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THE THEORY OF ENTERPRISE LAW AND THE HARMONIZATION OF THE RULES ON THE ANNUAL ACCOUNTS AND ON CONSOLIDATED ACCOUNTS IN THE EUROPEAN COMMUNITIES

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The Theory of Enterprise Law and the Harmonization of the Rules on the Annual Accounts and on Consolidated Accounts in the European Communities

by Professor Dr. Thomas Raiser

Giessen

I.

In this paper I shall discuss the theory of enterprise law and the harmonization of the rules on accounting in the EEC. More precisely I intend to question whether the 4th and the 7th EEC Directives on Company Law and the drafts for their implementation in German Law contribute to the explication or further development of the theory of enterprise law. In the first part I shall deal with this theory and with its historical, social and economic backgrounds. I must restrict myself, within the confines of this paper, to the German situation which is, in this field, presumably the most important one. The Directives on Company Law of the EEC and the German Implementation Laws will be dealt with in the second part. I shall not touch upon any details of the future accounting and audition rules, although these have been, for some time, the focus of most debate among book-keepers, auditors and even company lawyers 1). For myself, I take to heart the sentence: iudex non calculat, and moreover I have always found accounting to be a stupid and boring matter.

II.

Let us turn first to the doctrine of enterprise law. Originally, the notions of "enterprise" or of "entrepreneur" were not legal concepts of any particular significance. The German Commercial Code which was enforced, together with the Civil Code in 1900, uses the word mainly in the sense of "undertaking". The fundamental notions of commercial law are the concepts of "merchant", "trade", "partnership", "company", "commercial transaction" etc. 2). It is significant for the style and spirit of the Commercial Code that the rules concerning sole traders and partnerships take first and second place while those concerning the public company follow only in third position. 3) This terminology and structure correspond to the experiences and doctrines of the end of the 19th century. We can characterize by the following six items the economic and political situtation to which the legislation responded:

1.) The fundamental economic structure is the system of free market economy. In this system, economy is principally conceived of as a matter of private activity, gain and responsibility. State law is restricted to merely establishing a framework of general rules in order to guarantee a suitable formal order. Commercial and company law is, for that reason, essentially private law.

2.) The Commercial Code equates, already in its name, commerce with industry. Although the rise of industrial production had long ago begun, the merchant is still the paradigmatic legal actor. The prototype is the sole trader, who carries on his business together with his family and is engaged personally in its daily affairs and liable without limitation for the obligations he enters into through his business. Public and private companies with limited liability have not yet reached a system-forming function.

3.) Sole trader and partnership are legal forms for small units with limited financial resources, low complexity, few employees and narrow extension of business relations. Once again, the main emphasis of the law is focussed on this type of enterprise; whereas big business, represented by the public company, takes second place. The public or even political importance of single companies which might seem to require special legal attention or control is not an issue for legislation in commercial or company law. Further, the law is directed to independent entities: groups of companies and parent-subsidiary relations are still completely outside the perspective of the law.

4.) Sole traders and partnerships also represent and preserve the identity of ownership of the means of production and of control over the firm which is a substantial element of the classical conception of market economy. It is the merchants and partners who are the subjects of rights and duties which arise from their business and are the addressees of the legal norms. Partnerships have no legal personality of their own; according to the official juristic doctrine they are only approximated to legal personably in some instances 4). The legal personality of companies is attributed to the owners' association. The organisational independence of the enterprise as a social system and economic power-center is not noticed by the law. 5)

5.) The workers remain almost outside the horizons of commercial and company law. The Commercial Code included 25 sections about the rights and duties of commercial employees and apprentices 6) but this was not a complete regulation of the contract of employment. Labour law as a separate field of law had not yet emerged. In particular, participation and codetermination rights of the workforce or of trade unions and their influence on entrepreneurial decisions are still unknown.

6.) The state also remains outside the system of commercial law. The law mentions public enterprises, but only in a random manner. 7) In general, running a business is a private issue: the owner runs it according to his own interests in order to gain as much money from it as possible. The social and political importance of enterprises as producers of goods and services for the public and as creators of common wealth is not a topic of legal regulation, but is merely a reflection of the individual struggle for gain. Any idea of social or political responsibility of enterprises and their governance is foreign to this period.

On the whole, the structure and system of the Commercial Code reflects, even today, the conception of the liberal and capitalistic market economy. [8)]

III.

Clearly, we no longer share these views. The economic, social and political overturns that have taken place since the beginning of the centruy have brought about fundamental changes in the actual form of enterprises. No less changed are the legal conditions. Numerous amendments and reforms of commercial, company and labour law have been carried through, the most important ones being the two complete revisions of the Law on Public Companies in 1937 and 1965, [9)] the Workers' Councils Acts of 1920, 1952 and 1972[10)] and the Codetermination Acts of 1951 and 1976[11)]. A significant influence is exerted also by the new legal background formed by the German Constitution, namely the principle of the social state as fundamental maxim of legal order[12)].

The central thesis of my paper is that the theories of enterprise constitution and enterprise law which have become familiar in the FRG and which either supersede or at least supplement the conceptions of commercial law, merchant, partnership, company and company law are expressions of and reflections on these social and legal changes[13)]. The concept of enterprise is conceived as being in contrast to the traditional categories. As such, it is a complex and variable concept which embraces a multitude of elements not necessarily lying on the same level. It includes not only descriptive components which are marks of the economic and legal status it has already reached but also normative aspects and issues of legal policy which suggest the directions of favourable future development. It is a dynamic notion reflecting certain trends and tendencies. Hence an exact definition is difficult even where it is used as a technical legal term. [14)]

Instead of attempting to give a definition, the dimensions and facets of enterprise law may be best described by relating them to the six items mentioned above.

1.) Enterprise law reflects the new macro-economic environment and legal framework characterized in particular by the antitrust laws which both secure and at the same time relativate competition, by the increased potential of the state to control and steer the economic process including certain efforts of global planning, and by the international activity of all major enterprises and, accordingly, the internationalization or transnationalization of the applicable legal norms.

2.) The style of enterprise law is further formed, in contrast to the earlier commercial and company law, by the prevalence of the production and service industries which have overtaken commerce as important factors of economy. From this point of view enterprise law is conceived as a comprehensive theory embracing all autonomous economic units whatever kind and field of activity they comprise.

3.) Enterprise law emphasizes the size of an enterprise instead of the legal type of a company. Its paradigm is the big unit, particularly the public company, and thus the sole trader and the partnership lose their former significance. Its attention is directed especially to groups of companies and to the formation of legal structures for them. It tends to distinguish the applicability of legal rules in terms of size rather than legal form.

4.) Looking at the internal structure, enterprise law is based upon the separation of ownership and control; upon the existence of a professional management whose legitimation is not derived from the ownership of the means of production, but from personal ability; upon the growing importance of experts and staff positions and upon the development of a bureaucratic organization. The predominance of the personality of merchant or entrepreneur is replaced by the enterprise as a social system, organisation and institution or, as is found sometimes in the related law-literature, as an autonomous unit of the economic system.[15] The law has become aware of the fact that the governance of an enterprise includes the exercise of power and therefore demands legal mechanisms of control.

5.) Enterprise law is further substantially involved in the participation and codetermination rights of workers and trade unions. It links and combines company law and labour law in order to clarify in detail the rights and duties of the workers' representatives and the legal mechanism of the cooperation and bargaining processes between shareholders, directors and workforce. It establishes appropriate juristic doctrine on codetermination. During the late sixties and early seventies, when there was a considerable political struggle for equal codetermination this aspect became preponderant. Enterprise constitution was at that time widely used and understood as a model which supported the claims for equal rights of capital and labour in the governance of the enterprise.[16]

6.) Last but not least, the concept of enterprise law is associated with newly awakened interest in the social and political impact of big enterprises as producers of economic wealth, guarantors of jobs and income to numerous people, and centers of social domination which may also gain political influence. Enterprise law implies, in this context, that doing business is no longer merely a private matter but also involves social and public responsibility. From this position far-reaching deliberations and demands are sometimes derived concerning the appointment of representatives of the state or the public to the governing boards of big enterprises, in a similar way to workforce representation.[17]

IV.

It is a strong temptation to describe in detail how these elements developed form and validity in the course of our century but I must waive that task here. However, I shall mention a number of outstanding events that bear on this development. The limits of laissez-faire liberalism and the

political importance of big businesses became obvious during World War I. Walter Rathenau, then still leader of the AEG, voiced them dramatically in his famous essay "Vom Aktienwesen", published in 1917, in which he argued for a restriction of shareholders' influence on the enterprise and for public control.[18] At this time too, awareness grew regarding the legal problems of groups of companies and parent-subsidiary relations. In a number of big enterprises disputes arose between majority and minority shareholders and between shareholders and directors. These disputes were the reason for the formulation of judicial rules on division of power in the governance of the firm.[19] Both streams were canalised within the doctrine of "enterprise per se". Formulated towards the end of the twenties, this doctrine suggested in a rather unfortunate manner that the enterprise was to be thought of as separate from the persons running it.[20] Hence, the doctrine has frequently been questioned, even in recent times, as a misleading paradigm.[21] The legislator reacted to all those tendencies in the famous section 70 AktG 1937, ordering that "the directors of a public company shall govern the company under their own responsibility with regard to the welfare of the enterprise and its workforce and to the common benefit of people and empire".[22] When we eliminate from this rule the aspect of nazi-ideology, it establishes nothing less than the legal separation of ownership and control and of the public responsibility for the governance of public companies.

Codetermination by workers was first established by the Works Councils' Act of 1920 which ordered two seats on the supervisory board of every public company to be granted to workers' representatives.[23] Despite this first legal intrusion into the system of company law, legal doctrine did not become aware of the matter until the foundation of the FRG. The Codetermination Act of 1951, applicable to

the mining and steel industries, ordered for the first time parity of shareholders' and workers' representatives on supervisory boards. One year later, the Works Councils Act of 1952 attributed one third of the seats on the supervisory board of all big companies to the workers.[24]

The formulation "Reform of Enterprise Law", was first used in the program of the national meeting of German lawyers in 1951, which established a commission of experts charging it with preparing for the reform of enterprise law.[25] This commission, which worked until 1957, was primarily engaged in questions of codetermination, of groups of companies and of accounting.[26] It states that "company law does not comprise the enterprise in its totality, because only shareholder and entrepreneur appear as subjects of the economic process within the enterprise".[27] Accordingly, it conceives of "enterprise law as a systematic approach to the acknowledgement that entrepreneurs, owners and workers are, in different ways, participating and sustaining groups" and further that enterprise law is "a means to coming to terms with the macro-economic role of the enterprise."[28] Since then, the concept of enterprise law has become more and more familiar. In 1972, another commission was appointed by the Federal Government with the task of"examining the questions raised by the necessary development from company law towards a comprehensive enterprise law".[29]

The commission was asked to work out propositions for a reform of company law "aiming at the creation of an enterprise law which is adequate to the economic and social development of our time".[30] It published its voluminous report in 1980. The main subjects of its discussions were again the law of affiliated enterprises and codetermination and accounting law. The commission stressed three issues in particular:[31]

1.) The elaboration of models of codetermination which were independent of the legal form of company.

2.) The differentiation of enterprises according to their size instead of their legal form, not only with respect to codetermination, but also with reference to accounting, audition and disclosure etc.

3.) The differentiation between enterprises which have a primary relation in terms of persons and those which are primarily related to capital. This differentiation is conceived of as a systematic one, but also and more important as a program of legal policy. It reflects the perception that the law must be different for person-oriented enterprises where ownership, control, initiative and responsibility are still in the hands of one or a few entrepreneurial persons, and for capital-oriented enterprises which present an anonymous, bureaucratic structure and are governed by salaried managers.

When we attempt to summarize the present status of the doctrine of enterprise law in West Germany, we can ascertain that although the existence of the discipline has been widely acknowledged, there is not yet common agreement on the definition of the concept of enterprise and on the aims and the justification of the new discipline. The central ideas of enterprise law which I have described still give rise to much discussion and criticism.[32] The late Kurt Ballerstedt, one of the leading authors in this field, characterized the situation in 1977 in the sentence: "The relationship between ... enterprise law and company law is the field of disputes whose sharpness presumably exceeds that of the conflict between the schools of Romanists and Germanists during the 19th century. He who looks for a systematic concept of enterprise law, is exposed to the almost monstrous suspicion that he does not take seriously the acknowledgement of market economy."[33]

Of most significance, perhaps, is the use of the notion "interest of enterprise". This concept has been generally adopted in doctrine as well as in the jurisdiction both of the Federal Constitutional Court[34] and the Federal Court of Justice[35]. It also appears in the draft of the 5th Directive on Company Law of the EEC.[36] It functions as a general clause; as a point which crystallizes the process of integration necessary in all enterprises; and as a rule for the judicial evaluation of decisions made by governing boards. However, although widely used, one still finds considerable doubt as to the meaning of the concept and whether it is at all helpful.[37]

The struggle concerning the Codetermination Act, ended with the judgement of the Federal Constitutional Court in 1978, which held the Act constitutional[38]. Since then the discussion has greatly subsided and at present, the opposing forces seem exhausted. The social and political climate has become more conservative and no emotions, excitements or passions are raised by the processes of legislation in the field of enterprise law. The interest of jurists has been focussed on to other questions. The most important and significant events since 1978 have been the 4th Directive of the EEC and its translation into national law. Hence, I now turn to the question of what this new law contributes to the further development of enterprise law.

V.

The Directives of the EEC on Company Law do not, of course, aim at the evolution of enterprise law as a systematic category or political paradigm, nor does the Treaty of Rome offer any legal basis for such an endeavour. The purposes of the Directives are, according to Art.54 sect. III lit g, "the coordination of the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms

with a view to making such safeguards equivalent throughout the Community". With respect to the law of accounting, audition and disclosure, the introduction to the 4th Directive gives three reasons in explanation of this requirement[39]:

- that the activities of companies "frequently extend beyond the frontiers of their national territories",
- that limited liability companies "offer no safeguards to third parties beyond the amount of their assets";
- that equality of competition demands "minimum equivalent legal requirements as regards the extent of the financial information that should be made available to the public".

The 7th Directive further speaks of the need for comparability and equivalence of information about the financial situation of groups of undertakings in favour of shareholders and others.[40]

Enterprise law as understood in Germany can therefore emerge only as a reflection of the Directives. But even so we can detect patterns in them that fit into the scheme of enterprise law and which turn out to be particularly significant and instructive - because they express immanent structures instead of political programs and are hence likely to develop enterprise law more efficiently than political action.

Turning to the 4th Directive, two aspects must be stressed in this context.

1.) The Directive encompasses public and private companies and creates uniform law for both. It abandons the traditional differentiation between them which particularly in accounting and disclosure rules is deep-rooted in Germany. The limited liability appears as the significant common feature which overrides all other attributes. Given the applicability of

the Directive for the German Limited Liability Company it follows that more than 300 000 companies will be forced to change their accounting methods in compliance with the new law[41]. It follows that the transformation of the Directive into German Law will be a major step toward a uniform enterprise law.

2.) Instead of differentiation according to legal form the Directive distinguishes between large, medium-sized and smaller companies; the criteria being a combination of balance sheet total, total net turnover and number of employees. In principle, the rules are applicable to all companies. But the Directive gives Member States a choice of differentiation. They can permit smaller firms to make up the balance sheet and the profit and loss account in an abridged form and exempt them from the audition and publication of the accounts[42]. Smaller firms are defined by the limit of two of the three following elements: 1 Mio Ecu balance sheet total; 2 Mio Ecu net turnover or 50 employees[43]. Medium-sized companies within the limits of 4 Mio Ecu total of balance sheet, 8 Mio Ecu net turnover or 250 employees can be granted less far-reaching relief from the general rules[44]. Clearly these distinctions fit into the picture of enterprise law.

3.) The draft of the German Law on the implementation of the 4th Directive, the so called "Bilanzrichtliniegesetz"[45] goes some way beyond this. It declares the law applicable not only for public and private companies, but also for cooperatives, mutual insurance companies and public utilities[46]. Furthermore, it draws out a great number of detailed rules from the provisions of the Directive which it deems to be general principles of accounting, and derives from them a general system of basic accounting law applicable for all kinds of firms[47]. These rules are

placed in the Commercial Code under the heading "General Provisions"[48]. In the chapters on sole traders, partnerships and in the Laws on Public Companies, Limited Liability Companies amd Cooperatives only those rules appear which are especially applicable for these respective types of enterprises[49]. Originally, the draft already showed the influence of the doctrine of enterprise law in its terminology, since it addressed its provisions to enterprises instead of merchants and companies, and explicitely explained that the concept of enterprise includes sole traders, partnerships, companies, cooperatives etc.[50]. This, in some respect revolutionary, method of legislation raised strong resistance from industry[51], which in part became successful under the new conservative government. Although the legal committee of the Deutsche Bundestag in his deliberations on the draft in principle accepted the new system, it reduced the number of general provisions and further returned to the traditional terminology which refers to merchants, partnerships and companies. From the standpoint of enterprise law, this is clearly a stepback.

Another important event shows an even worse relapse. Notwithstanding the general provisions already the draft had to differ between sole traders and partnership on the one hand and companies on the other. Sole traders and partnerships are not forced to employ the highly sophisticated layouts for the balance sheet and the profit and loss account that are required from companies by the Directive[52]. They are also permitted to provide only abridged notes on the accounts and an abridged annual report[53]. They are not obliged to audition and to the publication of their accounts[54]. Last but not least they are relieved from the prohibition of setting up hidden reserves which, according to the Directive, is strictly valid for all companies[55]. The problem of this different treatment was the so called "Kapitalgesellschaft & Co.", particularly the "GmbH & Co.KG". This hybrid type combines a limited partnership and a limited liability

company by the means of putting the limited liability company in the position of the only general partner. The great advantage of this mixture of legal forms is the absence of any partner who is personally liable, or, in other words, the eventually complete limitation of liability. Whereas other legislations forbid the type or make it impossible, it has much adherence in Germany. We estimate that at least half the limited partnerships are GmbH & Co.KG's, among them the bigger and economically more important ones[56].

The recent development of company law tends to treat this type as a kind of company and to subsume it under company law. This is true for both legislation and jurisdiction[57]. Consequently, the first draft of the transformation law, which was passed by the social-liberal government in 1982, proposed to uncouple the GmbH & Co.KG from the law of partnerships and to put it on a par with the limited liability company[58].

When this intention became known, it aroused fierce resistance from industry which had immediately recognized the GmbH & Co.KG as being a useful loophole from the uncomfortable new provisions[59]. But, to its credit, the former Federal Government withstood the pressure. It took unusual care to explicate the reasons for the equalization of GmbH and GmbH & Co.KG[60]. First, it pointed at the limited liability, which, according to the introduction of the 4th Directive, needs to be compensated by strong accounting, audition and publication rules to provide safeguards for creditors and the public. The draft explicates that the Directive remains silent about the GmbH 6 Co.KG because this type of company plays a major role only in Germany and in the Netherlands. There, too, the government intends to include it in the national

implementation law. The draft further emphasizes that the loophole by which the European law may be evaded must be closed. It goes so far as to hint that if this is not done the FRG risks a complaint being brought by the EEC to the European Court of Justice. Last but not least it stresses that the particularly high rate of insolvency among GmbH & Co.KG necessitates taking strong measures for the protection of creditors.

In spite of all those arguments the new conservative government yielded to continuous pressure from industry and waived the inclusion of the GmbH & Co.KG, without giving any reasons except an apodictic statement that the wording of the Directive does not require its inclusion[61]. Thus political opportunism made its way against better insight in the economic facts and against fairness towards the EEC. My colleagues Lutter, Mertens and Ulmer published a joint ironic comment which concludes by the phrase: "satiram scribere difficile non est". They state that the described change of legal policy "is an interesting piece of learning how legislation can attack itself in the back, if required". Instead they request the legislator to "not lose, on behalf of concessions in daily policy, sight of the longterm structural developments of company law"[62]. These remarks speak for themselves.

VI.

I now turn briefly to the 7th Directive on the consolidated accounts of groups of companies. From the perspective of enterprise law, five issues are worth mentioning:

1.) In itself, the legislative decision to require consolidated accounts is an important step towards enterprise law. The law of affiliated undertakings has always been attributed

to enterprise law, in Germany, because, at least in principle, it acknowledges the economic and legal unity of the group in spite of the juristic personality of its member companies. It indicates that the group is subject to the public interest and that this transcends the necessary legal protection of minority shareholders and of creditors. The Directive articulates this in an introductory remark which states that the coordination of laws in this field aims "at the protection of those interests which exist towards companies"[63]. We can interpret this somehow vague formulation as a token that the organs of the EEC understand consolidated accounts as a means to serve both private and public interests[64].

2.) The 7th Directive proceeds by establishing general rules for all types of business associations. According to Art. 4 sec 1, the consolidated accounts must be drawn up whenever either the dominant or even one dependent enterprise has the legal form of company. Although this is, in theory, no complete abstraction from the legal form, because groups composed solely of partnerships are excluded, the rule covers, in practice, all combines of relevant size and importance. A deeper limitation lies in the right under Art. 4 sec 2 of the member states to exempt a combine from the obligation of drawing up consolidated accounts, when the dominating enterprise does not have the legal form of company. But the Commission has declared that it does not support this provision since it fails consistency in legal policy[65].

3.) Instead of differentiation according to the form of company, the Directive once again uses the size of the enterprise as the relevant criterion. According to Art. 6 sec 1, the member states are permitted to release a group from the necessity of producing consolidated accounts if the total of the enterprises which would be consolidated, does not attain the size of a medium-sized enterprise. The criteria for this distinction follow the 4th Directive.

4.) What must be viewed as remarkable progress from the perspective of enterprise law no less than from the view of the economy, is the further duty to include in the consolidated accounts parent and all subsidiaries without regard to their seat or place of operations: in other words to require a global account[66].

5.) In this context I finally mention the principle of unity. Art. 26 sec 1 orders that, in the consolidated account, the assets and proceeds must be declared in such a way that all companies included are taken as one enterprise. Hence claims and debts, expenses and revenues, profits and losses between the member companies must be eliminated.

VII.

In conclusion, enterprise law is, in German legal doctrine, a new category which emerges from company law and reflects the great changes of our century. Although the term is widely acknowledged and used, discussions and ideologically coloured disputes continue about what the concept means and for what purposes it is useful. Nevertheless, it turns out to be a substantial, paradigmatic notion - a symbol of law in transition. We have seen that important features of the new European accounting law both fit into its pattern and also serve to develop it, although the purposes of European law are quite different. This provides evidence that enterprise law meets the internal structures of the evolutionary process of forming new law. If this is indeed correct, it is not surprising that we still need more time to fully understand and explicate the developments that have so far taken place.

Notes

1) List of references in Lutter, Europäisches Gesellschaftsrecht, 2. Aufl. 1984, 506 ff.

2) §§ 1 ff., 17 ff., 105 ff., 343 ff. HGB

3) §§ 1 ff., 105 ff., 178 ff. HGB

4) A. Hueck, Das Recht der OHG, 32 f.; Fischer, HGB-Großkomm., § 105 Rdn. 7 f.; Kübler, Gesellschaftsrecht, S. 65

5) Th. Raiser, Das Unternehmen als Organisation, 1969, 15 ff.

6) §§ 59-83 HGB

7) §§ 36, 42 HGB

8) Th. Raiser, Die Zukunft des Unternehmensrechts, Festschrift für R. Fischer, 1979, 561 ff.; ders., Unternehmensziele und Unternehmensbegriff, ZHR 144 (1980) 206 ff. (225 f.).

9) Gesetz über Aktiengesellschaften und Kommanditgesellschaften auf Aktien (Aktiengesetz) vom 30.1.1937 und vom 6.9.1965

10) Betriebsrätegesetz vom 4.2.1920, RGBl. I, 147; Betriebsverfassungsgesetz vom 11.10.1952, BGBl. I, 681; Betriebsverfassungsgesetz vom 15.1.1972, BGBl. I, 13

11) Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie (Montan-Mitbestimmungsetz) vom 21.5.1951, BGBl. I, 347; Gesetz über die Mitbestimmung der Arbeitnehmer (Mitbestimmungsgesetz) vom 4.5.1976, BGBl. I, 1153

12) Art. 14, 20 I GG

13) Th. Raiser, Theorie und Aufgaben des Unternehmensrechts in der Marktwirtschaft, ZRP 1981, 30 ff.

14) Z.B. §§ 15 ff., 291 ff. AktG, §§ 1, 25 ff. GWB

15) Rittner, Die werdende juristische Person, 1973, 282 ff.; ders., Wirtschaftsrecht, 1979, 117; Wiedemann, Gesellschaftsrecht Bd. I, 1980, 307 ff.

16) e.g. Boettcher/Hax/Kunze/v. Nell-Breuning/Ortlieb/Preller, Unternehmensverfassung als gesellschaftspolitische Forderung, 1968 (sog. Sechserbericht)

17) Steinmann, Das Großunternehmen im Interessenkonflikt, 1969; Ott, Recht und Realität der Unternehmenskorporation, 1977

18) Rathenau, Vom Aktienwesen, eine geschäftliche Betrachtung, 1917.

19) Vgl. RGZ 68, 235; 80, 385; 85, 170; 107, 72; 107, 205; 112, 14; 119, 248; e.t.c.

20) Haussmann, Vom Aktienwesen und vom Aktienrecht, 1928; Netter, Zur aktienrechtlichen Theorie des Unternehmens an sich, Festschrift f. Pinner, 1932, S. 507 ff.; weitere Nachw. bei Zöllner, Die Schranken mitgliedschaftlicher Stimmrechtsmacht bei den privatrechtlichen Personenverbänden, 1963, S. 67 Fußn. 1.

21) Wiethölter, Interessen und Organisation der Aktiengesellschaft, 1961, 38 ff.; Flume, Die juristische Person, 37 ff.; Mestmäcker, Verwaltung, Konzerngewalt und Rechte der Aktionäre, 1958, 13 ff.; Zöllner, a.a.O., 67 ff.; Kübler, Gesellschaftsrecht, 167

22) § 70 Abs. 1 AktG 1937

23) § 70 BRG v. 1920 i.V.m. dem Gesetz über die Entsendung von Betriebsratsmitgliedern in den Aufsichtsrat v. 15.2.1922, RGBl. I, 209

24) § 76 Abs. 1 BetrVG 1952

25) 39. Deutscher Juristentag 1951 mit dem Thema: Die Gestaltung der Unternehmensformen unter den Gesichtspunkten der Wirtschafts- und Sozialverfassung, mit Referaten von Reinhardt, Nikisch und L. Raiser.

26) Studienkommission des Deutschen Juristentags, Untersuchungen zur Reform des Unternehmensrechts, Teil 1, 1955, Teil 2, 1957

27) a.a.O. Teil 1, 19

28) a.a.O. 19

29) Bericht über die Verhandlungen der Unternehmensrechtskommission, 1980, 78

30) a.a.O.

31) a.a.O., 100 ff., 130 ff., 504 ff.

32) Vgl. die Nachw. bei Raiser, Recht der Kapitalgesellschaften, 1983, 16 f.

33) Ballerstedt, Was ist Unternehmensrecht? FS f. Konrad Duden, 1977, 15 ff., 16

34) BVerfGE 50, 290, 374

35) BGHZ 83, 106, 120; 83, 144, 149

36) Art. 10 a II, 21 q II Amended Proposal for a 5. Directive. The English text uses the expression "interest of company"the German "Interesse des Unternehmens"

37) Nachweise bei Th. Raiser, Mitbestimmungsgesetz-Kommentar, 2. Aufl. 1984, 384; neuestens Jürgenmeyer, Das Unternehmensinteresse, 1984, 206 ff.

38) BVerfGE 50, 290

39) Official Journal of the European Communities, No. L 222, 14.8.1978, p. 11

40) ABl. Nr. L 193, 18.7.1983, 1

41) Lutter, Europäisches Gesellschaftsrecht, 2. Aufl. 1984, 36 f.

42) Art. 11, 44, 47 Abs. 2, 51 Abs. 2

43) Art. 11

44) Art. 27, 45 Abs. 2, 47 Abs. 3

45) Entwurf eines Gesetzes zur Durchführung der Vierten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts (Bilanzrichtlinie-Gesetz) v. 3.6.1983, Bundesrats-Drucksache 257/83

46) § 236 RegE HGB

47) §§ 236-290 RegE HGB

50) § 236 Abs. 1 RegE HGB

48) Drittes Buch, Erster Abschnitt, Erster Titel: Allgemeine Vorschriften (§§ 236, 237 RegE HGB)

49) Z.B. §§ 42-42 h RegE GmbHG, 33-33 d, 48 RegE GenG, 148 ff. RegE AktG

51) Stellungnahme zum Entwurf eines Bilanzrichtliniengesetzes, BB 1981, S. 1864

52) §§ 239, 253 iVm 236 II RegE HGB; dazu Hommelhoff, 4. EG-Richtlinie und Wahl der Unternehmensform, in Kießler, Kittner, Nagel (Hrsg.), Unternehmensverfassung, Recht und Betriebswirtschaftslehre, 1983, 187 ff.

53) §§ 270, 271, 273 iVm 236 II RegE HGB

54) §§ 274, 283 f. iVm 236 II RegE HGB

55) §§ 264 II, 265 II, III, 269 RegE HGB

56) Vgl. neuestens Koralblum u.a., Neue Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht, GmbH-Rdsch. 1985, 7,8

57) Z.B. §§ 129 a, 172 a HGB, 4 MitbestG; BGHZ 60, 324; 69, 274

58) §§ 178 ff. RegE HGB

59) Stellungnahme zum Entwurf eines Bilanzrichtlinie-Gesetzes, BB 1981, 1866 f.; Stellungnahme der Arbeitsgemeinschaft Selbständiger Unternehmer e.V., BB 1981, 1939 ff.

60) Begründung zum RegE eines Bilanzrichtlinie-Gesetzes v. 19.3.1982, BR-Drucksache 61/82, 63 f.

61) BR-Drucksache 257/83, 64

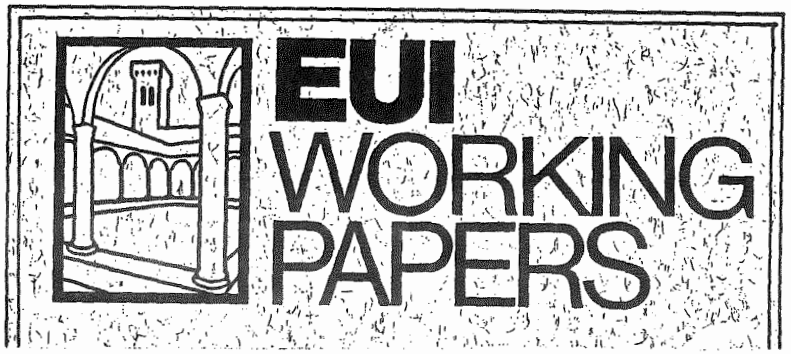
62) Lutter/Mertens/Ulmer, Die GmbH & Co. KG und das Bilanzrichtlinie-Gesetz, BB 1983, 1741

63) ABl. Nr. L 193, 18.7.1983, 1

64) see Schwarte, Referat vom Februar 1985, Manuskript 1 ff

65) Schwark a.a.O. 15

66) Art. 3 Abs. 1



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