisions for board and report regularly to it²⁶.

There should be an audit committee, a remuneration committee²⁷, a nomination committee²⁸, a general committee for strategy planning²⁹ and systematic performance evaluation, personnel committee and a credit risk committee³⁰.

Special in Germany is a mediation committee for negotiations with employee representatives³¹.

The audit committee supervises the external report and assesses the auditors³².

No former manager should be chairman in audit committee³³. The chairman of the supervisory board should be chairman in all committees except in audit committee³⁴.

There are certain decisions to which the supervisory body has to give its approval³⁵.

These are in particular: granting of loans³⁶, changing of strategy, new investments³⁷, fundamental changes in business policy, consulting contracts³⁸, managers who would like to

²³ Hampel Code 2.4.

²⁴ Baums Code III 1 B; Cromme Code 5.1.1; Peters Code 2.1.

²⁵ Baums Code III 3; Peters Code 3.2.

²⁶ Cromme Code 5.3.1.

²⁷ Cromme Code 5.3.3.

²⁸ Peters Code 3.2.

²⁹ Baums Code III 3 ; Cromme Code 5.3.3.

³⁰ Baums Code III 3.

³¹ § 27 III MitbestG; Baums Code III 3.

³² Peters Code 6.4.

³³ Cromme Code 5.3.2.

³⁴ Cromme Code 5.2.

³⁵ Baums Code II 4 G; Cromme Code 3.3.

³⁶ Baums Code II 4 C; Cromme Code 3.9.

³⁷ § 111 AktG; Baums Code III 2b.

³⁸ Baums Code III 2 Vienot Code; Cromme Code 5.5.4.

take supervisory mandates in another company³⁹ and acceptance of donations to board members⁴⁰. It is highly useful to establish a system of checks and balances in order to prevent abuse of powers in fundamental decisions and in personal relations.

It orders and supervises the auditors⁴¹, it assesses the internal control and strategy⁴².

Together with the management it determines the strategy⁴³.

Temporary delegates from supervisory to management board are possible⁴⁴, but should not parallelly act in supervisory board.

The management board manages the company and makes day-to-day business⁴⁵; it realise the objectives and strategy⁴⁶ on basis of a written procedure for work and operation in management⁴⁷.

bbb.) Directors

The directors have to act and decide in a way that is best for company's interests⁴⁸ and not their own. So it is prohibited to use business opportunities for their own⁴⁹, competition with the company⁵⁰, conflict of interest transactions⁵¹, acceptance of gifts or personal gains⁵², insider dealing and speculation⁵³ because it causes damages to the reputation and creditability of a company. Here the directors have to accept restrictions on their freedom so only long-term shares are permissible⁵⁴.

The independent directors control and decide on sensitive issues like remuneration. The supervisory directors should be independent towards each other⁵⁵ and discuss openly by keeping confidentiality.

Maximal one⁵⁶ or two⁵⁷ former managers should be in the supervisory board to safeguard independence from the management organ.

³⁹ Cromme Code 4.3.5.

⁴⁰ Baums Code III 2 G.

⁴¹ § 111 AktG, Baums Code III 2 E; Cromme Code 7.2.2.

⁴² Peters Code 4.1; 2.1.

⁴³ Baums Code II 1 B.

⁴⁴ Peters Code 3.7.

⁴⁵ Cromme Code 4.1.1.

⁴⁶ Peters Code 4.1.

⁴⁷ Cromme Code 4.2.1.

⁴⁸ Cromme Code 1.

⁴⁹ Baums Code II 4; Cromme Code 4.3.3, 5.5.1.

⁵⁰ § 88 AktG; Baums Code II 4 ; Vienot Code, Cromme Code 4.3.1.

⁵¹ Baums Code II 4 E.

⁵² Baums Code II 4 I, Cromme Code 4.3.2; Peters Code 2.14, 4.7.

⁵³ Baums Code II 4 Hampel Code.

⁵⁴ Peters Code 2.12.

⁵⁵ Peters Code 2.3, 2.6.

⁵⁶ Peters Code 2.5.

⁵⁷ Cromme Code 5.4.2.

A director should hold up to a maximum of five other supervisoryships to have enough time to fulfill his task properly and diligently⁵⁸. The Peters Code has the same aim but states no explicit number⁵⁹.

bb.) One-tier system

aaa.) Functions

The main tasks are coordination of the board's work and running of business⁶⁰.

It is absolutely necessary to have a clear distinction between chairman and CEO⁶¹, each with his powers and responsibilities⁶². This division ensures a balance⁶³ and prevents domination through any member⁶⁴.

This balance is strengthened by the board's composition of executive and non-executive including independent members. The independent⁶⁵ non-executives should at least provide one third⁶⁶ of the board members to be strong. They monitor the executives and observe the implementation of the strategy⁶⁷ to safeguard minority shareholders⁶⁸. The British Codes propose the introduction of an independent senior member⁶⁹.

The whole board is responsible of the account⁷⁰. Periodic review of organization⁷¹ helps to stay flexible. It is recommended to have a formal schedule with matters reserved to board for decision⁷².

The board should establish different committees for audit, remuneration and nomination⁷³, which can request external info⁷⁴.

The independent directors should compromise more than one third in these committees⁷⁵. Remuneration committees should consist mostly⁷⁶ or only of independent non-executives⁷⁷ to

⁵⁸ Cromme Code 5.4.3.

⁵⁹ Peters Code 2.10.

⁶⁰ Hampel Code 2.3.

⁶¹ Hampel Code 3.16, 3.17.

⁶² Vienot Code I 1-4.

⁶³ Combined Code A.2.

⁶⁴ Hampel Code 2.4 2.5.

⁶⁵ Hampel Code 3.9.

⁶⁶ Hampel Code 3.14 ; Combined Code A.3.1; Vienot II 23.

⁶⁷ Hampel Code 3.7, 3.8.

⁶⁸ Hampel Code 3.10.

⁶⁹ Hampel Code 3.18 ; Combined Code A.2.1.

⁷⁰ Hampel Code 6.15.

⁷¹ Vienot Code II 21.

⁷² Combined Code A.1.2.

⁷³ Hampel Code 3.12; Vienot II 23; Combined Code B.1.1-3.

⁷⁴ Vienot Code III 29

⁷⁵ Vienot Code II 23.

⁷⁶ Vienot Code II 23.

develop a pay policy and make specific pays for each director⁷⁸. The Combined Code proposes this majority for the nomination committee⁷⁹ that makes a succession plan⁸⁰.

Audit committees should account for at least three non-executive and independent directors⁸¹ to safeguard the independence and objectivity of auditors⁸² and issue a report every year⁸³.

bbb.) Directors

In contrast to the other Codes is the opinion of Hampel that former executives are good as non-executive supervisors⁸⁴.

All directors should be able and free to express their own independent opinion⁸⁵. They should not be involved in more than five directorships in other companies⁸⁶.

2. Internal information

a.) ECS

aa.) Two-tier system

The management organ shall issue a regular report to the supervisory board at least once every three months⁸⁷. In case of certain events the management board is required to report immediately.

In the other way round, the supervisory body can demand any kind of information⁸⁸, and independent examinations⁸⁹. Each supervisor may examine all the information⁹⁰.

These are mandatory provisions. But it is left to the member States to allow a single supervisor to require the managers to provide information⁹¹. So if only one supervisor is convinced that he has to investigate, but he is not entitled either by Member State law or the statutes, he has to convince other members to achieve a decision in accordance with the default rules⁹².

This person cannot in any case undertake investigations on his own because there is no parallel provision in Art. 41 (4) like in (3).

bb.) One-tier system

Meetings of the administrative organ shall take place at least once every three months⁹³. Each member can check all information⁹⁴ so that there may be no differences on the information level. But there are no provisions for the case that certain events occur and that the complete organ, including especially the supervisory directors, should meet to discuss the situation. Also the ECS misses a provision that the supervisory directors can arrange investigations.

b.) Codes

All the codes demand that each supervisor should be entitled to require information and arrange investigations; that the organs should meet immediately if an important event occurs; and that meetings should take place regularly.

⁸⁷ Art. 41 (1).

⁸⁸ Art. 41 (3).

⁸⁹ Art. 43 (4).

⁹⁰ Art. 43 (5).

⁹¹ Art. 43 (3).

⁹² Art. 50 (1).

⁹³ Art. 44 (1).

⁹⁴ Art. 44 (2).

aa.) Two-tier system

The management board supplies the supervisors with sufficient information⁹⁵ without delay⁹⁶. There is frequent contact between the chairmen and all directors⁹⁷. They discuss strategy, business performance and development⁹⁸ in an open manner⁹⁹ but keep confidentiality¹⁰⁰. This is a meaningful way of cooperation and internal control¹⁰¹. They meet regularly¹⁰² on basis of a fixed timetable¹⁰³ or if necessary, immediately.

All personal conflicts of interest should be subject to disclosure and consultation¹⁰⁴.

bb.) One-tier system

It is the management's and chairman's duty to inform the whole board¹⁰⁵ on all relevant matters¹⁰⁶ in good time or even immediately¹⁰⁷. Directors can also take independent advice¹⁰⁸ And request information¹⁰⁹ by using access to advice and service of secretary¹¹⁰. The board meets on a frequent basis¹¹¹, often¹¹² and long enough to allow serious discussions¹¹³. All directors act in overall interest of company, so there should be no pressure to withhold a controversial opinion¹¹⁴.

⁹⁵ Baums Code III 2.

⁹⁶ Cromme Code 3.4, 7.2.1, 7.2.3; Baums Code II 2.

⁹⁷ Peters Code 3.1.

⁹⁸ Cromme Code 5.2.

⁹⁹ Cromme Code 3.5.

¹⁰⁰ Baums Code III 2 C.

¹⁰¹ Peters Code 4.2 4.3.

¹⁰² Cromme Code 3.2.

¹⁰³ Peters Code 3.3.

¹⁰⁴ Baums Code II 4 A, B; Peters Code 2.9; Cromme Code 4.3.4, 5.5.2.

¹⁰⁵ Hampel Code 3.4.

¹⁰⁶ Baums Code II 2 E; Combined Code A.4.1

¹⁰⁷ Vienot Code, Hampel Code 7.6 – 3.4

¹⁰⁸ Combined Code A.1.3.

¹⁰⁹ Vienot Code II 27 Hampel Code 2.6

¹¹⁰ Combined Code A.1.4

¹¹¹ Combined Code A.1.1

¹¹² Hampel Code 3.11.

¹¹³ Vienot Code II 25

¹¹⁴ Hampel Code 3.6.

3. Appointment and removal of directors

a.) ECS

aa.) Two-tier system

The managing directors are appointed and removed by the supervisory body or according to Member State law by the general meeting¹¹⁵. Regularly the supervisors are appointed by the shareholders in the general meeting. There is no provision how to remove the members of the supervisory organ.

bb.) One-tier system

These directors are normally appointed as well by the general meeting¹¹⁶. Also the ECS lacks a provision about removal.

There is such provision neither in the specific rules (Art. 43-45), nor in the common rules (Art. 46-51) nor in the rules on the general meeting (Art. 52-60).

Considering an analogy is only possible if there is an unintentional gap¹¹⁷. But here is a clear provision about removal of managing directors in Art. 39 (2). In consequence that means that there is no possibility to remove a member of the supervisory or the administrative board. If the directors do not resign they will stay in office¹¹⁸ until the end of their period¹¹⁹.

b.) Codes

It differs between the member states' legal tradition whether the shareholders appoint and remove all directors or the supervisory body has power to do so.

and shareholders elect them¹²⁵. There should be no automatic reappointment¹²⁶. The election dates should differ¹²⁷.

4. Office period

a.) ECS

Art. 46 (1) allows a maximum period of six years and unlimited reappointments, Art. 46 (2).

b.) Codes

The recommended period differs, but six years is beyond all other ideas. This is by far too long. Directors should be appointed every year to ensure a possibility to react on changing circumstances. Otherwise directors could tend to abuse their office in this long period.

The period differs from three¹²⁸, four^{129 130} and five years¹³¹.

One has to differentiate between period of office and contract period, Hampel supports a maximum duration of one year¹³² in contrast to two year contracts¹³³.

There is an opinion for¹³⁴ and against¹³⁵ a maximum age.

5. Liability for breach of duty

a.) ECS

All members of SE's organs are liable if they breach any of their duties according to the national law, Art 51. That is a wide provision that covers all in theory.

b.) codes

¹²⁵ Hampel Code 2.8.

¹²⁶ Peters Code 2.7; Combined Code A.6.1.

¹²⁷ Vienot Code I 16.

¹²⁸ Hampel Code 2.8, 3.21; Combined Code A.6.

¹²⁹ Vienot Code I 15.

¹³⁰ Peters Code 2.7.

¹³¹ Cromme Code 5.1.2.

¹³² Combined Code B.1.7.

¹³³ Hampel Code 4.9.

¹³⁴ Cromme Code 5.1.2.

¹³⁵ Hampel Code 3.22.

The directors owe diligent and prudent care to the company and are liable for damages. Under a certain requirement are D&O policies allowed¹³⁶.

6. General meeting

a.) ECS

aa.) Competence

Only the general meeting has the competence to decide on certain issues relating to the ECS and the employee involvement directive as well on certain issues according to national law¹³⁷. There is no further specification. Also for the organisation of general meetings national law applies¹³⁸.

The general meeting has the sole responsibility to change SE's statutes¹³⁹. The required majority may differ in the Member States but according to Art. 59 (2) ca. 26 % of the total subscribed capital can pass such a fundamental decision.

Under the same conditions has the general meeting

any organ of the SE¹⁴⁵ or by shareholders who together hold at least 10 % of the subscribed capital within two months¹⁴⁶.

The same amount of shareholder capital is required to add items to the agenda¹⁴⁷. National law and the statutes may provide a lower amount for calling a general meeting and enlarging the agenda¹⁴⁸, so that minority shareholders have the possibility to influence the process.

b.) Codes

aa.) Competence

The general meeting should be entitled to decide on fundamental matters: amendments of the statutes¹⁴⁹, major changes of business activities, strategic policy, dividend policy, and remuneration¹⁵⁰. Depending on national law the general meeting elects all directors¹⁵¹ or the supervisors¹⁵². It has the authorisation to approve annual accounts¹⁵³.

Normally only few shareholders are present, so it is important to increase their participation and influence¹⁵⁴ by facilitating voting. It is inevitably necessary to enable shareholders proxy voting and effectively taking¹⁵⁵ part in general meetings by electronic means¹⁵⁶ in order to have a maximum of the shareholders present to rule the way of the company. An effective proxy solicitation system should be established¹⁵⁷ by e.g. in-house nominee for proxy¹⁵⁸. Costs for proxy voting should be charged by the company¹⁵⁹. The number of proxy votes should be disclosed¹⁶⁰.

Making general meetings more interesting: e.g. by multimedia presentation¹⁶¹, Q&A time, could increase its attractiveness.

Separate votes for each topic¹⁶² offer to the shareholders a better possibility for exercising their right. The chairmen of committees should be available¹⁶³ to directly ask them.

¹⁴⁵ Art. 54 (2).

¹⁴⁶ Art. 55 (1), (3).

¹⁴⁷ Art. 56 (1).

¹⁴⁸ Art. 55 (1), 56.

¹⁴⁹ Cromme Code 2.2.1; Peters Code 5.5.

¹⁵⁰ Hampel Code 4.20; Peters Code 4.4.

¹⁵¹ Combined Code A. 6.2.

¹⁵² §101 AktG; Baums Code III 2.

¹⁵³ Peters Code 3.6

¹⁵⁴ Peters Code 5.1 ; Vallance p.4.

¹⁵⁵ Hampel Code 5.16, 5.23 Vienot Code Combined Code C.2.1

¹⁵⁶ § 134 AktG; Cromme Code 2.3.3-4 ; Baums Code2.

¹⁵⁷ Peters Code 5.4.4.

¹⁵⁸ Hampel Code 5.25.

¹⁵⁹ Peters Code 5.6.1, 5.9.

¹⁶⁰ Hampel Code 5.14.

¹⁶¹ Hampel Code 5.14.

¹⁶² Hampel Code 5.17; Combined Code C.2.2.

¹⁶³ Hampel Code 5.19; Combined Code C.2.3.

General discussion of performance¹⁶⁴ and critical assessment of strategy¹⁶⁵ helps shareholders to express their opinion. This dialogue with institutional¹⁶⁶ and private investors¹⁶⁷ can improve the use of AGM¹⁶⁸.

Institutional shareholders have a responsibility¹⁶⁹ to use their votes and do this in the best interest of the company. Because of their important role they should disclose their internal voting guidelines¹⁷⁰. They should publish their voting intentions and reflect a long-term performance¹⁷¹.

All relevant documents should be issued 20 days in advance¹⁷² so that all interested parties can prepare themselves.

bb.) Call

Minority shareholders should have the right to summon a general meeting¹⁷³ at any time and to add items of importance to the agenda.

¹⁶⁴ Hampel Code 5.20.

¹⁶⁵ Peters Code 5.2.

¹⁶⁶ Hampel Code 5.10.

¹⁶⁷ Combined Code C.1, C.2.

¹⁶⁸ Hampel Code 2.C IV, 2.17.

¹⁶⁹ Hampel Code 2. C I, 2.14, 5.7.

¹⁷⁰ Hampel Code 5.8.

¹⁷¹ Combined Code E.1, E.1.1-3.

¹⁷² Hampel Code 5.21; Combined Code C 2.4.

¹⁷³ Cromme Code 2.3.1.

II. Protection of creditors and minority shareholders

1. ECS

There are certain provisions to protect shareholders, especially minority shareholders.

Before a transfer is agreed by the general meeting, the proposal has to state the safeguards¹⁷⁴.

There may be additional national provisions¹⁷⁵ and rules of private international law¹⁷⁶.

The draft terms of merger or formation of a holding SE of the concerned companies shall make a statement on the treatment of special rights shares¹⁷⁷, and minority shareholders¹⁷⁸. National law may adopt special provisions¹⁷⁹.

If there are different classes of shares, there have to be separate votes by each class, which is affected¹⁸⁰.

To protect creditors the ECS refers¹⁸¹ to the First Council Directive,. The ECS constitutes safeguards for third parties¹⁸². To enhance this protection the ECS requires a certificate by the competent national authority that the acts have been fulfilled in accordance with the regulations¹⁸³. In this way it should be guaranteed that all designated rules would be obeyed.

2. Codes

There are only a few code sections concerning this topic¹⁸⁴. Most safeguards are linked with disclosure and the competence of the general meeting.

¹⁷⁴ Art. 8 (2, 3, 4, 7, 15).

¹⁷⁵ Art. 8 (5).

¹⁷⁶ Recital (15).

¹⁷⁷ Art. 20 (1) (f), 32 (2).

¹⁷⁸ Art. 21 (c), 32 (2).

¹⁷⁹ Art. 24 (1) (C), (2), 25 (3), 34.

¹⁸⁰ Art. 60.

¹⁸¹ Art. 12, 21, 24 (1) (a, b).

¹⁸² Art. 29 (3).

¹⁸³ Art. 8 (7,8,9) 19, 25 (2,3) 26 (2).

¹⁸⁴ Peters Code 5.10.

III. Disclosure of information

1. ECS

There is a need to disclose all relevant information so that shareholders have a strong knowledge on the company's financial and economic situation.

First, each SE has to be registered in a national register in accordance with the First Council Directive, so that there is an equivalent standard in all Member States¹⁸⁵.

Secondly, all important documents must be published in the Member State where the SE has its registered office in accordance with the first Council Directive¹⁸⁶. That means in particular registering and disclosing the documents, supplying copies and publication in the national gazette¹⁸⁷.

Thirdly, in addition to the national publication there are a few concernings, which have to be publicised in the Official Journal¹⁸⁸, within short time¹⁸⁹. This concerns essential facts about the SE to identify it in case of registration¹⁹⁰, deletion and transfer of seat¹⁹¹.

For all other matters the disclosure provision of Art. 13 applies. These are in particular: transfer proposal¹⁹² & transfer of seat¹⁹³; completion of merger¹⁹⁴; draft terms for the formation of the holding SE¹⁹⁵; fulfillment of conditions for formation of the holding SE¹⁹⁶; draft terms of conversion into an SE¹⁹⁷; amendments of the statutes¹⁹⁸; decisions concerning winding up of the SE¹⁹⁹; draft terms of conversion into a national public company²⁰⁰.

Fourthly, in case of formation by merger there is some information, especially on safeguards for creditors and minority shareholders, to be published in the concerned national gazette²⁰¹.

¹⁸⁵ Art. 12 (1).

¹⁸⁶ Art. 13.

¹⁸⁷ Art. 3 (1) - (4) First Council Directive 68/151.

¹⁸⁸ Art. 14 (1).

¹⁸⁹ Art. 14 (3).

¹⁹⁰ Art. 15 (2).

¹⁹¹ Art. 8 (10), Art. 14 (1), (2).

¹⁹² Art. 8 (2).

¹⁹³ Art. 8 (12) [Art. 2 (1) lit. (g) First Council Directive].

¹⁹⁴ Art. 28.

¹⁹⁵ Art. 32 (3).

¹⁹⁶ Art. 33 (3).

¹⁹⁷ Art. 37 (5).

¹⁹⁸ Art. 59 (3).

¹⁹⁹ Art. 65.

²⁰⁰ Art. 66 (4).

²⁰¹ Art. 21 lit. a) - e).

Of special importance is the provision of Art. 20 (1 g). If a particular profit is granted to a board member or to an expert this must be disclosed.

2. Codes

That is basic information about the company, but not all what is demanded by the Corporate Governance codes. The ECS lacks disclosure requirements on director's remuneration, personal transactions, functions and controls.

Disclosure is a benefit for all²⁰². So it should be presented in a simple clear form²⁰³.

Disclosure is required in particular on all relevant facts about

- a. remuneration²⁰⁴: policy²⁰⁵, payment in stock options²⁰⁶, detailed individual remuneration of directors²⁰⁷;
- b. biography of directors²⁰⁸ executive as well as independent²⁰⁹ non-executive²¹⁰ ones; dates of office terms²¹¹; reason of resignation²¹²; amount of stocks held by directors²¹³; members of committees²¹⁴; number of meetings, directors attendance and failure respectively²¹⁵; conflicts of interest²¹⁶; related parties²¹⁷; pensions²¹⁸;
- c. explanation of Corporate Governance policy²¹⁹ and related internal structure²²⁰ with profiles²²¹ of the boards; shareholdings of the company²²²; change in certain amount of votes²²³; report on performance and risks²²⁴; going concern statement²²⁵;
- d. results of dialogue with investors²²⁶ and discussion on strategy²²⁷

²⁰² Steer 5.1.4, 5.1.17, 5.1.27, 5.1.32, 5.1.42

²⁰³ Hampel Code 4.16; Cromme Code 1.

²⁰⁴ Vienot Code II 7-11.

²⁰⁵ Combined Code B 3.

²⁰⁶ Vienot Code III 12-14; Cromme Code 7.1.3; Peters Code 4.5, 4.6; Baums Code II 3 A.

²⁰⁷ Hampel Code 4.2, 4.5, 4.14, 4.17, 4.17; Cromme Code 4.2.3 –4, 5.4.5; Peters Code 4.4; Baums Code II 3, III 1 E; Combined Code B.3.

²⁰⁸ Combined Code A.6.2; Hampel Code 3.21; Vienot Code I 18; Peters Code 2.4.

²⁰⁹ Combined Code A.2.1.

²¹⁰ Combined Code A.3.2; Vienot Code II 24; Hampel Code 3.9.

²¹¹ Vienot Code I 17.

²¹² Hampel Code 3.23.

²¹³ Vienot Code I 19; Peters Code 2.12; Baums Code II 2 j, III 1.

²¹⁴ Cromme Code 3.1; Combined Code A.5.1, B.2.3.

²¹⁵ Vienot Code II 26; Baums Code III 1 d; Cromme Code 5.4.6.

²¹⁶ Cromme Code 5.5.3.

²¹⁷ Cromme Code 7.1.5.

²¹⁸ Hampel Code 4.18.

²¹⁹ Cromme Code 3.10; Peters Code 6.1; Hampel Code 7.2.

²²⁰ Vienot Code I 6.

²²¹ Peters Code 2.2.

²²² Baums Code II 2 g; Cromme Code 7.1.4.

²²³ Baums Code II 2 i; Cromme Code 6.2.

²²⁴ Peters Code 4.2, 4.3.

²²⁵ Hampel Code 6.17.

²²⁶ Hampel Code 2. C II

The annual accounts should be published at least three months after close of financial year²²⁸. All shareholders should be treated in a fair and equal manner²²⁹ with annual and ad hoc reports without delay²³⁰. The company issues a calendar²³¹ with dates of events and publications also on the internet²³² and in English²³³.

IV. Accounts

1. ECS

The SE has to prepare its accounts and reports according to national law²³⁴.

2. Codes

To ensure reliable information for assessment of the company, it has to prepare a balanced and understandable report²³⁵.

There are differences which accounting standard should be used. The aim is international harmonisation²³⁶ to make comparison easier. Cromme Code proposes to use both the required national and the international standards²³⁷.

²²⁷ Peters Code 3.4, 3.5.

²²⁸ Cromme Code 7.1.2; Vienot Code IV 33.

²²⁹ Cromme Code 6.3.

²³⁰ Baums Code II 2 A, 2 B; Peters Code 2.6; Cromme Code 6.1.

²³¹ Cromme Code 6.7.

²³² Cromme Code 2.3.1.

²³³ Baums Code II 2 A; Cromme Code 6.4, 6.8.

²³⁴ Art. 61.

²³⁵ Hampel Code 2. D I.

²³⁶ Hampel Code 6.16; Baums Code II 2.

²³⁷ Cromme Code 7.1.1.

V. Independent experts

1. ECS

To verify directors' statements and draft terms independent experts can check them and report to the shareholders²³⁸. They are allowed to request any information²³⁹.

In contrast to this broad requirement Art. 37 (6), 66 (5) only provide to test the value of assets not the correctness of director's draft terms.

If an expert receives profit, this must be disclosed²⁴⁰.

2. codes

The independent²⁴¹ external auditors should assess objectively so that reliance on financial statements is ensured²⁴². They report to shareholders and directors²⁴³ about accounts and annual reports²⁴⁴.

To stay independent the auditors should receive only a certain percentage of income from one client (max 10%²⁴⁵ or max 30 %²⁴⁶). There should be formal and transparent arrangements²⁴⁷. Solutions for conflicts of interest²⁴⁸ and consulting contracts must be approved by supervisors²⁴⁹.

The audit committee or the supervisory board²⁵⁰ has to monitor the independence and objectivity of auditors²⁵¹.

²³⁸ Art 22, 31 (2) 32 (4,5).

²³⁹ Art. 22 (sub 2).

²⁴⁰ Art. 20 (1) (g).

²⁴¹ Peters Code 6.3;Hampel Code 6.8.

²⁴² Hampel Code 6.2.

²⁴³ Hampel Code 2. IV, 2.22.

²⁴⁴ Hampel Code 6.6.

²⁴⁵ Hampel Code 6.8.

²⁴⁶ § 111 AktG.

²⁴⁷ Hampel Code 2. D III.

²⁴⁸ § 111 AktG.

²⁴⁹ Baums Code III 2.

²⁵⁰ Baums Code III 2 e.

²⁵¹ Hampel Code 2.21.

C. Other governance subjects

I. Director's remuneration

The ECS does not treat with remuneration, but this is a matter of strong concern in all codes. Some provide performance linked pay²⁵² - linked to company and individual performance²⁵³ - Peters Code on the other hand has a strong position against it²⁵⁴. If share options as variable components²⁵⁵ are granted they should be closed for three years²⁵⁶. It is really important that the policy and the individual remuneration are totally disclosed. The decisions should be made by a special committee with a formal and transparent procedure²⁵⁷. No one should be involved in own pay affairs²⁵⁸.

II. Soft law

There is a strong support for flexible self-regulation²⁵⁹. Markets change continuously. In order to react appropriate in short time without a long legislative process, governance codes are a satisfactory way when created by experienced people²⁶⁰, e.g. London City Code²⁶¹. Finally best practice will be established.

In July 2002 the TransPuG was enacted in Germany. Art. 1(16) amends the Stock Corporation Act: § 161 AktG requires all listed companies to follow the Cromme Code on a comply or explain basis²⁶².

Art. 1 (10, 13, 14) NaStraG facilitates the exercise of voting rights. Art. 1 (25), 2 KonTraG provide strict audit requirements. In order to respond to permanently changing economic structures these are the efforts of recent German legislation.

²⁵² Hampel Code 2.9, 2.10, 4.7; Combined Code B.1.4; Cromme Code 5.4.5.

²⁵³ Combined Code B.1.

²⁵⁴ Peters Code 2.13.

²⁵⁵ Cromme Code 4.2.3.

²⁵⁶ Baums Code II 3 A.

²⁵⁷ Hampel Code 4.3, 4.13.

²⁵⁸ Hampel Code 2. B. II; Combined Code B.2.

²⁵⁹ Hampel Code 1.6; Baums "Daimler-Chrysler case" I; Edwards p.1; Hommelhoff p. 684; Wymeersch I p.485.

²⁶⁰ Peters Code 1.3.

²⁶¹ Hommelhoff p.683.

²⁶² also: Vienot VI 35; Combined Code preamble.

D. Governance provisions in Council Directives

There are issues the ECS has not necessarily to deal with because there are yet provisions in certain directives. These directives apply to national companies and linked by Art. 9, 10 they apply to SEs as well²⁶³.

²⁶³ **1. First Council Directive**

Certain facts of the governance structure must be disclosed in national gazettes and public registers (Art. 2, 3). Specifically relevant are the annual financial reports.

References: Art 12 (1), 13, 21 (b), 28, 32 (3), 33 (3), 37 (5), 66 (4).

2. Second Council Directive

All public companies have to publish the members and competence of all boards and organs, (Art. 2, 3). Reference : Art. 37 (6).

3. Third Council Directive

In case of mergers shareholders and creditors (Art. 13) shall be protected. References: Art. 17 (2) (a), 18, 22,31, 32 (4), 37 (6,7), 66 (5,6).

4. Fourth and Seventh Council Directive

All financial statements and reports of companies and groups of companies must be based on the true and fair view principle (Art.2 Fourth Directive) in order to guarantee reliable accounts.

5. Eighth Council Directive

It establishes standards for the independence of auditors (Art. 3-19).

6. Proposal for a Thirteenth Council Directive

In order to protect minority shareholders (Art. 5) and ensure equal treatment (Art. 3), it requires necessary information and disclosure of companys' structure (Art. 10).

CONCLUSION

The provisions in the ECS concerning Corporate Governance are not sufficient in comparison with international agreed standards:

It lacks provisions on committees. The right to request information is inadequate. There is an inconsistency concerning the directors in a one-tier board. The office period is far too long. The ECS does not deal with remuneration. That is acceptable because remuneration is a matter for each company on its own and cannot be decided in legislation.

Shareholders and creditors are relatively well protected and informed.

For coming legislation one should pay attention to the harmonization of accounting standards and further going requirements on independent auditors.

One cannot examine only the ECS because it is neither comparable to national law nor to Corporate Governance Codes. The ECS just constitutes a framework in which national law has to fill the gaps. The ECS does not stand alone in the field of harmonized European Company law. There are fourteen directives and proposals dealing with certain areas including Corporate Governance topics. One cannot even compare national law with Corporate Governance codes. Corporate Governance codes should complete national law by providing flexible rules of best conduct. National rules apply to the SE as well Art. 9, 10.

Nevertheless in contrast to some national law systems the minimum requirements in the ECS are rather low and insufficient - not up to date. That is the price one has to pay for European legislation, to find a minimum consensus takes a lot of time.

But because the national provisions including