PUBLIC CORPORATE GOVERNANCE FOR PUBLIC-SECTOR ENTITIES

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1. INTRODUCTION

At the end of the 1980s, the World Bank put a name "Corporate Governance" to the ideas on development policy, the aim of which is to help improve corporate management, accountability and transparency. In Germany, the discussion on Corporate Governance is now also increasingly referring to public-sector entities. In view of increasing budget deficits and a rise in the debt levels of municipal authorities, measures are being discussed that aim to prevent authorities and political institutions from investing in dubious projects or wasting public-sector funding. The objective must be to consolidate or rebuild the trust in the public authorities and public-sector entities in the same way that the Corporate Governance Code has done for listed companies.

The development of Corporate Governance in Germany started with the KonTraG ['Gesetz zur Kontrolle und Transparenz im Unternehmensbereich': Law on Control and Transparency in Business], which entered into force on May 1, 1998, and its far-reaching measures to improve corporate management and accountability. Developments to date have therefore mainly focused on companies listed on the stock exchange.

2. FOCUS ON EFFICIENCY AND TRANSPARENCY

In Germany, the discussion on Corporate Governance is now also increasingly referring to public-sector entities. In view of increasing budget deficits and a rise in the debt levels of municipal authorities, measures are being discussed that aim to prevent authorities and political institutions from investing in dubious projects or wasting public-sector funding.

The objective must be to consolidate or rebuild the trust in the public authorities and public-sector entities in the same way that the Corporate Governance Code has done for listed companies.

Public and private-sector entities operating on the free market must generally be treated equally. Conversely, this means that the public authorities and their associates are, in principle, also subject to European and German business law. This not only applies to state-owned companies or municipal entities that are already listed on the stock exchange, but also to all other public-sector entities, however small.

In recent years, public-sector entities have been faced with increasingly dramatic social, political and economic changes. There are growing demands from local

authorities, stakeholders and the general public that tasks be carried out efficiently. A firm grasp of the fiscal and legal framework and the use of diversified sources of funding is also expected. In light of these demands, the gap between the public and private sectors is closing rapidly, in particular with respect to the level of professionalism expected of the organizations concerned. These entities are thus faced with the task of reconsidering their internal governance framework and adjusting it to reflect these new circumstances. In the long term, the trust of local authorities, stakeholders and the general public can only be ensured if a sophisticated (governance) framework is in place which adequately reflects the special responsibility of holding assets in trust. Furthermore, a sophisticated governance framework is seen as a quality characteristic that sets a company apart from the competition, a particularly important factor in light of keener competition.

It is clear from their corporate objectives that public-sector entities usually have to meet several conflicting goals. On the one hand there is the public duty and responsibility, which is generally linked to the use of funds with spending often exceeding the available resources. On the other hand, the public-sector entities are expected to finance their owners, or at least work efficiently enough to keep any loss absorption to a minimum. Effective oversight of associates by stakeholders of public-sector entities is often hindered by the fact that they have neither the time nor the organizational framework to do so.

3. PUBLIC CORPORATE GOVERNANCE CODE

If private-sector companies listed on the stock exchange (have to) comply with a Corporate Governance Code, this begs the question whether and in what form it would make sense to apply this Code to public-sector entities too, or to develop a special 'Public Corporate Governance Code' geared specially to public interests.

In detail the legal situation in Germany is as follows:

For some time past cities like Stuttgart[1] and federal states like Berlin[2], Brandenburg[3] and Bremen[4] have their own, self-made and, as we assume, custom-made Public Corporate Governance Codes. The NRW.BANK was the first state investment bank in Germany that introduced a Public Corporate Governance Code in Germany on 17 February 2006 (Schröder, P., 2006). The present discussion about requirement and contents of a Public Corporate Governance Code was mainly promoted by management

[1] The state capital of Stuttgart developed a set of rules concerning Public Corporate Governance that regulates the cooperation between the local council, the shareholding administration and the municipal associate companies and thus considerably improves efficiency and transparency.

[2] On 3 May 2005 „guidelines for shareholdings of the state of Berlin for companies" were passed. They are not only applicable for corporations, but basically for all types of public entrepreneurial activities, e.g. public-law institutions.

[3] The state government of Brandenburg pushed a Corporate Governance Code for good and responsible management in July 2005. The contents of the code include regulations and recommendations for control, management and monitoring of state shareholdings.

[4] On 4 September 2006 the draft for a PCGC for Bremen associate companies was introduced.

consultancy and auditing. Recently, politics and public administration have increased their commitment in this topic: as more efficiency and transparency are as important for public entities as for private entities, the federal ministry of finance – the responsible ministry for shareholdings management of the Federal Government - is going to work out a Public Corporate Governance Code. As soon as a well phrased concept is available it will be presented to all participating offices of the Federal As soon a first well phrased draft is available, it will be presented to all participating offices of the Government and the federal states. After this procedural step a hearing is planned in order to appropriately discuss the draft of the PCGC.

The implementation of sophisticated oversight helps to optimize decision-making processes and the quality of corporate governance. Oversight is thus part of a provision against risk that helps to avoid financial problems in the future and prevent unfavourable developments by detecting risk at an early stage. Unlike in the private sector, economic efficiency is not the main objective of non-profit governance. Nevertheless, economic efficiency provides the essential basis for carrying out public tasks. The aim is to maintain and build on this basis as conditions get tougher in order to serve the actual purpose of the organization. Accountability as part of good and responsible corporate governance is not simply a retrospective control, but includes in its essence continuous, proactive and critical monitoring and advice based on cooperation. The balance of accountability and advice hinges mostly on the financial position of the organization and thus differs in each specific case. The first step is to determine the status quo with respect to the management of the organization and any oversight mechanisms in place. The aim is to determine an objective picture of the given circumstances.

The primary concern or even the turning point of every discussion about effectiveness has to be the scope of the regulations, consequently the question for scope of validity, obligations and accuracy of detail of a PCGC. Do the experiences gathered so far argue for a standardized code for all public entities, no matter how different they are concerning size, business area, legal structure etc.? Or do we keep the status quo where the individual regional administrative body is free to decide on the „if“ and „how“, on complexity and design of its personal code?

Given the multitude of tasks that have been outsourced off the core administration by public authority and various and important economic activities that have come up at the same time, all people who are active in this field should clearly see that the need for a PCGC doesn’t have to be seriously discussed any more.

- Especially public structures are characterized by complex and less transparent relationships of most diverse stakeholders which are under-fire. Probably due to the lack of traceability or transparency of corporate decisions, probably due to the individual’s exorbitant expectation of a public corporation.
- In times of short running financial resources public authority feels impelled to be more economically efficient and stronger market-oriented. The liberalization of formerly sovereign fields of activity, the expansion of organizational forms under private law and their integration into the existing

administration system contribute to give birth to a highly complex, versatile conglomerate that has to be safely steered through the economic everyday life.

- Finally we have to mention the high expectations of the citizens that have to be fulfilled by the public authority. Think of services of general interest in the economic, caring or cultural field, ensuring of public welfare as well as transparency concerning the use of funds in the public sector, especially in so called infrastructure entities, either energy and water supply, culture industry, housing associations or state banks and savings banks that are property of public authority or whose co-partner and/or majority shareholder is public authority.

Having assessed the status quo, the next step is to develop a target concept. The question here is "What are the parameters for sophisticated and effective oversight?". If this question remains unanswered in the 'as is' analysis, it will become imperative at this point to make decisions concerning the application of commercial law and stock corporation law provisions or the development of a tailored Public Corporate Governance Code.

A sensible, i.e. a sensibly applied code bundles the complex and numerous shareholdings and helps public authority to gain a purposeful shareholdings management. A vital element is a transparent shareholding report that alleviates to monitor the compliance of targets. Conversely the Code allows an effective coordination of targets with public authority. The PCGC should allow to develop awareness for an essential members' expertise of the Supervisory Committee as well as an effective communication flow referring to performance, risks and targets of the company.

At present, there is no generally applicable Public Corporate Governance Code. The possible contents of such a Code have been the subject of debate in both academic and practical fields for quite some time now.

Even if the users are very different it is not to be neglected that certain topics - of whatever dimension - are relevant to all stakeholders independent from the individual topic:

- Risk management, detection of financial disorder which can lead to a heavy burden for public authority;
- Code of behaviour for the Supervisory Committee such as discretion, further education, communicating with the management;
- Key factors of the PCGC are primary recommendations to improve processes and working structures of company institutions. Moreover, the role of the respective regional administrative body as shareholder has to be clarified.
- Another topic is accounting, even though in this field the extended rights of inspection planned in the budget standard law for corporations with majoritarian public participations are already on a high level.
- Concerning transparency, the disclosure of the remuneration of the members of the managing board and of the supervisory board will be an important topic.

The following regulations are taken into consideration in a model code (Ruter, 2005, 167 ff.):

- definition of the objective of the public entity derived from an overall concept of the regional administrative body;
- definition how the interested parties; institutions and individuals participate in guidance and control;
- way and method of exertion of influence on the corporation by the regional administrative body and its institutions;
- principles of behaviour and cooperation of bodies and institutions or members;
- necessity of measures and processes;
- area of responsibility;
- professional competence;
- selection, remuneration and behaviour of members of the institution;
- transparency of role conflicts and political obligation;
- conception of a risk management and an early warning system;
- internal and external duty to supply information;
- standardized und efficient reporting and accounting;
- evaluation and communication of the management;
- obligation to economical behaviour.

After all, a Public Corporate Governance Code should be a real tool for public authority; an instrument that is used willingly and successfully. Ideally it is a controlling instrument helping the community getting an overview and consequently leads to identifying existing scopes. In the worst case it is a further „data grave yard" filed without profiting from it.

Under these circumstances marked by a variety of public authorities and its entities on the one hand, and on the other hand topics that are relevant to all of them, the following conclusions can be drawn.

- There won't be one single Public Corporate Governance Code that suits all stakeholders in all areas.
- Public authority is - independent from its individual specification - interested in several topics (see above) to meet the complex demands that are approached with it.
- The committed and interested user is bound to tailor himself his own code: This necessary first step requires a profound knowledge of the legal and local situation, i.e. an active and realistic assessment.
- The elaboration of the target state which is the PCGC takes place after the analysis of the current state. The future user works out his/her code matching with local characteristics and necessities. For lack of universal codes a regress on an existing self produced code or already elaborated structures in the sense of a model code is recommended (Ruter, 2005, 167 ff.).
- It is not enough though to evaluate and construct a code. The final and crucial step should be the application of your own code in administration and public

entities. Herein the quality of the preparatory work can be seen – if the future users were involved in the development process from the beginning or did they give an impulse to implement the code, there won't be many problems concerning an effective and goal-oriented implementation.

The Public Corporate Governance Code presents the main legal provisions for managing and monitoring private-law local authorities. It also contains recognized standards of good and responsible corporate governance with the involvement of the respective political decision-makers. In the same way as the German Corporate Governance Code is aimed at German listed stock corporations, the Public Corporate Governance Code is geared towards public-sector entities organized as a GmbH (German limited liability company). This is the most common legal form used by the public sector for economic activity, as municipal law provisions require a limit on liability. The Code endeavors to act as an easy-to-understand and practical guide for public authorities so that state tasks can be performed in a simpler, less expensive and more efficient manner in future. This should help to reduce nasty surprises in future, such as sudden cases of liability for local authorities.

Nevertheless, these organizations will not be able to avoid making extensive adjustments that reflect the specific nature of their situation. The size of the organization, its objectives and activities and its legal and economic background all play a significant role here. The main elements of good governance are a supervisory body (in the form of a supervisory board or similar), the auditor, an internal audit and a functioning risk management system. These elements should not co-exist in isolation, but be interlinked to achieve the greatest possible benefit to the organization. In addition to the elements mentioned, it may make sense in certain cases to have a review pursuant to Sec. 53 of the HGrG ['Haushaltsgrundsätzegesetz': German Law on Budgetary Principles] or audits by the public sector, as these could act as a further effective control.

Of course, once the target standard has been set for the company in question, this is only the beginning. The next step is for the persons responsible to discuss possible improvements in a variance analysis and implement these in the organization.

For the sake of completeness let us talk about a frequently discussed problem: the question about the mechanisms of sanctions in case of failure to comply with the regulations. For listed enterprises the capital market functions as a corrective. This corrective doesn't mostly apply for entities of public authority. The obligation to „comply and explain" represents the main controlling mechanism of the German Corporate Governance Code that unfolds its potential in interaction with § 161 AktG. The mentioned principle is also of vital importance concerning the PCGC. In order that this obligation doesn't remain a „toothless tiger" and that the voluntary regulations attract attention, the interested public is required to act as a supervisor in the absence of possible sanctions. Enquiries of interested, committed citizens, citizens' action groups, (oppositional) politicians and not least coverage on public entities in the media can motivate public authority, not to say force, to put their voluntarily made guidelines into practice (Srocke, 2005, p. 22; Budäus, 2005, p. 22). We dare to say the critics are right that this is undoubtedly not a direct, automatically working sanction that punishes misconduct always, immediately and permanently. But one shouldn't underestimate the effectiveness of an indirect sanction. Especially the opportunity of misconduct,

disregards etc. being recognized and responsible persons being being severely critizised by the media is a fairly uncomfortable thought that definitely takes effects.

After all that has been said the conclusion is that a PCGC has to serve for sensitizing all persons involved, namely the management, shareholders‘ meeting, supervisory board. All of them should meet the public authority’s aims and use the funds placed at their disposal in an efficient and economical way (Seibicke, p. 99). Especially public authority is particularly interested in fulfilling its role as a shareholder by guaranteeing transparency, rights to influence, control and opportunities to control in terms of reporting, (“Accountability“, Häfele, 2007, p. 264; Föll, 2005, p. 104).

4. OUTLOOK

Even if the effort involved in good governance initially seems relatively large, the persons responsible will be rewarded with more space for the ‘actual’ task at hand. An efficient governance framework enables staff to mobilize more capacities for the corporate goal and provides the necessary support for day-to-day operations.

Then, such a code will be a „regulatory and targeting instrument to intensify information and communicative culture“ (Föll, 2005, p. 104). This informational and communicative function contributes to reduce this to partially big entrepreneurial risk that is connected with public entities. The PCGC is to combine public authority and public entity. On the part of the corporation, a functioning risk detection and controlling system ideally supports and completes this hinge. Moreover, a trained, well working Supervisory Committee contributes to an effective shareholdings management in the public sector (Müller-Marqués, Berger, Srocke, p.102). Due to the triad consisting of Public Corporate Governance Code, internal control system and supervisory bodies public authorities now have a set of tools with which they can work towards a good governance in the corporation and exert enough influence on its holdings. In this way it should be easier for public authority to achieve its goals efficiently, in a resource-friendly way and with a containable risk.

Corporate Governance of public entities is guaranteed by more than one component. A Public Corporate Governance Code if properly applied can become a key function that helps to ensure a good and responsible corporate governance. However it shouldn’t be considered as the only tool. But if integrated and connected with other instruments it can serve to implement and to assure an effective shareholding management of public authority. Only in this extended context of „effective shareholding management“ it becomes apparent that a PCGC is not an end in itself, but serves to organize the often complex matter of shareholdings, owner-operated municipal enterprise and further legal structures of public authority in an easily understandable and transparent way.

The objective of shareholdings management is to guarantee the public authority‘s political and economic goals being realized by public entities (Bremeier/Brinckmann/Killian, 2006, p. 27). This shareholdings management combines different components and targets into a mostly relatively complex network: The safety interest of the public authority is to keep the balance, i.e. to combine the effort to best-possibly minimize the risk for the public budget with the efficiency and competition of a public entity which can be forced to take some risks during

competition. In addition to economic success that is certainly wanted there is the demand for compliance of public tasks and also for political objectives.

For the public corporation it is a great advantage to receive guidelines that will be elaborated, arranged, implemented and at best be imbued with life. Clear regulations where the parties and partners know their rights and duties, where communicative structures are built and cultivated offer the possibility to a cooperation which is effective for all stakeholders and which gives less room for conflicts.

These „future prospects“ should encourage public authority and its entities to get involved into this admittedly not always facile and time-consuming process of implementing a Public Corporate Governance Code. The examples of already existing Public Corporate Governance Codes listed above show that more and more regional administrative bodies register a need for action to close the gaps of information and legitimation between the corporations and their environment.

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Abstract

This article describes the development of the implementation of a Public Corporate Governance Code for public-sector entities in Germany. It provides a description of a wholly process to implement such regulations for public authority and its entities to improve corporate management, accountability and transparency of the public sector in Germany.

Public and private-sector entities operating on the free market must generally be treated equally. Conversely, this means that the public authorities and their associates are, in principle, also subject to European and German business law. This not only applies to state-owned companies or municipal entities that are already listed on the stock exchange, but also to all other public-sector entities, however small.

These entities are thus faced with the task of reconsidering their internal governance framework and adjusting it to reflect these new circumstances. In the long term, the trust of local authorities, stakeholders and the general public can only be ensured if a sophisticated (governance) framework is in place which adequately reflects the special responsibility of holding assets in trust. Furthermore, a sophisticated governance framework is seen as a quality characteristic that sets a company apart from the competition, a particularly important factor in light of keener competition.

The needs are identified: Corporate Governance of public entities is guaranteed by more than one component. A Public Corporate Governance Code if properly applied can become a key function that helps to ensure a good and responsible corporate governance.