EUROPEAN UNIVERSITY INSTITUTE, FLORENCE

DEPARTMENT OF LAW

EUI Working Paper **LAW** No. 2003/8

Theoretical and Empirical Evidence of the International Proposals and Domestic Approaches Throughout the European Union in the Case of Corporate Governance: A First Attempt at Legal Systematisation and Categorisation

CHRYSSA PAPATHANASSIOU and ALESSANDRA CHIRICO

BADIA FIESOLANA, SAN DOMENICO (FI)

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the authors.

© 2003 Chryssa Papathanassiou and Alessandra Chirico
Printed in Italy in June 2003
European University Institute
Badia Fiesolana
I – 50016 San Domenico (FI)
Italy

THEORETICAL AND EMPIRICAL EVIDENCE OF THE INTERNATIONAL PROPOSALS AND DOMESTIC APPROACHES THROUGHOUT THE EUROPEAN UNION IN THE CASE OF CORPORATE GOVERNANCE: A FIRST ATTEMPT AT LEGAL SYSTEMATISATION AND CATEGORISATION[1]

Introduction

The objective of this paper is to discuss current trends in corporate governance in a European context.[2] The paper is structured around two aims: (a) the possibility of facilitating an efficient and competitive business in Europe, and: (b) the numerous influences stemming from the inputs of Common Law countries and Civil Law countries in the regulation of their approaches towards contemporary Company Law. Therefore, the present investigation will cover several issues like: a **modern** and updated **company law-making,** mainly focused on the **secondary regulation** by governments; the so-called "**standard**

---

[1] Prepared by Dr. Chryssa Papathanassiou, European Central Bank, and Alessandra Chirico, European University Institute, Florence. The views expressed in this article are those of the authors, and do not necessarily reflect those of the ECB or of the Eurosystem.

[2] See, *inter alia*, S. Grundmann and P. O. Mülbert, *Corporate Governance: European Perspectives*, in International and Comparative Corporate Law Journal, Vol. 2, Issue 4, 2001, 415 – 422; E. Wymeersch, *Factors and Trends of Change in Company Law*, *Ibidem*, 481 – 501; L. Renneboog, *Corporate Governance Systems. The Role of Ownership, External Finance and Regulation*, CEPS Working Document No 133, 1999. The role played by financial institutions which fall under the scope of Directive EU/2000/12 (O.J. L 126, 25 May 2000, p. 1-59) relating to the taking up and pursuit of the business of credit institutions is taken into consideration. The action plan published by the EC Commission on 11 May 1999 identified differences between national laws concerning the institutional structure of companies as a potential legal and factual obstacle to an emerging financial market in Europe, EU Commission, *Implementation of the Capital Market Frame: Program for Action,* Announcement of 11 May 1999, KOM (1999) 232 final.

setting" by market participants, and the **preparation of model laws and Codes of Best Practice**.[3]

Corporate governance can be defined as the "system by which companies are directed and controlled".[4] It refers, in particular, to the establishment and

---

[3] See, on this specific point, a European Commission document expressing the urgency of initiating a discussion on the need for the **modernisation of company law in Europe**, *A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts*, European Commission 2002, available at http://europa.eu.int/internal_market/en/company/company/modern/consult/consult_en.pdf Such a consultative document contains different topics on which the consultation has been undertaken. The most interesting for our purposes are those related to Corporate Governance (Chapter 3.1) and Shareholders' Information, Communication and Decision-making. Jaap Winter, the chairman of the Group, has already presented the main conclusions of the new report at the Council of Economics and Finance Ministers in Brussels on 5 November 2002, and the Danish Presidency has scheduled a first exchange of views about the final report for the Competitiveness Council on 15 November 2002. Furthermore, the European Commission has welcomed the final report by the High-Level Group of Company Law Experts on the modern regulatory framework for company law in Europe The final report covers the issues considered by the group under the second part of its mandate. Following the informal meeting of EU Finance Ministers in Oviedo that mandate was extended to cover additional corporate governance issues (**role of non-executive and supervisory directors**; **management remuneration**; **responsibility of management for financial statements; auditing practices**), in the light of issues raised by the collapse of Enron. Furthermore, the Commission is considering the presentation of an action plan for company law in early 2003. The final goal of such an action plan is summarised by the Internal Market Commissioner Frits Bolkestein: "*We have a unique opportunity in the European Union, as we move towards the integration of our capital markets by 2005, to put into place the best corporate governance standards in the world. We should seize the moment. Why is this so important? The Enron scandals have shown that undermining of investor confidence seriously damages the development of capital markets and subsequently economic growth. The High Level Group's excellent and comprehensive report gives us a platform to begin the definition of which areas need to be strengthened in the European Union. I want a full and open debate on the report's recommendations before we define our forward strategy in early 2003*." The report contains detailed recommendations on the following topics, in accordance with the Group's extended mandate: * corporate governance; * capital formation and maintenance; * groups and pyramids; * corporate restructuring and mobility; * the European Private Company; * co-operatives and other forms of enterprises. The full text of the Group's report can be found at: http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm

management of stock corporations, company law provisions on capital, regulations by law and statutes of manager/shareholders relations, procedures for the appointment of supervisory boards, responsibilities of managers, board members, and auditors. This definition encompasses the decision-making process, the duties of board members, and best practices. It is about **setting optimal framework conditions for efficient entrepreneurial decisions**. As a result corporate governance can be understood as a complex system of checks and balances operating inside the decision-making process within the company and from the constituencies of the company, as well as outside the company. The existence of **sound corporate governance rules** is therefore a crucial issue, while **compliance** with them is a separate one (even if not less important, as we will argue in the following sections of the present paper).

It is worth recalling that corporate governance has become topical in all industrial economies and cannot be considered in isolation within any one country nor with the consolidated experience in Common Law and Civil Law systems within the EU. As trade barriers fall, markets expand, information flows improve, and restrictions on investments disappear, it will become progressively easier for investors of one country to invest in corporations in another.[5] Movement towards a worl wide capital market could in turn have a substantial impact on corporate governance in individual countries. In a world with intense competition for global savings, sophisticated investors will be attracted to

---

[4] This is a definition given by the Cadbury Committee in its final report *The Financial Aspects of Corporate Governance* in December 1992. It includes a dualistic approach: an internal one, "directed", and an external one, "controlled". The former consists of the management of the company, while the external point of view mainly focuses on the control exercised by shareholders, creditors and (last, but not least) affected by the interaction of the financial market. See also on this point O. Williamson, *Corporate Governance*, 93 Yale L.J., 1197 (1984).

[5] It should be noted that the European securities market - in compliance with art. (44 (2) (g) EC Treaty and art. 48) has been partially fuelled by a liberalisation of cross-border activities by securities firms. The Investment Services Directive (93/22/EEC Directive) authorised all European Union securities firms to conduct cross-border operations anywhere in the EU based only on the license issued by their home state. Thus, well-capitalised firms of one country licensed to do business in their home country can now enter the European market and add liquidity. EU, thus, has already given an efficient proof of the will to provide a workable legal framework for those who wish to undertake business activities, in a way they consider to be the best suited to attain success. It is also worth recalling that according to the above-mentioned art. 48: "*Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall* (…) *be treated in the same way as natural persons who are nationals of the Member State*".

jurisdictions in which investment structures serve shareholders' interests. Since the attractiveness[6] of a particular jurisdiction will depend on its system of corporate governance, this could induce domestic markets to be more accommodating to global trends.[7] This situation would determine, in other terms, a State competition in the adoption of a certain model of corporate governance.[8]

Nevertheless, especially within the framework of the EU and with the consolidation of the process that led to EMU, the limitations of Nation States' sovereignty in tackling phenomena arising from globalisation are increasingly evident.[9] Reality is here actually ahead of theory, in that the transnational markets seem to sustain and develop themselves. The awareness of a commonality of fears, like the uncertainty of risk in financial markets and the growing complexity of transactions, has led **public authorities and private parties to put together mechanisms of trust with a view to creating order and governance among themselves**. In this context, the legal significance of relations which, for example, range from relational contracting to complex

---

[6] Just as the founders of a firm have incentives to make the kind of machines people want to buy, they have incentives to create the kind of firm, governance structure, and securities the customers in capital markets want. See, on this point, L.A. Bebchuk and M. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 Stan. L. Rev. 127 (1999).

[7] See B. R. Cheffins, *Current Trends in Corporate Governance: Going from London to Milan via Toronto*, 10 Duke J. Comp. & Int'l L. 5, 1999, p. 1 – 30. For further background on the increasing convergence of Corporate Governance as a result of the far-reaching globalisation and deregulation of financial markets, see M. Balling, E. Hennessy and R. O'Brien (eds), *Corporate Governance, Financial Markets and Global Convergence*, Kluwer Academic Publishers 1998; J. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implication*, 93 Nw. U.L.Rev. 641 (1999).

[8] More critical, G. Teubner, *Legal Irritants How Unifying Law Ends up in New Divergences,* in Varieties of Capitalism, The Institutional Foundations of Comparative Advantage, Edited by P. A. Hall and D. Soskice, Oxford University Press, 2001, p. 433.

[9] See G. Teubner, "'Global Bukowina': Legal Pluralism in the World Society", in Teubner (ed.), *Global Law Without a State* (Aldershot: Dartmouth, 1997), pp.3-28; and K. Ronit and V. Schneider, "Private Organizations in Global Governance", Paper prepared for the conference "Problem Solving Capacity of Transnational Governance Systems", Max-Planck-Institut für Gesellschaftsforschung, (Köln, 1996), p.9.

associations, such as **networks**, should be established to a high degree.[10] They represent a main source of the regulatory regimes that govern global economies.

An issue to explore is to what extent "**co-operative law**"[11] elaborated by public authorities within co-operative regulatory bodies provide governance to the international and European financial markets. Such an analysis tries to give an overview of the current arrangements allowing co-operative law-making to take place and of the sort of rules being produced. The aim is to highlight the nature of this co-operative law, its regulatory features, its circular effect on co-operative regulatory bodies, and whether it may be perceived as having a legal character.

Having underlined this crucial point, as a first step we would like to focus on underpinning principles of corporate governance developed in Europe. Thus, in order to achieve such a result, as a starting point we will discuss the **theory of separation of ownership and control** that explains why we need common corporate governance rules in the EU regulatory framework. Secondly, we intend to investigate the **current standards** in the industry, the **international principles**, and the role played by international financial institutions (**IFIs**) and **banks in promoting sound governance**. Finally, we will briefly sketch some of the most important **principles of corporate governance in the EU Member States in Codes of Good Practices**.

1. Separation of Ownership and Control and systems of ownership

The essential feature of corporate governance is derived from the relationship among shareholders, management and board of directors which is characterised by the separation of ownership and control.[12] Although shareholders may be viewed as a company's economic owners, investors in public corporations usually do not act in the manner one would expect of owners. Instead

---

[10] See T.L. Fort, "Trust and Law's Facilitating Role", *American Business Law Journal*, vol.34 (1996), pp.211ff.

[11] K.H. Ladeur, "The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law - From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-relationships", EUI Working Paper LAW No. 99/3 at p.42; and "Towards a Legal Concept of the Network in European Standard-setting", in Joerges/Vos (eds) *EU Committees: Social Regulation, Law and Politics* (Oxford: Hart, 1999), pp.151-170 (167).

[12] A. Berle and G. Means, *The Modern Corporation and Private Property*, (1932), New York, Harcourt, Brace & World, Inc., 1968.

shareholders allow the board and management to run the company. Giving executives the freedom to run a widely-held public company (a typical phenomenon of Common Law countries) constitutes a sensible division of labour, as managers become the effective corporate decision-makers, while shareholders cannot properly substitute for them. In such a context, one of the major risks is given by the possibility of mismanagement owing to conflicting interests between management and shareholders.[13]

As corporate executives receive only a fraction of returns derived from the profit-enhancing activities they engage in on behalf of their shareholders, they may be tempted to use their control over corporate assets to further their own interests at the expense of those who own equity. To the extent that managers pursue their own agenda, they impose what economists refer to as "agency costs" on these investors.[14] Nonetheless, in order to contain and mitigate such agency costs, various legal instruments have been undertaken such as, stock options for directors and managers or incentive contracts, in order to provide

---

[13] In the United Kingdom, for instance, the described process began with a spate of unexpected company failures and financial scandals in the early 1990s, with the most spectacular example involving the collapse of the business empire of Robert Maxwell. Thus, concerns about low standards of corporate governance led to much discussion about possible reforms.

[14] See Jensen-Meckling, *Theory of the Firm: Managerial; Behaviour, Agency Costs, and Ownership Structure*, in 3 Journ. Fin. Econ. 305 (1976); Fama, *Agency Problems and the Theory of the Firm*, in 88 Journ. Pol. Econ. 288 (1980). For an interesting investigation of this issue, see also A. Shleifer and R. W. Vishny, *A Survey of Corporate Governance*, 52 J. Fin. 737 – 754 (1997). The authors develop the agency problem by separating management and finance, explaining the core principles of corporate governance as "the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment" through different strategies (for instance stock options or incentive contracts) of control over managers.

more efficient shareholders' rights. High powered incentive contracts, however, adopted to contain the agency costs create enormous opportunities for managerial self-dealing, especially if these contracts are negotiated with poorly motivated board of directors rather than with major investors".[16] In fact, managers may negotiate such contracts for themselves when they know that earnings or stock price are likely to rise, or even manipulate accounting numbers and investment policy to increase their earnings.[17]

Thus, for better results, **internal and external checks and balances should be introduced**. Internally, institutionalised shareholder activism could play a role in monitoring internal decision-making processes. For instance, banks in their capacity as minority shareholders (or institutional investors) or other bodies such as the *Aufsichtsrat* in the German stock corporation could be in a position to bring the internal decision-making process in line with the governmental authority and the regulatory bodies. Externally, authorities and regulatory bodies may force listed or supervised companies to meet certain standards by requiring compliance with a corporate governance minimum, or rating.

A further consideration is that the results of this corporate governance research, which indeed is largely based on Common Law systems, cannot be transposed

---

[15] See on this point the paper by Daniela Fabbri, *"Legal Institutions, Corporate Governance and Aggregate Activity: Theory and Evidence"*, CSEF Working Paper No. 72, February 2002 (also available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=302190), where the author investigates the interaction between legal institutions and financial arrangements and the effects that these have on corporate decisions and aggregate activity, both theoretically and empirically. The aim of such a theoretical approach is to develop a two-country general equilibrium model with overlapping generations and asymmetric information in the credit market., showing that, at the steady state equilibrium, **firms located in the country providing legal enforcement of creditors' rights receive a larger amount of external finance** at a low price and are larger in size. On the other hand, as far as the empirical evidence is concerned, it is worth noting that the driving force behind the paper's results is that **improvements in the legal protection of creditor rights to repossess a collateral asset increase the investment rate of return by tempering the inefficiencies due to asymmetric information**. Thus, in the empirical part, the author provides evidence that confirms her theoretical predictions by using new data sets at firm and regional level for Spain and Italy, with the conclusion that measures the degree of legal enforcement by using statistical information on the performance of judicial districts (i.e. measures based on the number of backlogs, the number of concluded trials and the average length of trials) is definitely a worthy analytical tool.

[16] See A. Shleifer and R. W. Vishny, *op. cit.*

[17] Ibid., *op. cit.*

unaltered into a Continental European context, since European countries' ownership structures are substantially different.[18] In some continental European countries, ownership is not as dispersed as in other countries. On the contrary, a majority of shares are owned by a few shareholders and the minority does not have any means of effectively influencing the decision-making towards maximising shareholder value.

This being so, from a legal point of view, differences between Civil Law legal systems and the Common Law legal environment are reflected in two different systems of corporate governance: the shareholder-oriented model and the stakeholder-oriented model.[19] These two models of corporate governance may stem from a dispersed ownership system and a concentrated ownership system. These two models can be found respectively in two models of market economies: a liberal market economy or a co-ordinated market economy. On one hand, the first ownership system is roughly characterised by "strong securities markets, rigorous disclosure standards, and high market transparency, in which the market for corporate control constitutes the ultimate disciplinary mechanism"; on the other hand, the second system is basically characterised by "controlling blockholders, weak securities markets, and low disclosure and market transparency standards, with only a modest role played by the market for corporate control, but with a possibly substitutionary role played by large banks".[20] Under this assumption, recent commentaries have argued that deep and liquid securities markets appear to be an exception in Civil Law countries in

---

[18] Recent scholarship on comparative corporate governance has referred to "a puzzle", John C. Coffee, Jr., *The Rise of Dispersed Ownership: the Role of Law in the Separation of Ownership and Control*, Columbia Law School, The Centre for Law and Economic Studies, Working Paper No 182, January 2001. While Berle and Means assumed that all largely public corporations would mature to an end-stage capital structure characterised by the separation of ownership and control, the contemporary empirical evidence is to the contrary. Instead of convergence toward a single capital structure, the 20th century has seen a polarisation of corporate structure between two systems of corporate governance: a dispersed ownership system and a concentrated ownership system. See also Dalya, J., J. McConnell and N.G. Travlos, *The Cadbury Committee, Corporate Performance and Top Management Turnover*, The Journal of Finance, 57 (1), Feb. 2002, pp. 461-83.

For further analysis of this issue, see La Porta, Lopez-de- Silanos, Schleifer and Vishny, *Legal Determinants of External Finance*, 52 J. Fin., 1131, 1997.

[19] Cfr. Hansmann, Kraakmann, *The End of History for Corporate Law,* 89 Georgetown L. J., 439 (2001).

[20] J. C. Coffee, Jr., *op. cit.,* p. 2.

which concentrated ownership dominates dispersed ownership,[21] since these countries are mainly characterised by:

(i) Consensus among the constituencies of a corporation

(ii) co-determination (see. the case of Germany)

(iii) strategic, long-term ownership.[22]

If we understand control[23] as the concentration of voting power, we come to the following observations.[24] For instance, a low concentration of ownership and control is usually found in Common Law countries, where on average, single shareholders do not hold more than 15%, and voting power is also dispersed with multiple class voting shares and no voting restrictions. When voting power is dispersed, free riding on monitoring might occur as a single shareholder bears all the costs of control but only benefits in direct proportion to his or her share. Thus, management can end up in a powerful position.

As a result, the key governance issues are: **shareholder value**, **shareholder activism**, **stock options** and performance-related pay for management,

[21] For a critical analysis of the so-called transplant of Common Law models into Civil Law countries, see Lucian A. Bebchuk, *Asymmetric Information and the Choice of Corporate Governance Arrangements,* Harvard Law School, October 2002, document available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=327842, where the author underlines the risks connected to the asymmetry of information (characterising globalised financial markets), an asymmetry that might lead firms that go public to adopting – through the design of securities and of corporate charters – corporate governance arrangements that are far well known to be inefficient both by public investors and those taking firms public. For a further analysis, see Bebchuk, "*Vigorous Race or Leisurely Walk: Reconsidering the Debate on State Competition over Corporate Charters"* document: available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=325520

[22] For a more critical, "political thesis", according to which strong securities markets are inconsistent with the European political tradition of social democracy (where governments favour employees over shareholders and might even expropriate corporate assets if fuller transparency was required), see M. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 Stan. L. Rev. 539 (2000).

[23] F. Barca, *Alternative models of control: efficiency, accessibility and market failures*, in J. Roemer (ed.), *Property, relations, incentives and welfare*, St. Martin's Press Inc. and Macmillan Press, 1997.

[24] For further analysis of this point, see L. Renneboog, *op. cit.*, p. 5 – ff.

accountability and independence of the board of directors, **fiduciary duties of directors and hostile acquisition**.[25]

The opposite scenario of a high concentration of both ownership and control and can be found in a majority of companies in Continental Europe (especially in Germany) and Japan, or in companies which have been taken over where large blocks or shares are held by a few investors. **This structure does not favour hostile acquisitions and is based on consensus of the firm's constituencies.**

2. The role of IFIs and banks in developing corporate governance rules

Since the 1990s international organisations have devoted increasing attention to corporate governance as a topic of global concern. The evolution of the international economy and of modern capitalist structures is leading to both the spatial and sectional segmentation of market relations across national boundaries. Small, specific, and specialised groups of merchants or business communities are being established.[26] For instance, in May 1999, the OECD published its "Principles of Corporate Governance", which it noted "are the first attempt to develop a set of international standards for corporate governance' (OECD, 1999).[27] In June 1999 the OECD and the World Bank signed a memorandum on understanding that created a Global Corporate Governance Forum for the discussion and co-ordination of global standards of corporate governance. Other multilateral agencies, including the International Monetary Fund (IMF), the Asian Development Bank, and the Asian-Pacific Economic Co-operation Organisation, as well as institutional investors, are actively pursuing

---

[25] On the hegemony of the Anglo-American approach, see Andrè, *Cultural Hegemony: the Exportation of Anglo-Saxon Corporate Governance Ideologies to Germany*, in 73 *Tul. L. Rev.* 69 (1998). An other interesting perspective for the Italian situation is proved by Ferrarini, *valore per gli azionisti e governo societario*, in *Riv. Soc.*, 2002, pp. 462 ff.

[26] See R.D. Cooter, "Decentralized Law for a Complex Economy", *Southwestern University Law Review*, vol.23 (1994), p.445.

agendas to bring about the reform of corporate governance systems around the world.

This phenomenon can be seen as a response to the fact that economies are being built around alternative modes of production, as both current institutional arrangements and natural knowledge constraints do not allow for a consistent first-best solution for a given production problem. These circumstances and others determine a pattern of an indefinable multiple causality between market phenomena that severely restrains, if it does not undermine, the potential reach of public regulation as paradigmatically issued and adjudicated by the nation state.[28] Three reasons justifying the increasing significance of a modern regulatory framework for corporate governance today can be identified:

(i) the globalisation of financial markets[29];

(ii) the proliferation of new financial products;

(iii) the rise of institutional investors.

In the Asian context, for instance, there have been references to the 1997 crisis as a starting point for the interest in corporate governance issues in that region, spurring, *inter alia,* reforms in the listing rules of stock exchanges in Malaysia.[30]

On the other hand, in a European context, deep and significant changes have occurred; changes and new trends also connected to the multiplicity of sources of law and legal instruments to regulate this emerging phenomenon known in

---

[27] OECD Principles of corporate governance, OECD, Paris, 1999.

[28] See K.H. Ladeur, "Post-modern Constitutional Theory: A Prospect for the Self-organising Society", *Modern Law Review*, vol.60 (1997), pp.617ff.

[29] For evidence regarding a potential reverse development, see H. James, *The End of Globalization, Lessons from the Great Depression*, Harvard University Press, 2001, p. 201.

[30] Jesus Estanislao, President and CEO of the Institute of Corporate Directors in the Philippines and former Finance Minister in the early 1990s, underlines how weak corporate governance structures have undermined the ability of East Asian economies to establish sound and sustaining economic growth. See *East Asia's Financial Meltdown: Why Corporate Governance Matters,* http://www.cipe.org/efn/estanislao.php3

legal theory as legal pluralism,[31] strongly connected to the so-called "juridification of globalisation" of financial markets, which is characterised by the absence of a supranational authority.[32] Thus the described situation allows forms of self-regulation, like the "private sector main responsibility", to be developed.[33]

In the case of corporate governance, despite the fact that continental stock markets have traditionally been thin and illiquid, several studies nowadays show that the number of firms listing on European stock exchange rose sharply at the end of the 1990s.[34] Although the pattern is far from being uniform, the equity market grew rapidly in the late 1990s in France, Germany and Spain. Elsewhere, the number of listed companies may have declined, possibly because of an international wave of mergers and acquisitions, which itself is a sign of convergence. Furthermore, while IPOs were once mainly characteristic of the

---

[31] On this specific point, see K. H. Ladeur, *Post-Modern Constitutional Theory: A Prospect for the Self-organising Society*, Modern Law Review, vol. 60 (1997), pp. 617 ff. The recalled legal pluralism is not strictly rooted in hierarchical assumptions, such as the one between the public and the private sphere or any others based on power relations.

[32] Of particular significance for the present purposes are: M. Shapiro, *The Globalisation of Law*, (1993) 1 Indiana Journal of Global Legal Studies, 37 – 64; G. Teubner (ed), *Global Law Without a State*, Dartmouth, 1997; F. Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, European Law Journal, Vol. 5, No 4, 1999, 334 – 374.

[33] See P. Hommelhoff, *The OECD Principles on Corporate Governance: Opportunities and Risks from the Perspective of the German Corporate Governance Movement*, in International and Comparative Corporate Law Journal, Vol. 2, Issue 4, 2001, 457 – 480, where the principle of the private sector's main responsibility is defined as the most significant OECD's philosophy. The Author analyses the relationship between the public authority (the legislature) and the private sector in elaborating a regulatory framework and in drafting codes of best practice in corporate governance's matters, with the intention to stimulate investor confidence on a global scale.

[34] See Van der Elst, *The Equity Markets, Ownership Structures and Control: Towards an International Harmonisation?*, Working Paper, Financial Law Institute, Ghent University, Belgium, April 2000 as quoted by John C. Coffee, Jr., *The Rise of Dispersed Ownership: the Role of Law in the Separation of Ownership and Control, op. cit.*, p. 17.

U.S. and the U.K. markets, they have become common practice across Europe.[35] This is a testimony to the process briefly described.

This being so, it may even be argued that the surge of interest in corporate governance in Europe in the 1990s reflects, to some extent, a change in the way in which the role and functions of private companies in society are perceived.

As a consequence, there is nowadays a wider interpretation of what the purpose and goals of corporations/firms should be. Corporate governance is indeed concerned with the institutions that influence how business corporations allocate resources and returns. More specifically, a system of corporate governance shapes what makes investment decisions in corporations, what type of investments they make, and how returns from investment are distributed.[36] In most economies, corporate enterprises play a critical role in shaping economic outcomes through the decisions that they make about investments, employment, trade, and income distribution. Much of the contemporary debate on corporate governance has focused on the merits of different national systems for generating favourable outcomes for corporations themselves and the regional and national economies in which they are based.[37] As a result, the maximising of profits of private corporations is recognised as one of the relevant goals for such entities in several of the recommendations and statements of principle that are discussed below. International forums have paid attention to promote

---

[35] As John C. Coffee, Jr. points out: "the significance of this point bears emphasis, because systems of concentrated ownership were thought to lack the institutions necessary to bring new companies directly into the equity market" (Id. p. 19). This new trends operating in Europe are further strengthened by some other changes that are currently underway in the markets including (1) the inexorable movement towards a pan-European stock exchange; (2) the increased activity of securities analysts with regard to European corporations with minority public ownership; (3) the accelerating convergence in international accounting standards, and (4) the current international wave of mergers and acquisitions (Id. p. 92).

[36] O' Sullivan, *Contests for Corporate Control: Corporate Governance and Economic Performance in the United States and Germany*, Oxford University Press, 2000.

[37] See M. Roe, *Some Differences in Corporate Structure in Germany, Japan, and the United States*, 102 Yale L.J. 1927 (1993); Id., *Political Preconditions to Separating Ownership from Corporate Control*, 53 Stan. L. Rev. 539 (2000), where the influence exerted by social democracies on managers to stabilise employment or to forego some profit-maximising risks with the firms is particularly emphasised.

convergence of national systems of corporate governance towards common standards.[38]

In this context, the 1999 OECD principles are of course non-binding,[41] since they do not substitute for the law, but simply represent supplementary principles and standards of behaviour and good practice. According to the preamble, the principles are not meant to be used in national legislation but rather as points of reference in the different areas of corporate governance covered by the principles. Recent developments in the field of corporate governance guidelines imply that organisations active in the international financial markets have begun to use such guidelines as one of the benchmarks for evaluating potential investment opportunities.[42]

In particular, corporate governance codes, as self-spontaneous instruments still in search for the most appropriate forms of management and supervision, are

---

[38] There are several approaches to explain the use of the term "globalisation". It normally refers to origination, trading and distribution of debt and equity capital market instruments and their derivatives, foreign exchange trading and securities brokerage, management of market risk and credit risk, loan syndication and structured bank financing, corporate finance and advisory services, and asset management. All these activities are considered in terms of a "value-chain", one that ultimately gives rise to the real economic gains attributable to financial-centre operations.

[39] Of particular significance for the present purposes are: M. Shapiro, *The Globalisation of Law*, (1993) 1 Indiana Journal of Global Legal Studies, 37 – 64; G. Teubner (ed.), *Global Law Without a State*, Dartmouth, 1997; F. Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, European Law Journal, Vol. 5, No 4, 1999, 334 – 374.

[40] See P. Hommelhoff, *The OECD Principles on Corporate Governance: Opportunities and Risks from the Perspective of the German Corporate Governance Movement*, in International and Comparative Corporate Law Journal, Vol. 2, Issue 4, 2001, 457 – 480, where the principle of the private sector's main responsibility is defined as the most significant OECD philosophy. The author analyses the relationship between the public authority (the legislature) and the private sector in elaborating a regulatory framework and in drafting codes of best practice in corporate governance's matters, with the intention to stimulate investor confidence on a global scale.

[41] The OECD principles have been recognised as "the only multilaterally endorsed and comprehensive code that governments of countries are committed to promoting", Communication from the OECD, WT/WGT/W/93 of 31 October 2000.

[42] OECD Counsellors for the Economy in Corporate Governance Matters, *Corporate Governance Improvements of the Competitiveness and the Obtaining of Capital in Global Markets*, Paris, 1998.

also the products of efforts to regulate the conduct of companies whose securities are traded on the markets.[43]

Banks are a critical component in a market economy because they provide financing for commercial enterprises, basic financial services to a broad segment of the population, and access to payment systems.[44] Moreover, banks are at the forefront of market and technological developments, which pose new challenges for sound internal management. In addition, some banks are expected to make credit and liquidity available in difficult market conditions. It is vital therefore that banks have strong corporate governance.[45] In addition, banks may play a role in corporate governance as institutional investors[46] given that the predominance of mutual fund management companies often belongs to banking groups. The increasing involvement of institutional investors as holders of assets means that their impact on the functioning of financial markets is steadily growing. This situation determines an overlapping discipline of different

---

[43] See E. Wymeersch, *Factors and Trends of Change in Company Law*, in International and Comparative Corporate Law Journal, Vol. 2, Issue 4, 2001, 481 – 501.

[44] If one considers, for instance, the role played by the Basel Committee on Banking Supervision - established under the aegis of the Bank for International Settlements (BIS) after the collapse of the Herstatt bank at the end of 1974 with the central banks of the G-10 countries -, the above mentioned concept seems to be clearer. The aims of the Basel Committee are those of comparing supervisory methods and establishing privileged channels of communication between banking authorities, and also to co-ordinate joint policy on the supervision of international banking. With the Basel Concordat of 1975, a first visible result of the Basel Committee, the building principles of legal integration that were to follow for international banking markets became to some degree explicit. They related to the rules of conflicts for supervisory competences. The agreement was that a banking authority should have the responsibility to oversee the activities (but especially the solvency) of the banking groups established in their respective countries with the inclusion of foreign branches: ***the principle of home-country control***. Accordingly, there should be ***mutual recognition*** between country authorities of such competences.

[45] Cf. a paper issued by the Basel Committee on Banking Supervision that provides guidance on corporate governance in banks. This paper forms part of an ongoing effort by the Committee to strengthen procedures for risk management and disclosure in banks. See *Enhancing corporate governance in banking organisations*, http://www.bis.org/publ/bcbs56.htm, where the need for banks to be properly managed is clearly underlined, as most of the funds that credit institutions use to conduct their business belong to their creditors, in particular to their depositors. Furthermore, linked to this is the fact that the failure of a bank affects not only its own stakeholders, but may have a systemic impact on the stability of other banks.

[46] See the work edited by the OECD, *Institutional Investors in the New Financial Landscape*, 1998. On the subject in general, see G. Stapledon, *Institutional Shareholders and Corporate Governance*, Clarendon Press, Oxford, 1996.

phenomena, as banks can own shares in other financial institutions, in subsidiaries and funds of different kinds, in non-financial companies, and, to a certain extent, also in foreign companies. So banks can, in addition to the influence they exert in their capacity as lenders, have influence in their capacity as shareholders or management bodies. Finally, banks have more privileged access to strategic information regarding the financial conditions of corporate clients than most of other investors who own shares in the client companies. Therefore, banks in their dual capacity as both lenders and shareholders are in a position to monitor sound managerial decision-making. The prominent role of the banks in monitoring and influencing internal corporate governance mechanisms of a corporation is hereby acknowledged. It is not our intention to impose any further monitoring duties on the banks or any other obligations that go beyond their role as market participants. Further compliance or enforcement mechanisms have to be introduced by other authorities or bodies, which supervise corporations. In addition, it would be beneficial to have bodies exchanging information and ideas for board members and executives among themselves to discipline the market relations[47].

---

[47] An example is the Chairmen's Forum in the UK set up by Sir Adrian Cadbury. Another cornerstone example for Europe is the International Organisation of Securities Commissions (IOSCO) which, since 1983, has been a transnational organisation grouping securities markets authorities with the primary aims of enhancing regulatory co-operation, providing means of information and experiences, setting international regulatory standards, observing international securities transaction, and ensuring the authorities' mutual assistance in the implementation and enforcement of securities regulation. See IOSCO, *Resolution on Commitment to Basic IOSCO principles of High Standards and Mutual Co-operation and Assistance,* 1994. It should be noted that through IOSCO, national securities market authorities become involved in co-operative relationships between themselves in a network-like multilateral standard-setting agreement. This is what can be defined as an expression of the so-called soft law.

3. International Principles of Corporate Governance[48]

The purpose of the OECD principles is to assist governments in their efforts "to evaluate and improve the legal, institutional and regulatory framework for corporate governance in their respective countries".[49] Furthermore, the principles are intended to provide guidance and suggestions for stock exchanges, investors, corporations and other parties deemed to have a role in the development of good corporate governance. The principles focus on publicly traded companies, but the preamble states that they might to some extent also be useful for improving corporate governance in non-traded companies such as privately held or state-owned enterprises. It might be of interest to note that the OECD principles make no attempt at defining what should be the objective of the corporation's activities.

It is asserted in the preamble to the Guidelines that **they are not meant to be used as a substitute for private sector initiatives** to develop in more detail what constitutes "best practice" in governance.

The focus of the principles set out is on the problems that may arise as a result of the separation between ownership and control.

As regards the legal or quasi-legal status of the principles, as stated in the preamble they are non-binding and do not aim at detailed prescriptions for national legislation, but rather should be used as a starting or reference point for policy-makers when they examine and develop their legal and regulatory framework in the field of corporate governance.

The OECD principles have been commented upon by the International Corporate Governance Network (ICGN), and in so doing the ICGN has

---

[48] The OECD Council, meeting at ministerial level on 27-28 April 1998, called upon the OECD to develop, in conjunction with national governments, other relevant international organisations and the private sector, a set of corporate governance standards and guidelines. In order to fulfil this objective, the OECD established the Task Force on Corporate Governance to develop a set of non-binding principles that embody the views of the Member States . Following extensive consultations with various bodies, the OECD principles were presented to the OECD Council, meeting at ministerial level on 26-27 May 1999, where they were formally adopted. It should be noted that there are five main headings under which the OECD Principles of Corporate Governance are organised. They are: (I) the rights of shareholders; (II) the equitable treatment of shareholders; (III) the role of stakeholders in corporate governance; (IV) disclosure and transparency; (V) the responsibilities of the board.

[49] See, OECD Principles of Corporate Governance, cit., "Preamble".

proposed a number of amendments. These amendments are suggested with the express purpose of providing "clear, concrete guidance" on how to implement the OECD principles in practice.

The recommendations set out by the ICGN are in the form of a "working kit" that aims to articulate the tenets of corporate governance as viewed by ICGN members. At the same time, these amendments affirm certain principles suggested in the principles, such as the "one-share, one-vote" principle with regard to shareholder voting rights. While this principle was mentioned in the principles, it was explicitly affirmed therein that no position was taken on the applicability of this concept. In this respect, the OECD principles are more prudent than the recommendations issued by other organisations active in the field of corporate governance. The principle of "one-share, one-vote" is recognised and upheld not only in the ICGN amendments, but also in the pan-European principles and recommendations issued by the European Association of Securities Dealers (EASD).[50] Further amplifications set out by the ICGN include an opinion on the composition of board committees, where the ICGN amendments suggest that certain committees (notably those that concern themselves with audit, nomination and remuneration questions) should be composed wholly or predominantly of independent non-executives.

4. Other initiatives in the field of international corporate governance undertaken by IFIs

A number of other organisations (i.e. the WTO, the IMF, the OECD, IOSCO, the Basel Committee, the International Corporate Governance Network, the European Corporate Governance Network, the World Bank and their Ombudsman)[51] have elaborated rules of international corporate governance in

[50] The EASD's principles favour "one-share, one-vote" because it provides all shareholders with a greater incentive to participate in the decision-making process, furthering more closely the interests of the company as a whole: the "one-share, one-vote" principle is strongly endorsed by institutional investors who wish to have voting rights proportional to the cash-flow rights they acquire.

[51] The above-mentioned organisations have compiled a thorough collection of full text corporate governance codes, principles of corporate governance and corporate governance reforms. See, the collections available on the World Bank web-site (in http://www.worldbank.org/html/fpd/privatesector/cg/codes.htm), OECD website (http://www.oecd.org/oecd/pages/home /displaygeneral/0,3380,EN-home-76-3-no-no-no,FF.html) and the European Corporate Governance Network website (http://www.ecgn.ulb.ac.be/ecgn/codes.htm).

order to provide Europe with a modern regulatory framework for company law. Harmonisation of company law structures in the EU, as in the case of easing cross-border mergers and level take-over bid procedures, has been blocked for some time and no immediate breakthrough is expected, apart from the adoption of the legislation for the European Company Statute in 2001.[52]

The European Bank of Reconstruction and Development (EBRD) has adopted a checklist on the implementation of principles of corporate governance. The checklist takes into account the OECD guidelines (see section 5 *infra*) and uses them as a starting point for a comprehensive evaluation of the state of corporate governance rules in the institutions to be assessed in their roles as potential investees. Depending on whether the institution is considered to be subject to good or satisfactory principles of corporate governance, or whether the rules in place are considered to be lacking or inappropriate, the risk associated with the project may be adjusted accordingly. In cases where the risk arising from this factor is deemed to be high, this may be a substantial factor when determining whether to proceed with the equity investment. Thus, this is an example of how non-binding rules (in this case a modified version of the OECD guidelines) can be applied in an international context and directly influence decision-making by actors in the financial field. For the EBRD, corporate governance is a field where prospective members of the EU have made a lot of progress in the past ten years. However, progress in this area is perceived as a dynamic process as new markets are created and new technologies are used, which make changes in existing corporate governance necessary. Minority rights and sound public bid procedures are some of the priorities according to the EBRD. It is acknowledged that progressive strengthening of corporate governance in one bank is likely to have an effect on other banks.

It is also suggested in the introductory part of the checklist that it might form part of the EBRD's standard due diligence in assessing a project and the risk factors associated with it. This statement provides further confirmation that the corporate governance regime of an institution is a factor that may substantially

---

[52] See, on this point, K. Lannoo, *Corporate Governance, West and East: A Synthesis of the EU Framework in the Perspective of Enlargement*, in *Corporate Governance, Financial Markets and Global Convergence*, Kluwer Academic Publishers, 1997. The legal framework for the "European Company", known by its Latin name (Societas Europaea (SE), consists of the Regulation to establish the European Company Statute (ECS) and the related Directive concerning worker involvement in European companies adopted by the Council of Ministers on October 8, 2001, thirty years after the first proposal. The legislation is due to enter into force in 2004.

influence the evaluation of the prospects of a project. In this way, a connection between the corporate governance regime and the pecuniary value (as affected by considerations of risk) of a potential investee is firmly established.

The IMF is conducting a series of studies and publications closely related to the matter under analysis here,[53] on the basic assumption that good regulatory governance in the financial system is a critical component of financial stability. Research on the topic has not been very systematic and deep. **By focusing on four key components of regulatory (such as governance-independence, accountability, transparency, and integrity), it should be possible to explore the quality of regulatory governance based on the financial system evaluations under the Financial Sector Assessment Programs** (FSAPs), which are a comprehensive effort to analyse regulatory governance issues. In terms of independence, banking supervisors are better placed, while securities regulators perform better on transparency. Insurance regulators are weak in all the regulatory governance components. On the whole, regulators still have a long way to go in terms of monitoring good governance.

The Financial Stability Forum - established in 1999 by the Finance Ministers and Central Bank Governors of the G7 countries to promote international financial stability through information exchange and international co-operation in financial supervision and surveillance - (FSF) has elaborated twelve standards, which are widely accepted as good principles, practices or guidelines for sound financial systems. The Compendium of Standards provides a point of reference for financial authorities and market participants. Corporate governance features among the set of standards related to sound institutional and market infrastructure. The Compendium of Standards refers to the OECD principles of corporate governance.[54]

Another recent addition in this field is the corporate governance ratings service provided by Standard & Poor's, applicable to in emerging markets around the world. The ratings take into account such issues as transparency, recognition of minority shareholder rights, board effectiveness and the level of commitment to accountability and shareholder value. It may be noted that both the S&P corporate governance ratings and the guiding principles of the EBRD are mainly

---

[53] See, *inter alia*, Das, Udaibir S. and Quintyn, Marc G., *Crisis Prevention and Crisis Management: The Role of Regulatory Governance*, IMF Working Paper Series, No 2002/163.

[54] See http://www.fsforum.org/Standards/KeyStds.html.

applicable to corporations in countries that have traditionally been viewed as less developed in the field of company law and financial regulations. Notwithstanding this state of affairs, the principles embraced by the various corporate governance guidelines might be of some interest in a European context as well as they lay down criteria that are considered to be minimum or desirable standards in different areas of company law.

Scoring systems similar to the S&P ratings have also been undertaken in Europe, for example by the German Association of Financial Analysts, Portfolio Managers and Investment Consultants that has developed a Scorecard for German Corporate Governance.[55]

Finally, as far as the securities market is concerned, IOSCO has elaborated principles of maintaining high regulatory standards and providing the fullest mutual assistance and co-operation among IOSCO's members, who are due to perform a self-evaluation of their own ability to "provide assistance to foreign securities regulators" by means of a written assessment to be deposited at the IOSCO's secretariat for free consultation by its members.[56].

5. National guidelines, standards-setting, recommendations and codes of good practice on corporate governance in the EU countries

This section briefly sketches a comparative analysis of the relevant recommendations and codes of good practice (as a soft law response within the framework of the called "juridification of globalisation"[57]) in the 15 member states of the EU. Similarities and differences are discussed and summarised in

---

[55] Another organisation active in the field of international corporate governance is the Californian pension fund, CalPers, which has adopted a number of global proxy voting principles. Moreover, one of the major American institutional investor, which the Teachers' Insurance and Annuity Association-College Retirement Equities Fund (TIAA-CREF) has also drafted a policy statement concerning principles of corporate guidance where individual issues are elaborated upon to some extent.

[56] For a detailed analysis of the structure, mandate and tasks of the IOSCO, see Pedro Gustavo Teixeira, *Public Governance and the Co-operative Law of Transnational Markets: The Case of Financial Regulation*, a revised version of a paper presented in the Workshop on "Public Governance in the Age of Globalisation" (Florence, EUI, March 2000).

[57] Cfr. *supra* footnote 30.

the light of the international framework of non-binding rules and statements of principle in the field of corporate governance.[58]

In most countries, the relevant documents are those issued by private organisations or governmental institutions such as the stock exchange, professional associations or shareholder organisations.[59] It should be noted in this context that many organisations active in the field of corporate governance explicitly assert in their respective statements and guidelines that rules on corporate governance showed not be laid down in laws, since developments in the markets are too fast to allow for them to be accommodated in the statutory regulations on companies. However, such a statement is to be evaluated extremely carefully, since there has been an expansion of legal rules related to the protection of the shareholders and creditors in the corporate governance of European companies.

---

[58] For a more structured comparative overview of company law systems in EU, see E. Wymeersch, *Current Reform Initiatives: Challenges and Opportunities*, paper presented in Stockholm on 7-8 December 2000 at the conference on *Company Law Reform in OECD Countries. A Comparative Outlook of Current Trends*.

[59] A useful link for such a survey is: http://www.calpers-governance.org/principles/international/other.asp. See also the Comparative Study of Corporate Governance Codes Relevant to the European Union and its Member States, Weil, Gotshal & Manges LLP, http://europa.eu.int/comm/internal_market/en/company/company/news/corp-gov-codes-rpt-part1_en.pdf.

5.1 Tenets of corporate governance rules and principles in the EU countries

The national guidelines, regulations and principles in the field of corporate governance display a high degree of uniformity as regards the basic tenets of corporate governance.[60] A number of general and broadly formulated principles seem to be shared by the European countries, and these principles could be taken to form a basis for elaborating national corporate governance rules. These general principles include:

(i) **The shareholders have a right to the protection of basic rights,** such as the right to secure methods of ownership registration; to obtain relevant information on the corporation on a timely and regular basis; the right to participate and vote in general shareholder meetings on decisions affecting the company as well as the right to elect and replace members of the board. Furthermore, the shareholders have a basic right to secure ownership and convey or transfer shares in a secure way (involving registration or notarial procedures when necessary). A basic shareholder right is the right to have a share in the profit of the corporation.

(ii) **The remuneration policies of the board and its relevant committee/s should be transparent** and information should be provided with regard to the remuneration of the board and the considerations underlying the decision to set the existing level of remuneration.

(iii) **A clear division of responsibilities** should be maintained at the head of the company **between the board and the management.**

(iv) **The board should be chiefly responsible for monitoring managerial performance** and achieving an adequate return for shareholders, while preventing conflicts of interests and balancing competing demands on the corporation.

[60] S. Vitols, *Varieties of Corporate Governance Comparing Germany and the UK,* in *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage,* edited by Peter A. Hall and David Soskice, p. 337, Oxford University Press, 2001. The author distinguishes between two different models of corporate governance, the "shareholder model" and the "stakeholder model". The former is driven by markets, is characterized by dispersed ownership interested in increasing share prices, where employees have no formal voice in corporate decision-making. The latter is characterized by strategic long-term shareholders, employee representation system in large corporations, and consensus negotiations between different constituencies of a firm.

(v) The board should contain some directors that do not perform management functions within the company or its subsidiaries (**non-executive directors**).

(vi) The board should be able to exercise objective judgement on corporate affairs independent, in particular, from the management.

(vii) The **national rules on corporate governance should ensure that relevant information on the structure and operations of the company is disclosed**. Information that should be thus disclosed includes facts pertaining to the financial situation, performance, ownership structure and governance of the company.

(viii) **The board should have regular meetings** in order to be able to monitor continuously the management and operations of the company.

On the basis of the above, it is now possible to distinguish between two different models of corporate governance, the "shareholder-oriented model" and the "stakeholder-oriented model". In the former (closer to Common Law conuntries), decisions are dictated by the principle of maximisation of shareholder value, while the latter (closer to Civil Law countries) takes into account interests of other constituencies, in particular of employees and communities, in which firms are located. The former is expected to survive owing to the dominance of institutional investors, although it has been heavily criticised for its shortcomings.[61] These models reflect policy choices in the economy. **Co-ordinated Market Economies** and **Liberal Market Economies** are two broad concepts that have been identified in **Germany** and the **UK** respectively.[62]

Non-binding codes have proven a good way to regulate the business conduct of decision-makers. Compliance with principles usually introduced by the stock exchanges or capital markets commissions are based on the model of "comply or explain". Companies are obliged to comply unless they can adequately explain why certain principles should not apply. European codes are characterised by

---

[61] Recent cases provide evidence that the principle of maximizing shareholder value may induce decisions favouring short-term upward share prices, while severely damaging the long-term viability of a company. G. Teubner, *op.cit.*, pp.420, 440. Teubner claims that European harmonisation should take into account the varieties of capitalism and accompanying differences in production regimes.

[62] S. Vitols, *op.cit.*, p. 339.

homogeneity and convergence, so that further harmonisation steps by the Commission should not be considered at this stage.[63]

5.2 A short overview of national corporate governance regimes and recommendations issued in the EU countries[64]

5.2.1 AUSTRIA

In the case of Austria, it seems that no organisation or institution has taken the initiative to draft any recommendations or principles on good corporate governance. However, some provisions in Austrian company law might be mentioned in this context, as they demonstrate the degree to which principles of corporate governance have been taken up by the legislator.

Under Austrian law, it is mandatory for stock corporations and large limited liability companies to maintain a **supervisory board that monitors the actions of the management board**. This supervisory board must contain a number of members who are elected by a council representing the employees: a third of the board members are appointed in this manner.

It is strictly forbidden to introduce multiple voting rights, even though a maximum number of votes per stockholder can be specified in the articles of association. The "one-share, one-vote" principle is widely adhered to.[65]

5.2.2 BELGIUM

In Belgium, **the Commission on Corporate Governance seeks to promote improved standards of corporate governance within Belgian companies, chiefly with a view to enhancing their competitiveness on the capital markets**. The Commission takes the view that the powers vested in the various

---

[63] Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States, on behalf of the European Commission, Internal Market Directorate General, Weil, Gotshal & Manges, LL.P. January 2002. *See* also, Corporate Governance Principles and Recommendations, European Association of Securities Dealers, May 2000.

[64] This section reflects the situation until November 2001. Recent developments have only been taken into account on a case-by-case basis. For a detailed and thorough analysis of the European situation, we recommend Barca and Becht (eds), *The Control of Corporate Europe*, Oxford University Press, 2001.

[65] See K. Gugler, S. Kalss, A. Stomper and J. Zechner, *The Separation of Ownership and Control in Austria*, in Barca and Becht (eds), *The Control of Corporate Europe*, *op. cit.*

bodies involved in corporate governance should be clearly defined and the rules on financial reporting should be strengthened. It has adopted a single set of recommendations for all listed companies.[66] In the preamble to these recommendations, it is stated that it would be preferable not to resort to statutory provisions to enforce corporate governance in Belgium. Instead, the market authority of the Brussels Stock Exchange proposes a "**comply or explain**" approach with regard to listed companies.[67] This approach would entail an obligation on behalf of listed companies to disclose the specific circumstances or reasons explaining why the recommendations have not been complied with. The principles laid down in the recommendations are more wide-ranging, with respect to a number of areas, than the principles set out in the OECD Guidelines. The recommendations include, *inter alia*, the rule that the board of directors should not consist of more than twelve members and that **the board committee responsible for deciding on the remuneration of directors should be made up of a majority of non-executive directors.**

With regard to the procedure of recognition,[68] the **Commission considers that Belgian company law already incorporates the basic concepts required for adequate corporate governance**. More specifically, the legislation embodies the principle "one share, one vote", the rule that all directors share equal responsibilities, the requirement that directors act in the sole interest of the company and the rules on conflicts of interest within the board of directors.

5.2.3 DENMARK

A number of draft Guidelines on Good Management of a Listed Company have been issued by the Danish Shareholder's Association in February 2000.[69] This short list of general principles is a summary and does not elaborate on corporate governance questions in any detail. Nevertheless, it is possible to deduce a few conclusions from the material at our disposal.

---

[66] Federation of Belgian Enterprises (VBO/FEB), *Corporate Governance – Recommendation from the Federation of Belgian Enterprises*, 1998.

[67] See *Belgian Report of the Commission on Corporate Governance* (Cardon Report), edited by the Brussels Stock Exchange in 1998.

[68] See *supra*, footnote 38, P. Hommelhoff.

[69] Guidelines on Good Management of a Listed Company (Corporate Governance), Danish Shareholders' Association, http://www.shareholders.dk/index.asp

First of all, it can be observed that the guidelines express a wish that "shares with disproportional voting rights should be abandoned": this would seem to be a call for adherence to the "one-share, one-vote" principle embraced in the Belgian and Greek recommendations as well. The guidelines suggest that the board should have at least 4 non-executive members (in the guidelines, the expression used is "4 members independent of day-to-day management").

Furthermore, the guidelines contain a number of suggestions on other fields of governance and make quite explicit recommendations in some fields that have not been covered by most national corporate governance guidelines. In particular, it is recommended that the dismissal compensation of a director should not exceed 2 years' payment, and that the compensation in question should not be paid out if the director "severely mismanages his/her job, or if he/she resigns on his/her own initiative". It is also stated that the dismissal compensation should not include "any kind of bonuses". Such an explicit recommendation in this field has not been included in any of the other guidelines and recommendations, and the conditions for receiving compensation are also peculiar to the Danish guidelines. It may be suggested here that the inclusion of such recommendations in the guidelines reflect the more egalitarian wage structure of Denmark in comparison to other countries in the European Union.

5.2.4 **FINLAND**

No Finnish organisation or institution has taken the initiative to draft any recommendations, principles or codes of good practice on corporate governance.[70] However, some provisions in the Finnish Companies Act (734/1978, as amended) might be mentioned in this context, as they show the degree to which principles of corporate governance have been taken up by the legislator.

What can be underlined is that the "one share – one vote" principle (stated in chapter 3, section 1 a, subsection 1 of the FCA) is deemed to be the starting point of shareholders' voting rights. Thus, each share shall carry one vote in all matters handled at the General Meeting of the Shareholders. The Article of Association may, however, stipulate that the shares can carry different numbers

[70] Notwithstanding, in order to obtain a clear picture of the situation of corporate governance in Finland, it could be worth making reference to the *Rules of the Helsinki Stock Exchange* (http://www.hexgroup.com/regulation/englanti/contents.html).

of votes. The rationale behind this clause (allowing the existence of shares with multiple voting rights) is that each share shall carry at least one vote. Therefore, different numbers of votes may be attached to the shares by a introducing different classes of shares in the Article of Association.[71]

5.2.5 France

In France, there have been a few reports and recommendations issued in the field of corporate governance. The Committee on Corporate Governance chaired by Marc Vienot has released two reports on corporate governance, in 1995 and 1999 (the Vienot I and II reports).[72] The AFG-ASFFI Commission on Corporate Governance also issued, later in 1999, a set of recommendations on corporate governance for publicly traded companies. These reports focus on somewhat different topics, and it would seem that the AFG-ASFFI recommendations cover a wider array of subjects than the Vienot reports.

The AFG-ASFFI principles address, among other topics, the question of separation of the oversight and executive functions of the company, and recommend that the positions of Chairman of the Board and Chief Executive Officer should be kept separate. In this, the AFG-ASFFI provisions are quite similar to those of the Belgian recommendations (see section 6.2.2 *supra*). Another question discussed in the AFG-ASFFI recommendations is the number of directors on the board: the recommendations note that French law prescribes that there shall be at least three and no more than twenty-four directors on the board. The AFG-ASFFI Commission suggests that the number of directors should be kept at a "reasonable level", and that a limit of sixteen members should be imposed in practice.

The Vienot II report elaborates on some points that are not discussed in detail in the AFG-ASFFI recommendations, such as the disclosure of remuneration awarded to management and directors. It may be interesting to observe in this context that the Vienot II report suggests that some remuneration amounts awarded to directors should be disclosed individually. This recommendation would seem to go further than the OECD guidelines in this respect and to be more in line with the suggested amendments to these guidelines issued by the

---

[71] For a more accurate analysis, see an unofficial translation, *The New Finnish Companies Act*, Edita Ltd, Helsinki 1997.

[72] Available at the following website: http://www.ecgn.ulb.ac.be/ecgn/docs/codes/vienot1-fr.pdf and http://www.ecgn.ulb.ac.be /ecgn/docs/codes/vienot2-en.pdf

ICGN, wherein it is stated that the remuneration amounts of individual directors should "preferably" be disclosed by the company.

As regards the presence of non-executive directors on the board, the Vienot II report is of the opinion that at least one-third of the board should be made up of such directors, while some committees should contain as large or larger a number of non-executives (non-executive directors should account for at least one-third of the audit and appointment committees, and the remuneration committee should contain a majority of such directors).

The final provisions of the Vienot II report concern the implementation of the recommendations of the report. The considerations of the Committee on this point mirror those expressed in the Belgian guidelines: the Vienot II report states that it is necessary that listed corporations should comply with the recommendations set out in the two Vienot reports and explain any deviations from such compliance. In this, the Vienot recommendations follow the same lines as the Belgian and and Greek guidelines: the adoption of the "comply or explain" approach by various countries would seem to suggest that such an approach has gained some acceptance in the European Union member states.

5.2.6 GERMANY

The German Panel on Corporate Governance has issued a **Code of Best Practice for Corporate Governance**, in which frequent references are made to the OECD Guidelines. In the German "Corporate Governance Kodex"[73], it is noted that those provisions are based on the existing German company law.[74] This is the case: (i) in the field of protection of shareholder's rights, through provisions in the German Act on Corporate Control and Transparency and the German Stock Corporation Act (*Aktiengesetz*), (ii) with regard to the equal treatment of shareholders, it is asserted without qualification that the principles stipulated by the OECD are in place for German companies and (iii) the disclosure and transparency rules in the OECD guidelines are, according to the Code, covered by provisions in a number of Acts (the German Stock Corporation Act, the German Securities Trading Act, the German Commercial Code, the German Antitrust Act and the German Banking Act).

---

[73] Drafted by the Cromme Committee.

[74] See http://www.corgov.de/english/grundsaetze.shtml

An important element of corporate governance in German companies is co-determination. In large corporations of more than 2,000 employees, half of the supervisory board members (Aufsichtsrat) are employee representatives, and shareholder representatives the other half.[75] Apart from the co-determination in the decision-making process, every plant with at least five employees is entitled to a works council. This works council negotiates key issues with the management, in particular hiring of new employees, new technology, overtime, redundancies, short-working time and social plans for redeployment and early retirement. The German model is thus characterised by a dialogue of the firm's constituencies which builds up consensus on key managerial issues regarding the status of employees. This model is based on long-term goals and activities and less on market-oriented trends.[76]

5.2.7 GREECE

The Committee on Corporate Governance in Greece has adopted a series of principles on corporate governance.[77] These principles display a quite high degree of similarity with the recommendations of the Belgian Banking and Finance Commission, and as such are more far-reaching in their implications than the OECD Guidelines. The introductory section of the recommendations asserts that any direct introduction of statutory regulations raises the risk that compliance may be enforced to the letter rather than to the spirit of efficient governance: this statement echoes the almost identical assertion made by the Belgian Banking and Finance Commission in its set of recommendations for Belgian listed companies. Another point where the Greek recommendations display a high degree of similarity with the Belgian principles is in the suggestion made that a "comply or explain" approach should be adopted by the relevant authorities. Moreover, the Committee on Corporate Governance in Greece recognises the right to cast a vote for each share, regardless of class, as a basic shareholder right. In this adoption of the "one-share, one-vote" principle, the Greek recommendations once more mirror the Belgian guidelines issued ten

---

[75] Provisions in Mitbestimmungsgesetz, AktG, Montanmitbestimmungsgesetz.

[76] S. Vitols, *op.cit.* p. 352, 360.

[77] For a further analysis, see http://www.ismm.ru/corp/greece.htm. See also *Principles on Corporate Governance in Greece: Recommendations for its Competitive Transformation,* Committee on Corporate Governance in Greece (under the co-ordination of the Capital Market Commission) available at the following website: http://www.ecgn.ulb.ac.be/ecgn/docs/codes/greece-engl.pdf

months previously. A new law[78] has amended the Greek law 2190/20 concerning public corporations.

5.2.8 IRELAND

The Irish Association of Investment Managers (IAIM) has issued a set of guidelines for corporate governance, share option and other incentive schemes.[79] These guidelines do not, thus, cover all the questions and areas discussed in the OECD guidelines and in many of the national recommendations, but centre on issues pertaining to the remuneration of management and the operation of option and/or incentive schemes for the employees. In this limited field, some interesting observations and conclusions can be drawn from the Irish guidelines. First of all, the IAIM endorses the UK Combined Code on Corporate Governance in its entirety, noting that the requirements regarding disclosure of director's remuneration have hitherto differed considerably between Ireland and the UK, and that the requirements set out in the UK Combined Code should be adopted in Ireland requiring the Irish Stock Exchange to amend its Listing Rules accordingly. The Irish Stock Exchange also affirms that it has incorporated certain provisions of the Combined Code in the Listing Rules of the Exchange (June 2001).

As regards specific procedures for the determination of remuneration, the IAIM guidelines assert that the remuneration of executive directors should be determined by a special remuneration committee, made up wholly of non-executive directors. In this, the guidelines display a high degree of similarity to those set out in the ICGN Statement on Global Corporate Governance Principles (see section 5 *supra*), wherein it is stated that the remuneration committee of the board should be made up "wholly or predominantly" by non-executive directors. The UK Combined Code is expressly invoked as the source of this proposal in an Irish context. The IAIM Guidelines also contain some provisions limiting the amount of remuneration, more specifically a rule that options granted to any director should not exceed 4 times his/her total annual emoluments from the companies involved in a share option scheme. This would seem to be a delimiting provision of the same kind as the Danish rule on maximum dismissal compensation, if considerably less extensive in its scope and application than the principle suggested by the Danish Shareholder's Association.

---

[78] Law 3016/2002 (Government Gazette 110 _/17-05-2002).

[79] See http://www.ecgn.ulb.ac.be/ecgn/docs/codes/iaim.pdf.

5.2.9 ITALY

The Committee on Corporate Governance in Italy has issued a report (the Code of Conduct)[80] in which a number of principles for companies are set out. These principles do not address questions of shareholder's rights or issues pertaining to the procedure at shareholder meetings, but focus instead on the roles and functions of management and the board of the company. It is recommended that a number of board members shall be non-executives, and the comments made in conjunction with the Code observe that non-executive directors normally outnumber executive directors in Italy. On a detailed level, the Code of Conduct recommends that the committee is responsible for the appointment of directors should contain a majority of non-executive directors. The same composition is recommended for the remuneration committee. General remarks are also made with regard to the relation between the board and the management, in which context the Code repeats the basic principles that seem to be shared by the European Union countries (namely, that the board should exercise its functions independent from management).

Despite the applicability of these general principles, in February 1998 the Italian Government passed an Act reforming the Law on Financial Services,[81] Stock Exchanges and Listed Companies. With regard to listed companies, the reform was intended to strengthen minority shareholders' rights. The idea behind the new rules on corporate governance was that banks and active institutional investors would make use of these rights in their monitoring of listed companies.[82] A reduction of the agency costs stemming from the separation between ownership and control in listed companies would follow, with beneficial effects for shareholders' wealth and for the national economy as a whole.

More recently, 4 years after the enactment of the above-mentioned Decree 24 February 1998, No 58, the Italian Government is in the process of passing another act reforming the Company Law (with special regard to Listed

---

[80] *Italian Report & Code of Conduct (Preda Code)* available at the following website: http://www.ecgn.ulb.ac.be /ecgn/docs/codes/CodeofConduct.pdf

[81] *Testo Unico delle disposizioni in materia di Intermediazione Finanziaria*, Legislative Decree 24 February 1998, No 58, http://www.ecgn.ulb.ac.be/ecgn/docs/codes/TestoUnico(eng).pdf

[82] M. Bianchi e L. Enriques, *Corporate Governance in Italy After the 1998 Reform*: *What Role for Institutional Investors?*, in Quaderni di Finanza CONSOB, No 43- January 2001.

Companies),[83] and a Committee of Experts for the Corporate Governance of Listed Companies has been established with the aim of putting under examination the possibility of drafting a ***Corporate Governance Code***[84] tackling the following main points: (1) Role of the Board of Directors;[85] (2) Composition of the Board of Directors; (3) Independent Directors; (4) The Chairman of the Board of Directors; (5) Information to be provided to the Board of Directors; (6) Confidential Information; (7) Appointment of Directors; (8) Remuneration of Directors; (9) Internal Control; (10) Internal Control Committee(11) Transactions with related parties; (12) Relations with Institutional Investors and other Shareholders; (13) Shareholders' Meetings; (14) Members of the Board of Auditors.

It should be noted that one of the main value highlighted under section (11) – namely related to the relationships with markets participants - is **fairness**, which is deemed to reflect best international practice as well as having a basis in Italian legislation on conflicts of interest (one of the hottest topics in Italy). In fact, on the one hand, "substantial fairness means the fairness of the transaction from the economic point of view, as when, for example, the consideration for a good is in

---

[83] Note that the Italian Parliament has already approved a draft of a Legislative Decree, due to be enacted at the beginning of 2003.

[84] Available at http://www.borsaitalia.it/Corporate Governance form (4236).htm

[85] As stated in the document, the board of directors' tasks include providing strategic guidance, as well as organisational guidance for the group. The board is also the collective body responsible for verifying the existence of the controls needed to monitor the performance of the company. In addition, the board has the authority to appoint one or more managing directors and an executive committee, requiring them, however, to provide adequate information on the exercise of the powers delegated to them. The Committee believes that the board has the right and the interest to monitor that there is not a significant concentration of decision-making power in the bodies with delegated powers without an adequate system of controls. In fact, while it is certainly necessary for companies to have a strong executive leadership endowed with adequate powers and able to exercise them to the full, it is equally necessary for the board of directors, collectively, to supervise the running of the business in a predetermined and agreed manner. At all events, the Committee recommends that, in addition to matters reserved to the board by law or the bylaws, the powers delegated to managing directors should not cover the most important transactions (including, in particular, those with related parties), the examination and approval of which remains the exclusive responsibility of the board. The Committee recommends that the board of directors should establish guidelines and criteria for identifying such transactions. The information provided at the shareholders' meeting shall be sufficiently detailed so as to allow the advantages the transactions offer the company to be understood. The appointment of an executive committee does not relieve the board of directors of any of the tasks assigned to it under this article.

line with the market price". On the other hand, procedural fairness means compliance with the procedures that are intended to ensure the substantial fairness of transactions.[86]

Moreover, as far as **relations with institutional investors and other shareholders** are concerned, "the chairman of the board of directors and the managing directors shall, while complying with the procedure for the disclosure of documents and information concerning the company, actively endeavour to develop a dialogue with shareholders and institutional investors based on recognition of their reciprocal roles. They shall designate a person or, where appropriate, create a corporate structure to be responsible for this function."[87]

The specification that the dialogue with institutional investors must be established in compliance with companies' communication procedures is intended as a reminder that it must not lead to disclosure of of important facts before they are communicated to the market.

The Committee deemed that the behaviour of institutional investors was beyond the scope of its remit. It nonetheless has recognised that corporate governance rules contained in the Code of Conduct may induce more listed companies to apply it.

---

[86] In order to avoid conflict of interests under the aegis of fairness, under point 11.2 is set out that "Directors who have an interest, even if only potential or indirect, in a transaction with related parties shall: a) promptly inform the board in detail of the existence of the interest and of the related circumstances; b) abandon the board meeting when the issue is discussed.

[87] This is due to the fact that the Committee believes that it is in the interest of listed companies to establish a continuous dialogue with all shareholders and, in particular, with institutional investors. In fact, correct, complete and continuous communication with shareholders is something that is appreciated by present and prospective investors. In view of the special role and functional specialisation of institutional investors, the Committee recommends that companies identify the person responsible for relations with investors and that highly capitalised companies with a broad shareholder base establish a corporate structure devoted to this function and provided with adequate means and professional skills. The Committee also recognises that, in smaller companies with a simpler organisation, the task of handling investor relations can be performed directly by appropriately identified members of the top management of the company.

5.2.10 Luxembourg

In Luxembourg, no set of corporate governance guidelines seems to have been issued, and thus the rules laid down by law are the main sources of legal material in this area. The relevant provisions are binding, as opposed to many of the statements issued by organisations in other countries, and are prudent in comparison with the recommendations issued by independent actors such as ICGN or Hermes Investment Management Limited. Rules are laid down on the reporting requirements of listed companies: these rules set down requirements that do not appear to be overly restrictive (listed companies are required to issue annual and semi-annual report incorporating financial and other information of relevance to outside parties).

5.2.11 The Netherlands

A set of recommendation on corporate governance in the Netherlands was issued in 1997, the so-called Peters report.[88] This report contained forty recommendations made by the Dutch Committee on Corporate Governance. The report is not drafted in the form of provisions for the Stock Exchange (as is the case in Belgium and Ireland), but rather as a set of recommendations by an independent committee similar to the committees issuing guidelines in Germany and Greece. The points made in the Peters report are quite general in nature and do not go into great detail. The document contains no discussion on such issues as the relation between ownership and shares and voting rights or the composition of the board and its committees, and is thus not as enlightening as many of the guidelines and recommendations issued in other EU countries.

5.2.12 Portugal

In Portugal, the Commissâo do Mercado de Valores Mobiliàrios (the Securities Market Commission) has adopted a set of recommendations on corporate

---

[88] *Peters Report & Recommendations* in http://www.ecgn.ulb.ac.be/ecgn/docs/codes/nl-petersreport.pdf.

governance.[89] The principles stated in this document are quite general and noncommittal, consisting mostly of broad guidelines and statements of intent. No detailed prescriptions are given with regard to such questions as voting principles, the compensation of board members or the relations between board and management. Those recommendations do not go very far in comparison to the guidelines that have been drafted in other EU countries. A general admonition to refrain from "poison-pill" strategies is laid down, and it is recommended that special committees be set up within the board of directors to handle, matters pertaining to the nomination and remuneration of directors. Another principle set out in the recommendations is that one or more members of the board should be independent in relation to the dominant shareholders. This practice is "encouraged" by the Securities Market Commission: the precise wording, and the suggestion that "one or more" such members should be included, would seem to imply that this rule is far more limited in its scope than the recommendations drafted in Belgium, France or Ireland.

5.2.13 Spain

In Spain, the Comisión Especial para el estudio de un Código Etico de los Consejos de Administración de las Sociedades adopted, in February 1998, a set of recommendations on corporate governance, known as Código de Buen Gobierno or (more appropriately) *El Gobierno de las Sociedades Cotizadas*.[90] This code of good practice is composed of three different parts focusing on: (I) the main political aims of the initiative within the framework of the Spanish regulatory reform; (II) a detailed analysis of the role and functions of the Board of Directors, with particular stress both on the relationship between the Board itself and the shareholders, and on the rules of disclosure and transparency; and finally (III) what is properly defined as *Código de Buen Gobierno*, containing a set of broad guidelines on the rules of conduct of the different bodies involved in the corporation. One of the most important principles set out in such recommendations is that one or more members of the board should be independent in relation to the dominant shareholders.

---

[89] *Recommendations on Corporate Governance*, Comissão do Mercado de Valores Mobiliários, http://www.ecgn.ulb.ac.be/ecgn/docs/codes/cvmv(eng).pdf.

[90] See *Código de Buen Gobierno*, http://www.ecgn.ulb.ac.be/ecgn/docs/codes/codgoes1.pdf.

The Commission entrusted with the drafting of the Code is not a private sector initiative but was instead it has established following a proposal by the Minister of Economy.[91]

5.2.14 **SWEDEN**

In Sweden, as in Denmark, the entity responsible for the drafting of recommendations on corporate governance is the shareholder's association. The guidelines issued by the Swedish shareholder's association develop in some detail various areas in the field of corporate governance.[92]

It is interesting to note that the Swedish guidelines include a provision that is identical to the rule set out in the Danish corporate governance principles with regard to the dismissal compensation of a director. That is, the Swedish recommendations state that the managing director should not receive severance payment in excess of the equivalent of two years' basic salary, and that no bonus should be paid out. Furthermore, the recommendations suggest that no severance pay shall be awarded if a managing director resigns at his/her own initiative or where he/she has seriously mismanaged the assignment.

The recommendations suggest that a remuneration committee should be set up as a subgroup of the board, but no principles are suggested with regard to its precise composition. Furthermore, the recommendations do not contain any provisions on voting rights.

5.2.15 **UK**

In the UK, different initiatives aiming to draft rules and principles on corporate governance have resulted in a number of reports, statements and recommendations being issued. One document (the so-called Greenbury Recommendations)[93] deals exclusively with the question of remuneration for

---

[91] It should be noted that all the members of the Commission were appointed after a decision taken at the ministerial level on 24 March 1997. This also applied in the establishment of another Commission acting in corporate governance matters, called Comision Nacional del Mercado de Valores (CNMV) - the agency in charge of supervising and inspecting the Spanish Stock Markets – which was created by the Securities Market Law (No 24/1998).

[92] Corporate Governance Policy, Swedish Shareholders' Association, http://www.ecgn.ulb.ac.be/ecgn/docs/codes/aktiespararna.pdf.

[93] http://www.ecgn.ulb.ac.be/ecgn/docs/codes/greenbury.pdf

board members, and goes quite far in its recommendations. It suggests that the board should set up a special remuneration committee, and that this committee should consist exclusively of non-executive directors. In advocating this arrangement, the Greenbury Recommendations go further than most of the other collections of corporate governance principles adopted in other EU countries: as the question has been addressed in other EU states, the recommendations have not gone further than suggesting that some or, in certain cases (Belgium, Greece), a majority of the members of the remuneration committee should be non-executive directors. The Greenbury recommendations support detailed reporting of the elements in individual remuneration packages, a demand which is also expressed in the ICGN amendments to the OECD Guidelines (see section 5 *supra*). They would also seem to be one of the first collections of guidelines where the "comply-or-explain" approach is laid down as a vehicle to achieve an improved corporate governance regime.

A more recent (January 2001) set of guidelines on corporate governance is the Code of Good Practice issued by the Association of Unit Trusts and Investment Funds (AUTIF).[94] These guidelines in themselves are quite wide in scope and go into details. The practical interest of the Code as such is rather limited in view of the broad and non-committal manner in which the recommendations are drafted, but the recommendations also include references to the Combined Code of the London Stock Exchange. This body of rules contains provisions that are more detailed, and they have a direct bearing on the behaviour of companies listed on the London Stock Exchange, since the principles laid down in the Combined Code must be adhered to by all such companies. The procedure for ascertaining whether a company has complied with the Combined Code or not is outlined and it is worth noting that a "comply-or-explain" approach has been adopted by the Stock Exchange Authorities.[95]

The Combined Code elaborates on the desirability of maintaining a division of functions within the bodies of a company, and states (in its provision A.2.1.) that a decision to combine the roles of chairman and chief executive should be publicly justified.

---

[94] http://www.investmentfunds.org.uk/closed/members/circulars/Green/002-01-01.pdf

[95] In the Annex of the Listing Rules of the London's Stock Exchange is written that "the company will be required either to confirm that it complies with the Code provisions or – where it does not – provide an explanation. Again, it must be for shareholders and others to evaluate such explanations" (point 5 of the Preamble).

The Combined Code also recommends that a board should include a balance of executive and non-executive directors, even though no specific ratios or minimum numbers of non-executives are set down in the relevant provision. In some of its provisions, the Combined Code echoes the earlier recommendations issued: when the Code recommends that "levels of remuneration should be sufficient to attract and retain the directors needed to run the company successfully, but companies should avoid paying more than is necessary for this purpose", this wording corresponds in full to a principle set out in the Greenbury Recommendations. As regards the question of executive remuneration, however, the Combined Code does not go as far as the Greenbury Recommendations, merely recommending that a remuneration committee be set up, without elaborating on how such a committee should be organised.

Similar provisions relating to accountability and auditing are included in the Combined Code: in this area, the Code states that a "sound system" of internal control should be maintained and that an annual review should be undertaken of risk management as well as financial, operational and compliance controls. Furthermore, it is recommended that an audit committee be established under the auspices of the board.

A recent compilation of principles and recommendations on corporate governance is the Statement on UK Corporate Governance and Voting Policy 2001, drafted by Hermes Investment Management Limited.[96] These principles address a number of issues pertaining to corporate governance, such as the composition of the board and its committees, the separation of roles at the highest level, the determination of the remuneration of board members and the information that should be included in the annual and periodical reports and statements.

The Hermes Statement asserts that separation of the roles of chairman and chief executive is highly desirable, and that deviations from this principle are generally not desirable.

CONCLUSION

1. Corporate governance is increasingly becoming a global, transnational language encompassing a set of different rules, ranging from minority shareholders' rights to auction-type bid procedures for public projects. As

[96] http://www.hermes.co.uk/corporat/PDFs/CorpGov.pdf

shown in the paper, corporate governance is indeed part of a bigger picture, parts of which can be found in corporate law, administrative law, securities laws and supervisory rules.

2. Despite these global trends, in a European context this matter (mainly developed in the Anglo-Saxon culture) has to deal with the Community Law of the Single Market for financial services, based on the three principles of: (i) minimum harmonisation of national laws through Community directives; (ii) home-country control of financial institutions by national regulators; and (iii) mutual recognition of national competence. As for international markets, the effectiveness of this framework is mostly dependent on the establishment of co-operative relations between the financial regulators of Member States, which are due to act according to the "law of co-operation" at a supranational level.

3. As far as the topical features of corporate governance are concerned, ownership and control are separated in a corporation, but financial regulators are supposed to limit and mitigate through corporate governance's practices agency costs by imposing transparency and disclosure duties.

4. IFIs have an important role to play in assisting countries in strengthening their corporate governance systems. The OECD principles constitute a recognised standard that other international organisations use in the framework of their projects. To the extent that international principles are to be considered as "soft law" without any legal enforcement mechanisms, their application by private institutions and public bodies is fostered by monitoring from international organisations in their capacity as lenders. However, it should be noted that only structural changes have sustainable effects. On one hand, national laws must be reinforced with sound corporate governance practices. On the other hand, national authorities and private companies need to be educated to monitor and apply sound rules of corporate governance.

5. Banks, in their capacity as minority shareholders and institutional investors, can contribute to strengthening corporate governance.[97]

---

[97] Please note that the Community legislation regarding banking services, which is for the most part consolidated under the Codified Banking Directive, provides the main examples regarding the features of the law of co-operation between European financial regulators. See Directive 2000/12/EC of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions, OJ L 126, 26.5.2000, p. 1.

6. Corporate governance rules may not be effective unless they are enforced. That enforcement mechanism can be played by a market for corporate control because it can put a price on adverse managerial decisions and thus discipline managers. In order to achieve a market for corporate control, measures that promote such a market, such as the proposed take over directive, should be given priority at the EU level.

Annex I : Comparative Table

Country	National guidelines, recommendations and codes of good practice on corporate governance	Date
AUSTRIA	No organisation or institution has taken the initiative to draft any recommendations or principles on good corporate governance	
BELGIUM	**"Merged" Code** Belgian Corporate Governance Commission (an initiative of the Brussels Stock Exchange) and the Commission Bancaire et Financière/Commissie voor het Bank-en Financiewezen The "Merged Code" resulted from the : **Cardon Report (1998) &** **Banking and Finance Commission Report (1998)** **"Guidelines on Corporate Governance Reporting"** Issued 18 November 1999	December 1998

DENMARK	**Guidelines on Good Management of a Listed Company (Corporate Governance)** Danish Shareholders Association	February 2000
FINLAND	No organisation or institution has taken the initiative to draft any recommendations or principles on good corporate governance	
FRANCE	**Vienot I Report** Conseil National du Patronat Francais (CNPF) and Association Francaise des Entreprises Privees (AFEP) **Vienot II Report** Mouvement des Entreprises de France (MEDEF) [formerly CNPF] and Association Francaise des Enterprises Privees (AFEP) **Recommendations on Corporate Governance** AFG-ASFFI Commission on Corporate Governance	July 1995 July 1999 September 1999
GERMANY	**Cromme Commission** Commission charged to develop a German corporate governance Kodex, following the recommendations of the	Ongoing

	Baums Commission **Baums Commission Report** (German title : Bericht der Regierungskom-mission Corporate Governance) **Corporate Governance Rules for German Quoted Companies** German Panel on Corporate Governance **German Code of Corporate Governance (GCCG)** Berliner Initiativkreis Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG) German Ministry of Justice	10 July 2001 January 2000 June 2000 Ratified on 5 March 1998
GREECE	**Principles on Corporate Governance in Greece: Recommendations for its Competitive Trans-formation** Committee on Corporate Governance in Greece (under the co-ordination of the Capital Market Commission) New law 3016/2002 amending Law 2190/1920 introducing independent directors	October 1999 May 2002

IRELAND	**Corporate Governance, Share Option and Other Incentive Schemes** Irish Association of Investment Managers ("IAIM")	March 1999
ITALY	**Report & Code of Conduct ("Preda Code")** Committee for the Corporate Governance of Listed Companies Source : Milan Stock Exchange **Testo Unico sulle disponsizioni in materia di intermediazione finanziaria** Law Reform based on Draghi Proposals **Corporate Governance Code** Committee for the Corporate Governance of Listed Companies	October 1999 February 1998 Revised edition: July 2002
LUXEMBOURG	No organisation or institution has taken the initiative to draft any recommendations or principles on good corporate governance	
THE NETHERLANDS	**Peters Report & Recommendations**	June 1997
PORTUGAL	**Recommendations on Corporate Governance** Comissão do Mercado de Valores Mobiliários (CMVM)	November 1999

SPAIN	**Código de Buen Gobierno**	February 1998
SWEDEN	**Corporate Governance Policy** Swedish Shareholders' Association	January 2000
UK	**Cadbury Report** **Greenbury Report** **Hampel Report (Final)** **The Combined Code** Part of the London Stock Exchange Listing Requirements **Internal Control : Guidance for Directors on the Combined Code** (Turnbull Report) Institute of Chartered Accountants in England and Wales **The KPMG Review Internal Control: A Practical Guide** **Code of Good Practice** Association of Unit Trusts and Investment Funds ("AUTIF") **Hermes Statement on Corporate Governance and Voting Policy**	December 1992 July 1995 January 1998 June 1998, 1999 January 2001 July 1998