

**Government Commission
German Corporate Governance Code**

Chairman

[TRANSLATION]

Government Commission on the German Corporate Governance Code
c/o Commerzbank AG, 60261 Frankfurt am Main

To:
European Commission
via e-mail
markt-complaw@ec.europa.eu

**Chairman
Klaus-Peter Müller**

Postal address:
60261 Frankfurt am Main

Business premises:
Kaiserplatz
60311 Frankfurt am Main

Telephone +49 69 136 – 20
Fax +49 69 136 - 471 44
stab.corp.gov.kodex@commerzbank.com

Frankfurt am Main, 7 July 2011

Statement on the European Corporate Governance Green Book

The Government Commission on the German Corporate Governance Code (hereinafter Code Commission) is responsible for the annual review and, where necessary, amendment of the recommendations of the German Corporate Governance Code against the backdrop of national and international developments.

1. General

The Code Commission welcomes the declared goal of the Green Book to examine and to evaluate the current Corporate Governance Code for European companies.

Corporate governance and corporate social responsibility

The Commission supports the approach taken in the Green Book of dealing

Members: Klaus-Peter Müller (Chairman), Prof. Dr. Dres. h.c. Theodor Baums, Dr. Hans-Friedrich Gelhausen, Dr. Dr. h.c. Manfred Gentz, Dietmar Hexel, Ulrich Hocker, Prof. Dr. Henning Kagermann, Max Dietrich Kley, Peer M. Schatz, Christian Strenger, Daniela Weber-Rey, Prof. Dr. Axel von Werder, Prof. Dr. Beatrice Weder di Mauro

separately with the important topics of corporate governance and corporate social responsibility and possibly adopting different regimes.

Inclusion of shareholders

The Code Commission generally welcomes the inclusion of company shareholders. However, it should be noted that codes of conduct for shareholders and their authorised officers, such as duties of transparency and independence laws, are to be sent directly to the shareholders and their authorised officers. The actual addressees of the Corporate Governance Code are the Management Board and Supervisory Board of the companies. They cannot fulfil recommendations geared towards shareholders. The Code Commission strongly supports some of the measures described in the Green Book (set out in detail below), however it also recommends proposals which are designed to urge shareholders to take an interest in the continued existence of the companies and their long-term added value and encourage them to take a more proactive stance on issues of corporate governance, not to place it in the context of a corporate governance framework, but where necessary, to incorporate it into a separate regime.

Composition of the Supervisory Board

The Code Commission is in general agreement with the estimation of the Green Book that Supervisory Boards should be composed of members of differing opinions, competencies and appropriate professional experience, who are also willing and able to invest adequate time in their task as a member of the Supervisory Board, as well as critically examine the proposals and decisions of the Management Board. Furthermore, the Code Commission agrees that the composition of the Supervisory Board should be adapted to the business activities of the company. Reservations regarding the answer to individual questions are

based on the desire to uphold the flexibility and self-determination of companies and not to place any excessive bureaucratic burdens on them. According to section 4 of the Green Book, the latter should be excluded – but only subsequently – through a detailed impact assessment.

Risk management responsibility

The approach of the Green Book to emphasize the responsibilities of the Supervisory Board in the area of risk management has the general approval of the Code Commission. The Code Commission is convinced that risk management not only amounts to the identification and treatment by the company of the important risks, but also includes the fundamental decision of which risks a company should be willing to take in general.

The German Corporate Governance Code reflects this conviction in its recommendations to the Management Board to coordinate with the Supervisory Board (section 3.2) regarding the strategic direction of the company, which of course includes an assessment of risks in addition to opportunities, and to regularly inform the Supervisory Board about the risk situation of the company, risk management and compliance (section 3.4 para. 2). It also opens in section 3.3 the opportunity to subject decisions that could fundamentally alter the asset, finance and income situation of the company to the approval of the Supervisory Board. However, the considerations of the Green Book to also charge the Supervisory Board with responsibility for defining risk policy exceed this and continue to draw criticism in Germany, since the definition of risk policy and the associated risk management is fundamentally viewed as a sole competency of the Management Board. However, from the Code Commission's point of view, the Supervisory Board certainly bears the responsibility for approving the risk profile and the company's risk appetite as well as for monitoring adherence to objectives

[TRANSLATION]

connected with the risk profile (see section 0 below, statement on questions 11-12). At the same time, however, care must be taken that the Supervisory Board is not given any tasks that are clearly the responsibility of the Management Board. This should be made clear by the EU Commission.

Quality of the declarations of conformity

However, the Code Commission exercises caution with regard to the statement of the Green Book that the quality of the companies' explanations in cases of divergence from code recommendations is not satisfactory and should thus have to be monitored publicly.

German listed companies are legally required to declare annually whether or not they have complied with the recommendations of the German Corporate Governance Code. Since the Accounting Law Modernisation Act (*Bilanzrechtsmodernisierungsgesetz*) of 25 May 2009 went into effect, which implements the rules of regulation 2006/46/EG, companies are required not only to disclose divergences from the code recommendations, but also give reason for these divergences.

Therefore, a reason was required for divergence from code recommendations for the first time in 2010. Against this backdrop, the statements of the Green Book regarding the quality of the reasons for divergences from code recommendations, insofar as pertains to German companies, seem premature.

The Code Commission has fundamental reservations regarding the planned review by public entities of the quality of information contained in the declarations of conformity. As indicated in the answer of individual questions, a public review of the quality of information contained in the declarations of conformity does not achieve the goal of more meaningful declarations, despite the substantial

bureaucratic effort. The review conducted by public entities is a violation of the recognised and valued soft-law approach, which is a general feature of the Corporate Governance Code that has proven itself in the past. The same applies to the considered duty of companies not only to provide a reason for a divergence, but also to declare which measures should be taken in place of the declined recommendation.

2. Area of application of European corporate governance rules

Size-dependent differences

The European legal provisions for corporate governance are currently applied to all listed companies, regardless of the size of the company. The Green Book rightly poses the question, whether EU corporate governance measures should take account of the size of listed companies.

Insofar as EU corporate governance measures are based on the recommendations of national corporate governance codes, distinguishing between large companies and SMEs does not make sense if, as is the case with German corporate governance, the corresponding codes permit companies to diverge from individual recommendations of the relevant code and are only obliged to disclose this divergence and give reasons for it in the declaration of conformity.

Corporate governance measures for unlisted companies

The Code Commission advises against taking Corporate Governance measures on an EU level for unlisted companies. The Green Book has correctly noted that essential Corporate Governance rules are already part of national corporate law, which is applied to unlisted companies. This applies, in particular, to the regular pronounced rules on the protection of minorities as is manifested in the unanimity

rules, quotas and bans on voting.

Corporate Governance measures for listed companies are fundamentally justified in the principal/agent conflict. The individual participants of an open shareholder circle are generally dependent on the management to use the capital they make available to the company in a way that is appropriate, risk-aware manner and in the shareholders' interests. This situation is structurally different in unlisted companies. As a rule, unlisted companies have a closed shareholder circle. The shareholders are more intensively involved in the business conduct of the company and have comprehensive information and co-determination rights. They regularly invest their money for the long term in company activities, and are thus not investors driven by price developments.

3. Detailed notes

On question 3

The authority and responsibility of the Supervisory Board and the Management Board – and thus the members of each executive body – are clearly separated in German law. Such a separation is a natural result of the dualistic system. The German Corporate Governance Code also regulates the cooperation of Management Board and Supervisory Board in paragraph 3 and describes in section 5.2 the tasks and authority of members of the Supervisory Board. From the perspective of German law, Community rules on this matter are not necessary.

On questions 4 through 6

As already stated under General and Composition of the Supervisory Board, the Code Commission agrees in principle with the analysis of the Green Book in section 1.1. Accordingly, the German Corporate Governance Code stipulates in

**Government Commission
German Corporate Governance Code**

Chairman

Page 7 | 6 July 2011

[TRANSLATION]

section 5.4.1 that the Supervisory Board must be composed in such a way that overall its members have the knowledge, skills and specialist experience to duly perform their tasks, and that the Supervisory Board should specify concrete objectives for its composition. In doing so, it must take the company-specific situation into consideration and be mindful of the international activity of the company, potential conflicts of interest, an age limit to be determined for Supervisory Board members and diversity. According to the German Corporate Governance Code, diversity may be defined as professional diversity (section 1.1.1 of the Green Book) and international diversity (section 1.1.2 of the Green Book), as well as gender diversity (section 1.1.3 of the Green Book). Gender diversity is especially emphasized through the code recommendation to make special provision for appropriate participation of women. The goal of the Supervisory Board and the status of implementation should be published in the corporate governance report. The German Corporate Governance Code thus already materially fulfils the requirements implied in the Green Book in its remarks on section 1.1. However, it deviates from the suggestions of the Green Book in this respect by leaving it to the companies to set company-specific goals and have them subsequently evaluated by its stakeholders. In order for companies to have the flexibility in future to react to new developments, it should be left to them to define the degree of detail for the "profile for members of the Management Board". The Code Commission is convinced that both tasks can be best carried out by the companies themselves and that both national and EU legislation is overextended if it is to formulate company-specific requirements for the composition of Supervisory Boards and the qualification of their members.

The issue of the right composition of the Supervisory Board also includes the issue of gender diversity, a subject to which the German Corporate Governance Code devotes particular attention. In this regard, the Code Commission does not believe a gender "balance" or a generally binding quota should be established. A

[TRANSLATION]

one-size-fits-all solution in the form of a generally binding quota for women will not account for the complexity of the issue or the needs of the individual companies. Therefore companies should set targets themselves, publish these and leave it up to stakeholders to evaluate the setting and achieving of targets.

On question 7

Section 100 of the German Stock Corporation Act (AktG) and subs 5.4.5 of the German Corporate Governance Code limit the number of mandates the members of the Supervisory Board may hold concurrently. From the perspective of German law, there is no need for regulation on an EU level.

On question 8

According to section 5.6 of the German Corporate Governance Code, the Supervisory Board should regularly review the efficiency of their activity. This code recommendation is broadly complied with. However, from the perspective of the Code Commission, it may be useful and in the interest of the Supervisory Board to not only review their efficiency regularly, but to have their activity reviewed with the help of a qualified third party in major intervals, but at least once a term. The concrete selection of the third party should be left to the company.

On questions 9 and 10

The German Corporate Governance Code provides for disclosure of the remuneration policy and remuneration report in section 4.2.3 and 4.2.5. Disclosure of the individual remuneration of the members of the Management Board is stipulated by law, while disclosure of the remuneration of members of the Supervisory Board is decided by the General Meeting of Shareholders.

**Government Commission
German Corporate Governance Code**

Chairman

Page 9 | 6 July 2011

[TRANSLATION]

Article 120 para. 4 of the German Stock Corporation Act (AktG) gives the General Meeting of Shareholders the opportunity to decide on the approval of the remuneration system for members of the Management Board without legal obligation.

The remuneration report includes information on past compensation. A resolution on this matter is implied in the discharge resolution for the Supervisory Board.

Further influence of the shareholders on the remuneration of the Management Board, which according to German law is the sole responsibility of the Supervisory Board, would directly concern the division of powers according to German corporate law.

On questions 11 and 12

Under General "Risk management responsibility" it was described that and to what extent the Supervisory Board of a listed German company is involved in defining the risk profile of the company as part of the company strategy and in risk management. However, the finding of the Green Book that it is generally recognised that the Management Board bears primary responsibility for defining the risk profile and for appropriate monitoring, does not apply to listed German companies. It is contrary to the division of powers according to German corporate law. Instead, cooperation in Germany between the Management Board and the Supervisory Board is expected. For this reason, the Supervisory Board cannot be obliged to solitarily ensure that the provisions for operational risk management of the company are effective and appropriate. The requirements of the Green Book, however, appear rather to aim for agreement from the Supervisory Board for the risk profile. Responsibility of the Supervisory Board for such approval of the risk profile and risk appetite of a company and for the monitoring of compliance with

the requirements in the interest of a coherent risk culture would not be contrary to the traditional division of powers in the dualistic system.

The company strategy and corresponding risk profile are disclosed at the General Meeting to the extent required by the shareholders for taking a decision regarding their investment in the company and particularly for discharging the Management Board and Supervisory Board.

The issue of disclosure of relevant, important business risks mentioned in question 11 is accounted for by legal regulations on the risk report.

On questions 13 through 23

It was set out above there are systematic concerns in the EU regarding the inclusion of shareholders and their authorised officers in the Corporate Governance Code. It has been proposed to incorporate this rule in a separate regime. With this proviso, the Code Commission largely agrees on the substance of the analysis of the Green Book in paragraph 2 and supports considerations to increase transparency in the fulfilment of fiduciary duties, establish sufficient independence of wealth managers from their shareholders and further simplify cross-border coordination. The transparency of advisors for proxies should also be increased with regards to the analysis, methods, conflicts of interest, strategies for conflict resolution or conformity or non-conformity with a code of conduct. Furthermore, legislative measures can be taken to limit the opportunity for advisors to perform consulting services for companies that should be invested in.

The protection of minority shareholders is governed by many different approaches in the national corporate laws of the member states. From the perspective of the German system, the corresponding provisions of corporate law and the pronounced case law are sufficient to adequately protect minority shareholders

**Government Commission
German Corporate Governance Code**

Chairman

Page 11 | 6 July 2011

[TRANSLATION]

even against transactions with associated companies. Community-wide regulations should be omitted from the view of subsidiarity and restraint in intervening in national corporate law.

In order to change the inappropriate, short-term thinking of many investors, the Code Commission recommends a formulation similar to that which is contained in the German Corporate Governance Code as an insight from the 2007/2008 crisis: "The Management Board manages the company under its own responsibility and in the interest of the company, in other words, taking account of the interests of the shareholders, employees and other groups connected to the company (stakeholders) with the aim of creating sustainable added value."

Measures to promote the capital participation of employees can certainly be in the interest of the company. However, this is not to be systematically stipulated in the Corporate Governance framework of the EU.

On questions 24 and 25

According to the guideline 2006/46/EG, which was implemented in Germany in the Accounting Law Modernization Act (*Bilanzrechtsmodernisierungsgesetz*) of 25 May 2009, listed companies are required not only to declare, but also give reason for, divergences from code recommendations. In this way, the transparency characteristic of the Comply or Explain principle should be created. It should also – as the Code Commission has indicated on many occasions – encourage companies to reject code recommendations they deem not to be reasonable in their individual case, and thus contribute to a healthy culture of divergence.

The additional proposal of the Green Book that companies should also describe an alternative measure taken if they should decline a code recommendation is only instrumental if the company remains free to follow this recommendation. In

**Government Commission
German Corporate Governance Code**

Chairman

Page 12 | 6 July 2011

[TRANSLATION]

contrast, an obligation to indicate alternative measures taken is more likely to promote restraint from companies in declaring divergences from the code. Companies will be reluctant to take the risk of a public discussion regarding the adequacy of alternative measures. There is therefore the risk that through the obligation to describe alternative measures, companies will tend to feel pressured to accept code recommendations, even if they do not view these as convincing. The proven Comply or Explain approach, which is recognized by companies, will not be well served in this way.

The authority of (public) supervisory authorities to review the quality of information contained in the declarations of conformity, is rejected by the Code Commission.

This also applies to the proposal that each national Code Commission should assume this task themselves, if required. The proven Comply or Explain principle is not well served if the self-organisation forum of business is obliged to monitor compliance with the recommendations in addition to imposing the code recommendations. It is for a valid reason, the task mandated to the Code Commission by the German Ministry of Justice rules out a review of individual declarations of conformity by the Code Commission.

Yours sincerely,

A handwritten signature in black ink, reading "Klaus-Peter Müller". The signature is written in a cursive, flowing style.