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New governance modes for Germany's financial reporting system

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TranState Working Papers

NEW GOVERNANCE
MODES FOR GERMANY'S
FINANCIAL REPORTING
SYSTEM

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No. 34

Universität Bremen • University of Bremen
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Staatlichkeit im Wandel • Transformations of the State
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New Governance Modes for Germany's Financial Reporting System

ABSTRACT

The question raised in this paper is whether changes over the last 20 years in the German financial accounting system signal a retreat of the nation state from this policy field. Using a comprehensive perspective on accountancy we consider the steps in the accounting process, i.e. standard setting, enforcement and disclosure, and analyse whether significant privatisation tendencies can be observed in accounting, whether and how the state safeguards its scope for interventions in the public interest and how these changes compare to the ongoing globalisation in accounting. We find that changes in all these areas are first of all driven by the application of European legislation, but also by voluntary harmonisation and an increased involvement of private actors. Altogether, a shift towards a (more) societal governance mode can be witnessed. However, the State increases its interventions at the same time by regulating arenas in which it was previously not active.

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New Governance Modes for Germany's Financial Reporting System

1 INTRODUCTION¹

The nation state seems under pressure. Individualisation and globalisation chip at its foundations (Zangl et al. 2004). Individualisation on the one hand challenges the standardised offerings that the state seems only able to provide. As a consequence, governments have been withdrawing from many fields to improve quality and to cut costs (Chi et al. 2003). Governments have been compelled to collaborate with “private” actors in the provision of public infrastructure and welfare (Marsh and Rhodes 1992), most notably in public schooling, health, and urban development. Globalisation on the other hand challenges the regulatory potential of the nation state. States have already been forced to cooperate with other governments on an informal basis to provide solutions for problems that a national government alone could no longer solve (Rosenau and Czempiel 1992), among them climate change, migration or social standards (Behrens 2004).

In the narrower perspective of organising national economies, a mixed picture emerges for the role and the influence of the nation state. National governments are indispensable through their provision of the rule of law to guarantee private property rights and through the possibility of recourse to effective adjudication by the state monopoly of force (e.g. Lütz 2004). Beyond these essential elements of the “basic state”, nation states established many other interventionist regulatory and legal frameworks, whose usefulness and staying power is doubtful. The last two decades have seen massive turbulences for the role of the state as a provider of regulation. This commotion is not only due to the disillusionment about what nation states can achieve in respect of positive effects in a purely national arena, but may also be due to the globalisation of business that are object of state intervention. From previous evidence it seems very likely that the remaining regulatory might of national governments depends on the respective policy field in question. Bank capital adequacy requirements, for example, were standardised internationally (Genschel and Plümper 1997). In taxation, however, we can not observe a similar trend (Ibid.). Though states lost economic control of many previously national industries through privatisation (telecommunications, transport, other public utilities), increase of regulation can be observed in fields of e.g. public service delivery (Midwinter and McGarvey 2001).

¹ We received helpful comments from Andrea Mennicken at the ‘Governance without Government’ Conference in Cardiff (May 2005) and two anonymous reviewers. We thank all of them. Generous funding was granted by the VolkswagenStiftung.

Analysing the case of Germany, we investigate the regulatory arena of accounting. This is particularly interesting as accounting and accountability reflect a societal discourse about what kind of performance is expected from firms and those who run them. In this policy field, national governments are also juxtaposed with firms whose business outlook is increasingly international and whose resources can thus be more easily deployed beyond the boundaries of the nation state.

Accounting is the process how (results of) business transactions are recorded, verified and disseminated to wider business and investment audiences, who use accounting information for their decision making. As financial reports are the “end products” of the accounting process the term financial reporting will be used interchangeably with the term accounting in this regulatory context. Financial reports are a major source of information for equity financial markets (e.g., Scott 2003, 135-164) and the latter’s effective functioning is crucial for the overall functioning of the economy. This has long been an argument for governments to become involved in accounting and the wider organisation of financial markets. As the financial markets are believed to be champions of globalisation, the tensions between national regulatory powers and pressures from global business should become most visible.

Our Analysis contrasts the governance modes of accounting in the “golden age” of the nation state, which lasted until around 1980 (e.g., Hobsbawm 1994), with the newly emerged governance modes of the early 2000s. We look both at the changes of the public-private and the national-international regulatory mix, and try to answer the question of whether and how the nation state has lost, stabilised or augmented its regulatory influence in accounting.

The remainder of the paper is organised as follows: Part 2 gives a brief introduction into the policy field of financial accounting, its purposes and presents a taxonomy of possible governance types. Using the “golden age” of the interventionist nation state which ended about 20 years ago with the adoption of three major European directives as a starting point, part 3 focuses on the development of the private sectors’ involvement in standard setting, enforcement and stock exchange governance. In part 4, we discuss the significance of the observed changes in terms of the outlined governance framework and seek to explain them considering both system inherent and external causes.

2 ACCOUNTING: THE POLICY ISSUES

Financial reports reflect a political or societal notion of accountability. Perks (1993, 24) distinguishes four dimensions of accountability: (1) the subject (who is accountable), (2) the receiver of an account (to whom), (3) the means of accountability (how) and (4) the object (for what). In a strict agency perspective, accountability means that managers give their principals (mainly owners and potential investors) an idea of how the company of interest has performed during the reporting period, how it is currently

doing, how it is possibly continuing in the future, what it has accomplished, what its economic stocks of resources and obligations are and so on (Demski and Christensen 2003, 2). For this purpose, they use financial reports, which tell a story about the financial history of an organisation. This requires translating business transactions into numbers and calls for the use of a range of valuation techniques and recognition rules (“standards”), which may require judgement and discretion from those who apply them. Standard setters like the International Accounting Standards Board (IASB), the Accounting Standard Boards (ASB) in the UK or the Financial Accounting Standards Board (FASB) in the USA focus on the management of a (joint stock) company giving account to its shareholders (Nobes 2003, 68-71). In its implementation, this concept of accountability has three aspects: It consists of the (1) rules how to produce accounting information (area of standard setting), the (2) enforcement of their qualitatively high application (e.g. by means of auditing) and (3) regulation how to disseminate (disclose) this information.

This approach to accountability is a particular view of what accountability means and what accounting is supposed to do. Accountability can also be construed in a much broader fashion. Accounts can encompass other objectives as well – they can be used for creditor protection (La Porta et al. 1998, 1134-1135), serve as a base for taxation (e.g., Lamb et al. 1998) or play a role to solve conflicts which may arise among owners, between owners and managers or other interested parties. They may inform about how socially responsible managers have acted with respect to the employees, environment, the general public, etc. (FASB Conceptual Framework, 1.24). Accountability and accounting therefore reflect a societal discourse about firms: what is to be expected from them and by whom.

Political and cultural forces drive and (corporate) governance models reflect this extended or differential idea of accountability. In many countries, for example, the accounting system is connected to the legal and the taxation system of the nation state (Lamb et al. 1998; Nobes 2003, 515). There, accounting extends into capital markets and company law to provide particular corporate governance mechanisms. In addition, it tries to consider the local and global economy and the logic and needs of local and global capital markets and investors; and other institutions in national systems like collective bargaining, jurisprudence and so on.

As the agency model focuses on (equity) capital markets in which efficient contracts can emerge, state intervention here is about accelerating efficiency: governments optimise economic factor allocation by standardising accounting rules, and they reduce information asymmetry to achieve a further gain in welfare (see critically Watrin 2001). The extended concept of accountability makes accounting not a matter of market efficiency but a policy field in its own right. In this tradition, interventions cannot be

thought of in terms of capturing the efficacy of the supply and demand but in terms of acting in the public interest (Mayntz 2004). Economic efficiency only factors into, but does not solely determine public interest.

Every public policy field requires choosing institutional arrangements that allow achieving the particular policy goals: the policy perspective. Should one rely on markets and self-regulation, or on certain mode of state intervention (see e.g., Mayntz 1988, 285; in an accountancy framework Watrin 2001, 58-93)? Although a number of theories explain private incentives for disclosure (e.g., Scott 2003, 413-427) and empirical studies report evidence that the quality of disclosure is associated with stock prices (Healy et al. 1999) and capital costs (Botosan 1997) it is commonly assumed that state intervention in accounting is still needed (see e.g., Scott 2003, 428-434). But what are permissible or acceptable forms of organisations and institutions? And do these modes change with internationalisation and globalisation?

In the range of possible organisational modes, we draw on the seminal work of Streeck and Schmitter (1984) which distinguishes three major bases of social order—‘Market’, with its guiding principle of dispersed competition, the ‘State’ with hierarchical control, and ‘Community’ with spontaneous solidarity.² In the ideal ‘Market’ solution, entrepreneurs seek to maximise their profit in exchange for a good or service provided to their customers on a transactional basis. The ideal ‘State’ mode of organization is bureaucratic in principle – allocational decisions are made through enforced public policies hierarchically. In the ‘Community’ ideal, finally, leaders of societal groups seek esteem, while their followers cherish the sense of belonging to the group as such (Streeck and Schmitter 1984, 5-6). Although each of the three principles is said to have its own integrity and tendency towards reproduction, modern social order is in fact a continuous struggle of the three for “the allegiance of specific groups, for the control of scarce resources, for the incorporation of new issues, for the definition or rules regulating [behaviour], and so forth” (Ibid., 7). The interplay of these three pure modes can be called “governance”.

Our paper uses the framework of Streeck and Schmitter (1984) for the analysis of the regulatory mode in Germany. For this reason, we constructed the matrix (Table 1) of possible modes of intervention in fields of standard setting, enforcement, and disclosure.

A pure ‘State’ approach to accounting regulation emphasises hierarchical control of the accounting process. Accounting is then (fully) regulated by the state. Conflicts of

² In fact Streeck and Schmitter try to distinguish a fourth - ‘associationist’ - basis of social order as a qualitatively different mixture of the previous three. We, following Puxty (implicitly 1987) consider these arrangements as a part of the ‘Community’ basis.

interest will be solved by means of law making, regulation of state authorities, and court interpretation of the passed legislation. The concept of accountability (policy or content perspective) will be regulated by law and administered by command. For the act of

Table 1: *Modes of Intervention in Accounting*

| Process Step Mode of Governance | Standard Setting | Enforcement | Disclosure |
|------------------------------------|-------------------------------|---|-------------------------------|
| State | Accounting Rules set by Law | Monitoring Authority, Auditing Regulation | Disclosure Stipulation by Law |
| Community | Private Standard Setting Body | Professional Self-Regulation, Private Enforcement Panel | Stock Exchanges (Inst.) |
| Market | Emerging Accounting Practice | Needs-based Auditing | Transaction-Based Contracts |

standard setting this implies accounting rules to be drafted by public authorities and pronounced as law. Interpretations are provided either as amendments, regulations or in form of case law. Published information is scrutinized by public enforcement agencies and auditing is regulated by terms of law, regulations and jurisdiction. Finally also the obligation of distributing information i.e. the question of who has to disclose which set of information to whom is governed by law. A competing ‘Community’ theoretical approach to accounting would leave the establishment of institutions, the definitions of procedural rules, and the delineation of the accountability concept to (private) societal groups such as professional self-regulatory bodies, and institutions with market-making characteristics. The emergence of accounting rules in this setting is arranged by organisations under private law. These institutions can be either professional organisations of one status group or jointly composed boards that include members of more than one group of stakeholders. Enforcement by means of a review panel may be organised in the same way and public accountants govern their professional codes of conduct, questions of accreditation etc. independently from state intervention. Disclosure exigency arises from market mechanisms such as transaction costs, cost of capital, adverse publicity, by organisational membership requirements and is prescribed by institutions such as stock exchanges with listing requirements. A fine ‘Market’ approach, in the end, would mean that there is no discernible regulation of the accounting process. Accounting practice may however emerge thanks to the laws of competing supply and demand for accounting. Enforcement is achieved by means of (private) auditing, and disclosure by case-by-case contracts on financial reports when capital transactions are about to be undertaken.

Puxty et al. (1987) note that the bases of the social order do not appear in their pure forms in accounting. This mix of modes is often referred to as governance. The term

‘governance’ emphasises the network of public and private actors (Benz 2004) in which state intervention (‘government’) only plays a part in establishing the social order. According to Héritier (2002, 3) “... governance implies that private actors are involved in decision making in order to provide common goods and that non-hierarchical means of guidance are employed ... Where there is governance, private actors may have independently engaged in self-regulation, or a regulatory task may have been delegated to them by a public authority, or they may be regulating jointly with a public actor.” Governance cannot mean finding institutional arrangements “beyond the state” as all activities are conducted under the framework of law and therefore the state. Both the concept of government and governance include the state and additional structural elements. Following Benz (2004), one can distinguish a “government perspective”, which pitches the state (government) and state intervention against the market or society, and a “governance perspective”, which sees the state, markets and networks as complementary forms of institutional structuring.

In the next section we address the question whether there has been a substantial shift of governance modes in the policy field of financial accounting in Germany. We start our analysis with the actors involved in the standard setting process to turn subsequently to actors in enforcement processes and discuss finally the special role of stock exchanges before we evaluate the changes in a subsequent chapter.

3 TWO DECADES OF CHANGE IN FINANCIAL ACCOUNTING

3.1 Standard Setting

Traditionally, financial accounting in Germany has been regulated by codified law. This law (to be found in the Commercial Code, the *Handelsgesetzbuch*) was put forward by the respective ministries (bureaucracy). It had to be approved by the parliament and any interpretation of the law was under the competency of courts. Parliament rule setting had been a long standing tradition having survived two world wars and several economic crises. Dating back to 1794 (Born 2002), one may have considered this as a corner stone of how standard setting is organised in Germany. The parliamentary tradition was still in practise in the early 1980s. No private actors were involved in this process (apart from, for instance, participation in parliament hearings or lobbying activities).³

The first limit to the might of the nation state started with European harmonisation (e.g., Flower 1997). The early Treaty of Rome (“Treaty Establishing the European

³ However, the *Institut der Wirtschaftsprüfer* (a professional association of auditors) is publishing auditing standards for their members. These standards do also play a role at least in the interpretation and of the rules set by the state.

Community”) from 1957 already established “a formal reason for the harmonisation of accounting systems across Europe” (Haller 2002). This had no impact on the national legislators in accounting as major steps towards an Europeanised accounting law were only taken in 1978 and 1983 when two European Council Directives were passed. As Council Directives have to be implemented into each member state’s law, the national parliament’s power to set accounting law in its sole discretion apparently was curtailed, but most contentious issues in European accounting could still be decided by national parliaments as the directives contained much scope for choice. Germany enacted the directives in 1985.⁴ But even though the scope of the national parliament on setting accounting rules might have been diminished through European legislation, formulating accounting rules still remained a duty of state institutions (EC/EU institutions in cooperation with national parliaments) and not of any private actors.⁵ In 1998, this setting changed in two respects in Germany.

With the “Gesetz zur Kontrolle und Transparenz im Unternehmensbereich” (KonTraG, supervision and transparency act), an amendment to the commercial code being put forward as a reaction to some corporate scandals in Germany, the Federal Ministry of Justice was allowed to accredit a privately organised standard setting institution. In the same year, a contract was signed between the Ministry of Justice and the newly founded private standard setter, the German Accounting Standards Committee (GASC). Its board (GASB), staffed with academics as well as users and preparers of financial reports, was authorized (1) to develop recommendations for group accounting, (2) to advise the Ministry of Justice in accounting legislation projects and (3) to represent the Federal Republic of Germany in international standardisation committees (see § 342 Handelsgesetzbuch). In the standardisation contract, the Ministry of Justice committed itself to involve the board in all legislation projects concerned with accounting. The major task of the GASB was to develop accounting standards (for consolidated financial statements) independently. However, such standards did not represent official accounting rules until the Federal Ministry of Justice (reviews and) publishes them.

⁴ In Germany, the Fourth, Seventh and Eighth Council Directives were transposed into national law with the *Bilanzrichtliniengesetz* of 1985. Formally, these Directives refer to Article 54, 3 (g) of the Treaty of Rome. The Fourth Directive of July, 25, 1978 (78/660/EEC) relates to the annual accounts of certain types of companies; the Seventh Directive of June, 13, 1983 (83/349/EEC) relates to consolidated accounts and the Eighth Directive of April, 10, 1984 (84/253/EEC) deals with persons responsible for carrying out the statutory audits of accounting documents.

⁵ In fact, the European Commission only opened an infringement procedure in accountancy matters in 2004, when it was claimed that some amendments in Italian accountancy laws did not conform with the EU directives.

The GASB was not the only private Standard Setter gaining importance for German (group) accounting. In 1998, the “Kapitalaufnahmerleichterungsgesetz” (KapAEG, German capital raising facilitation act) was adopted and brought further significant changes. With this amendment listed (parent) companies were allowed to publish their consolidated financial statements following recognised international accounting standards, in practice IAS/IFRS or US-GAAP. The fact that firms were no longer forced to publish their group accounts according to German GAAP was accompanied by strong objections from jurisprudence: firstly a lack of legitimacy of the externally set rules was observed and secondly the impossibility to further influence standard setting was criticised (see Ebert 2001, 53-56). Both IAS/IFRS and US-GAAP are set by private standard setters. The Financial Accounting Standards Board (FASB) is the relevant Standard Setter for the United States (US-GAAP), the International Accounting Standards Board develops the International Financial Reporting Standards (IFRS)⁶. As standards for group accounting totally eluded from German authorities’ influence,⁷ private standard setting reached its climax during the period of this legislation’s validity.

In 2000, the European Commission put forward a requirement for listed companies domiciled in the European Union to publish consolidated financial statements in accordance with International Accounting Standards (Commission of the European Communities 2000 and 2001; for a conceptual discussion Flower 1997). Consequently, in 2002, both the European Parliament and Council decided that “[f]or each financial year starting on or after 1 January 2005, companies governed by the law of a Member State shall prepare their consolidated accounts in conformity with the International Accounting Standards adopted (...) if, at their balance sheet date, their securities are admitted to trading on a regulated market of any Member State (...)”⁸ This directive was transformed into German law in 2004 with the “Bilanzrechtsreformgesetz” (accounting law reform act).⁹

⁶ Initially, the standards were called International Accounting Standards (IAS). With recent reforms the overall name of the standards was changed to IFRS, but there are still single IAS that have to be applied. So, IFRS is a generic term standing for (single) International Financial Reporting Standards (IFRS), International Accounting Standards (IAS), interpretations of International Financial Reporting Interpretations Committee (IFRIC) and interpretations of the Standing Interpretations Committee (SIC).

⁷ However, there is also a German member in the IASB and the GASB cooperates with the IASB as one of its liaison standard setters.

⁸ Cited from regulation (EC) No 1606/2002 of the European Parliament and of the Council of July, 19, 2002.

⁹ With this amendment, § 292a of the commercial code was eliminated. There are some interim arrangements.

These reforms suggest at first glance that a clear shift in the accounting standard setting process has taken place: Governmental law-making gave way to private sector standard setting (or, in other words to a more societal mode of governance). Haller (2002) explains this observation by a rapidly changing accounting environment, calling for private standard setting by professional experts with sophisticated and special knowledge that can no more be expected from members of the parliament or bureaucrats in ministries.

Nevertheless, the evidence of a shift towards private standard setting is not as clear at second glance. Firstly, the changes only took place in the field of group accounting. Indeed, European member states had the possibility to allow or oblige companies to adopt IFRS for individual accounts. But Germany did neither oblige nor allow¹⁰ companies to publish their individual accounts in accordance with IFRS. Federally/state set German GAAP remained in force for all individual accounts and for group accounts of unlisted companies. Secondly, governments (mainly represented by the Council) remained influential in accounting standard setting by means of a required comitology process (see Dehousse 2003), known in an accounting context as “endorsement” (Schaub 2005). Any IFRS has to be approved by the European legislator before becoming applicable. This implies an analysis of (1) whether the standard under consideration does not conflict with the “true and fair view” principle as defined in the EC Directives and (2) whether the accounting standards are in the European public interest. The endorsement process is by no means paper tiger as for instance the endorsement of IAS 39 (“Financial Instruments: Recognition and Measurement”) proves. This very standard was endorsed only “with the exception of certain of its provisions on the use of the fair value option and certain of its provisions relating to hedge accounting...” (Official Journal of the European Union (L 363/3), December, 9th 2004). Therefore, IAS 39 became never effective in its initial form. As a consequence, the private standard setter may feel obliged to react to the objections of the legislator concerning unendorsed standards or other pronouncements. Moreover, once endorsed, the standards of the board immediately lose their character as pronouncements of a private standard setter by becoming community law (Küting and Ranker 2004).

Thus, standard setting is not completely privatised. One could say that the state’s interventionist interest is now combined with the flexibility and professionalism of a private standard setter that initially develops accounting standards. In the end these norms become applicable for group accounting of all (listed) companies domiciled in the European Union. This represents a significant shift in the standard setting process.

¹⁰ Certainly, companies are allowed to publish individual accounts following IFRS, but this does not free them from publishing individual accounts following German GAAP.

However, it should be emphasised that not only a privatisation shift in standard setting but also a movement towards internationalisation can be observed. Notably the European Union increased its importance in this process (indicating substantial harmonization within the community). In summary, standard setting became a much more complex process with multilevel public and professional private actors involved.

3.2 Enforcement

In the golden age of the nation state, Germany's main enforcement mechanism was the annual audit, which had been mandatory since 1931 (Streissle 2001). Every auditor has to be member of the "Wirtschaftsprüferkammer" (chamber of auditors), a professional organisation governed by public law. This chamber is assigned by law¹¹ to regulate the accreditation of public accountants, supervise the profession, and operate a system of quality controls, which includes pronouncing auditing standards (see Marten et al. 2003; WPO § 57). The latter obligation is to a large extent fulfilled by the "Institut der Wirtschaftsprüfer" (Institute of Certified Public Accountants), which is an organisation under private law. Its auditing standards (IDW AuS) and interpretations of relevant law are intended to fill gaps in (legal) auditing and accounting regulation (Born 2002, 483). These pronouncements, strictly speaking only representing a technical expression of opinion, support auditing practice. Even if these standards therefore do not constitute legal requirements, they effectively bind auditors as their application is considered to be a part of the principles of proper auditing (see Marten et al. 2003). Departure from these rules is accepted only in exceptional cases and bears risks of litigation. Next to national professional organisations, international associations exist (e.g. the Fédération des Experts Comptables Européens (FEE) and the International Federation of Accountants (IFAC)) seeking to provide a professional guidance on the multi-national level. EU legislation had an impact on auditing with the 8th Council Directive on the approval of persons responsible for carrying out the statutory audits of accounting documents (transposed into German law in 1985).

This interplay of national and international legislators as well as private institutes involved in governing statutory audits evidences a network-approach to regulation. Governance, not mere state intervention has been the prevailing regulatory mode. This did not preclude debate about further improvement: The quality of the statutory audit has been subject to controversial discussions questioning the effectiveness of audits as an enforcement instrument (e.g., Naumann 2000). Recent accounting scandals revealed a major misperception that audits were regarded sometimes as an inspection of sound management, capable to detect fraud infallibly. Auditing literature calls this misconception "Erwartungsluecke" (expectation gap, see Epstein and Geiger 1994;

¹¹ Gesetz über eine Berufsordnung der Wirtschaftsprüfer (Wirtschaftsprüferordnung, WPO).

Forster 1994). Over the years several attempts to close this gap have been undertaken by the legislator, e.g. with the aforementioned KonTraG. This amendment augmented the inspection scope of auditors and compelled them not only to supply a formulaic certification notation but to deliver a more detailed report. The KonTraG also facilitated shareholders to enforce possible claims against board members.

The most significant change in the enforcement regime dates only to December 2004: The “Bilanzkontrollgesetz” (financial statement monitoring act) amended the commercial code to the effect that a private enforcement institution could be established (see § 342b Handelsgesetzbuch). In July 2005 the Financial Reporting Enforcement Panel took up its operations after it had been founded in September 2004 and formally recognised by the responsible ministry in March 2005. The panel that is known in German press as “Bilanzpolizei” (Accounting Police, see e.g., Handelsblatt 31.08.2005, 32) extends the enforcement procedure by implementing a second stage of checks beyond the statutory audit (Hommelhoff and Mattheus 2004). The panel unfolds its power mainly because it is backed by an already existing public authority, the “Bundesanstalt für Finanzdienstleistungsaufsicht” (BaFin, Federal Oversight Commission for Financial Services¹²) that only occasionally intervened into enforcement procedures (see Schüler 2004). As enforcement exerted by private actors and public authorities were both tightened recently it is rather difficult to identify a clear direction of the governance change. With the BaFin only representing the last resort in this process and the panel intended to be the decisive actor, the new enforcement regime even stronger tries to combine the state’s interventionist interest with the flexibility and professionalism of the private sector (Lütz 2004). In this respect a shift in governance towards a community mode can be witnessed. It has to be emphasised however that the state safeguards the public interest not only by regulating the process but also keeping the crucial stage of enforcement – that is when cooperation between the private actors fails – in its own hands (Lütz calls the current reforms a “push in regulation...”¹³, 21-23).

3.3 Disclosure and Stock Market Governance

Disclosure – the dissemination of financial information to a wider and unspecific audience – is strongly related to the regulation of stock markets. Here, stock exchanges are the most important institutions and thus worthwhile looking at (e.g., Huddart et al. 1999). A stock exchange can be defined as a “commercial entity carrying on the

¹² In the process of restructuring banking and insurance oversight the BaFin was set up in 2002 as an integrated financial supervisory authority (Schüler 2004, 13). One of its responsibilities is overseeing the trade in securities. It is not responsible for the oversight of stock exchanges. (see <http://www.bafin.de>).

¹³ Original text in German “...Schub an Regulierung”.

business of running an exchange and seeking to protect and promote its business” (IOSCO 2001, p. 6). Such entities generate revenues by offering services like listing and trading of securities, providing clearing and settlement facilities or by selling market information. Hence, important stakeholders of a stock exchange are dealers, intermediaries, issuers and information vendors (Mues 1999, 91; IOSCO 2001, 6).

In Germany, stock exchanges were typically operated by the (local) chambers of commerce and industry (Mues 1999, 93). This made bourses “locally organized mutual associations” (Steil 2002, 62). Eight such regional stock markets were re-established in the post-war years.¹⁴ Article 74 of the German Basic Law has assigned stock exchange legislation primarily to the States (Bundesländer). While, within the scope of concurrent legislation, the Federal government (Bundesregierung) always had the possibility to intervene in stock market and exchange regulation, it did not exert any relevant influence until the late 1980s (Lütz 1998, 155). Since the late 1980s, both the German banking sector and large non-financial firms made substantial efforts to strengthen the “underdeveloped” security market. While banks tried to enter the promising investment and IPO market, the latter tried to increase financial flexibility in order to reduce their dependency on bank financing (Deeg 2005). These aims were constrained by the stable cartel-like relations that existed between the different actors of the fragmented German stock exchange system that were tolerated (if not supported) by the regional governments. Such relations existed not only between the actors of particular exchanges but also between the different (regional) exchanges. For example, some “blue chips” had to be traded at all German exchanges. Hence, issuers had to apply at all exchanges and, even more important, had to pay all related fees in an arrangement which benefited the small regional exchanges but made the stock exchange system as a whole unattractive for investors. One reason for the underdevelopment of the German capital market in that time is sometimes traced to this sort of regulation. But for stock exchanges times were changing tremendously. This was not so much because of the emerging European Single Market in financial services, but mainly because of technical innovation (e.g., Williamson 1999). In former times, a stock market was an “empty room” in which (human) brokers dealt with one another. With automation of trading it turned out to be possible to substitute the labour of the floor brokers and dealers (Deeg 2005).¹⁵ Thus, economies of scale (especially in the area of computing systems) gained

¹⁴ The eight German stock exchanges are/were domiciled in Bremen, Hamburg, Berlin, Hanover, Frankfurt, Düsseldorf, Munich and Stuttgart (the latter four were the larger ones). In 1999, the BÖAG Börsen AG was founded to operate both the stock exchanges in Hamburg and Hanover. In 2003 the stock exchanges in Bremen and Berlin have been merged.

¹⁵ An appealing example is the German XETRA system.

importance. The increased potential reach of the markets and heightened needs for investments raised the question of whether bourses and/or stock exchange operators should be privatized and was in part answered in the affirmative.

However, German bourses are, until today, self-regulated, not-for-profit entities under public law. But since 1993, the Frankfurt Stock Exchange, Germany's largest bourse, has a private administrating and operating institution (“Börsenträger”): the Deutsche Börse AG. The Deutsche Börse AG, is in duty to make, on request, “available the necessary staff, the financial resources, and the facilities and premises” for the operations of the Frankfurt Stock Exchange (see § 2 of the Exchange Rules for the Frankfurt Stock Exchange). However, the bourse itself – and not the Deutsche Börse AG – decides e.g. about admission rules, trading fees and disciplinary procedures in order to enforce the exchanges' rules (Lütz 1998, 155).

Despite criticism against the split system (Hopt and Baum 1997), there seems to be no official intention in Germany to bring the (legal) separation between the bourse and its operator to an end. However, the fact that the largest German bourse now is operated by a private company might have some implications on the policy and governance of the bourse itself. There seems to be some evidence that the private operator is not just technically acting but increasingly involved in setting rules for the bourse's constituents. Examples include that the Deutsche Börse AG, not the bourse, issues the guidelines for the regulated unofficial market (see § 89 of the Exchange Rules for the Frankfurt Stock Exchange). Recently, with the Entry Standard, the Deutsche Börse AG created a new segment in the unofficial (“open”) market. Further on, an admission for Xetra Funds, a trading segment for fund shares and fund-managed securities, has to be applied for and depends on approval of the Deutsche Börse AG's management (see section 2 (1) of the Conditions for Participation in Xetra Fund). This sort of regulation also applies for the participation in the Quality Segment for Structured Products, where specific certificates and warrants are traded (see section 1 (1) of the Conditions for Participation). The listing requirements in the closed Neuer Markt were set by the Deutsche Börse AG, too.

Nowadays, disclosure requirements for listed companies are still to a large extent regulated by law, but private sector actors such as the Deutsche Börse AG have entered the arena. As they earn their money with the prosperity of their respective bourses, they have a natural self-interest in enhancing listing quality. It is difficult to judge to what extent (if at all) the Deutsche Börse AG has until now influenced or demanded reforms in the listing rules of the Frankfurt Stock Exchange. But there is clear evidence that disclosure requirements increased in the last years. Issuers on the Frankfurt Stock Exchange now have the choice between listing in the Prime or the General Standard. In the latter, standard disclosure requirements are less demanding and accord to

(minimum) legal requirements. Listing in the Prime Standard, in contrast, requires among other premises quarterly reports in both German and English, application of international accounting standards (IFRS/IAS or US-GAAP) as well as ad hoc disclosures (in German and English) going beyond legal requisites. Those requirements are set up (autonomously) by the stock exchange and defined in the Stock Exchange’s rules and regulations (Börsenordnung). Only firms being listed in the Prime Standard are eligible for the important indices (calculated and published by Deutsche Börse AG) such as DAX and are therefore effectively forced to follow the Prime Standard’s rules.

Supervision of the German stock market system also changed substantially. The role of the nation/federal state has been strengthened here especially with the intention to support internationalisation and integration of capital markets (Lütz 1998). In 1992 the installation of a new (federal) market supervisory body, the supervisory office for securities trading (BAWe), was announced and later enacted. The federal impact was further strengthened with the merger of that and several other supervisory offices to a single Federal Financial Services Authority (BaFin) in May 2002. In the resulting organisation of German stock markets the former mutual stock exchanges lost some powers to the state and private actors and, additionally, the nation state plays an increasingly important role in market supervision.

4 WITHERING INFLUENCE OF THE NATION STATE?

4.1 Re-balancing the Public-Private Mix

Germany’s accounting system has been dominated by ‘State’ governance in the beginning of our observation period. Table 2 shows the settings before changes initiated by the EU or arising from globalisation issues could be observed. The domination of

Table 2: *Approach of Accounting Regulation in the “Golden Age” of the Nation State*

| Process Step / Mode of Governance | Standard Setting | Enforcement | Disclosure |
|-----------------------------------|-------------------------------|---|-------------------------------|
| State | Accounting Rules set by Law | Monitoring Authority, Auditing Regulation | Disclosure Stipulation by Law |
| Community | Private Standard Setting Body | Professional Self-Regulation, Private Enforcement Panel | Stock Exchanges (Inst.) |
| Market | Emerging Accounting Practice | Needs-based Auditing | Transaction-Based Contracts |

Legend:

| | |
|-----------------|--|
| Mode is applied | Instruments are used more intensively then in the contrasted era |
|-----------------|--|

public intervention is most obvious in standard setting, where a relatively pure ‘state’ approach was used. Moreover German government intervened moderately in field of

enforcement by pronouncing laws on auditing on the one hand and assigning the chamber of auditors with a large bundle of governance tasks on the other hand. Enforcement agencies interfering into financial accounting did not exist. Disclosure stipulation was again primarily regulated by laws, considering that stock exchange governance did not manage to gain much importance due to market fragmentation. The organising mode in German accounting policy has significantly altered over the last two decades. Table 3 highlights the regulatory changes. In standard setting, the German

Table 3: *Today’s Approach of Accounting Regulation*

| Process Step / Mode of Governance | Standard Setting | Enforcement | Disclosure |
|-----------------------------------|-------------------------------|--|-------------------------------|
| State | Accounting Rules set by Law | Monitoring Authority, Auditing Regulation Professional Self-Regulation, Private Enforcement Panel | Disclosure Stipulation by Law |
| Community | Private Standard Setting Body | | Stock Exchanges (Inst.) |
| Market | Emerging Accounting Practice | Needs-based Auditing | Transaction-Based Contracts |

Legend:

| | |
|-----------------|--|
| Mode is applied | Instruments are used more intensively then in the contrasted era |
|-----------------|--|

parliament lost its monopoly in setting accounting standards for group accounts. This loss of influence of the nation state does not constitute a shift from public to private. Governments still retain their jurisdiction in accounting, albeit on the European level. However, private actors got involved in standard setting. This involvement is by no means a retreat of the state, as the privately set rules (GAS and IFRS) have to be adopted in both cases by the respective authorities. The picture in enforcement and disclosure even shows an increase in state intervention. While both auditing and a (state) regulated profession of auditors (not accountants) existed already in the “golden ages” to enforce standards, there used to be no particular private or state enforcement agency monitoring the compliance with accounting rules. Private as well as governmental enforcement have been tightened in Germany – constituting increased state intervention. In the field of disclosure, increased involvement of private institutions can be witnessed. Traditionally, disclosure rules were set by the legislator. As for companies listed in the Prime Standard, the privately set disclosure requirements of the Deutsche Boerse AG going beyond legal requirements are effective. Hence it is beyond doubt that private actors are influential in formulating disclosure requirements.

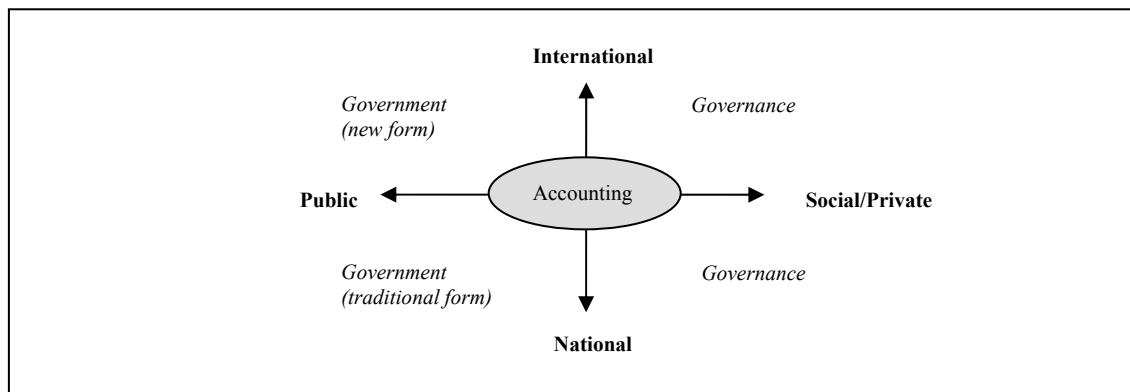
A shift away from state intervention in all fields of accounting is not uniform. State intervention did rather increase than decrease at the same time as the involvement of private actors became more pronounced. Community or market type governance was

replaced or augmented by regulation; especially by the nation state. What indeed took place was a significant change of the public-private mix of accounting regulation.

4.2 Internationalisation

While the form of intervention in accounting has changed due to private actors' participation, this is not the whole picture of Germany's new accounting governance. Another dimension of the recently implemented changes is a shift from national to supra-national governance forms. Figure 1 shows that this dimension is another subject of analysis to be considered when discussing regulatory changes.

Figure 1: *Two-axis model of changes in policy fields*



Source: Collaborative Research Center 597 "Transformations of the State", adapted

Changes in these dimensions are not necessarily interrelated. Accounting history provides numerous examples of alterations in intervention happening only along one of the two axes (e.g. the foundation of the SEC that introduced governmental scrutiny into financial accounting while standard setting remained in the hands of the profession). After having identified a shift towards private participation in German accounting governance, our description in part 3 shows as well that the observed changes at the same time represent a move towards internationalisation. The latter however happened until now mainly in standard setting while regulation of enforcement and disclosure remains a national matter.

Apparently, the simultaneous movement in Germany is interconnected, as neither of the shifts can be separated from the European harmonisation processes. In concrete examples: The mandatory adoption of IAS/IFRS was prescribed by the EU. The setup of a review panel for improved enforcement, moreover, is construed according to a recommendation of the Committee of European Securities Regulators (CESR). Internationalisation in accounting goes beyond Europeanisation however, and that is for at least two reasons: looking at the German case, it becomes clear that internationalisation is more than just technical harmonisation of a commonly governed economic area by means of state intervention. The internationalisation process follows at the same time a (perceived) need to prepare firms for participation in the international

capital markets. The permission to apply other than German accounting rules in 1998 (Kapitalaufnahmeleichterungsgesetz, HGB § 292a) goes along with this idea. On the macro level, a trend towards global accounting standards is observable with the two major players in standard setting, the FASB and the IASB, increasing their harmonisation efforts. As an example can serve the joint international group on performance reporting, that seeks to develop a common regulation for this central field of accounting.

Considering the tendency of Germany transforming from an insider to an arm's length economy (Franks and Mayer 1994; Schmidt 2003; Leuz and Wüstemann 2004) with firms competing for funds globally, another link between the shifts in both dimensions becomes visible (see Lütz 2004). Comparative accounting literature shows that standard setting as a state intervention with minor private participation can be found in the so-called "Continental-European" creditor-oriented accounting systems. Investor-oriented "Anglo-American" systems, in contrast, rely usually (see Nobes and Parker 2004) on standard setters under private law that are usually staffed with competent professionals and thus more flexible in coping with new challenges (see Ebert 2001, 69-73). Legitimising the foundation of the GASB in 1998 (likewise with the Kapitalaufnahmeleichterungsgesetz), the German legislator made a step towards the increasingly predominant "Anglo-American" way to regulate accounting by adjusting governance modes with the alteration of intervention mechanisms.

What is more, the above described authority shifts towards supra-national and private institutions constitute what is often referred to as 'global governance' concept (see Rosenau and Czempiel 1992; Mürle 1998). Mürle (1998) defines global governance as "the search for solutions to transboundary problems, which emerged [...] due to the current forms of globalization".¹⁶ As a result, new structures of politics serve as means to cope with new kinds of regulatory deficits. Apart from formal regulation, informal one is of importance, with relationship between the state and non-state actors given a lot of attention (Ibid.). The shifts towards global governance have been interpreted by several economic as well as political models (as in: Kahler and Lake 2004). Some authors use functionalist economic models (Haas 1958; Keohane and Hoffmann 1991), others efficiency based costs-and-benefits explanations of market integration (Casella and Feinstein 2002). Political models focus on distributional effects of globalisation (i.e., losers-winners and their resulting political preferences).

With respect to the focus fields of this paper (standard setting, enforcement, and disclosure), we can observe a new form of (global) governance in the first two of the fields – shift towards internationalisation and professionalisation of authority.

¹⁶ Authors' translation from German.

Disclosure level specifications, at last, have been altered by the domestic and foreign capital market demands. The issue remains, however, whether the emerging global accounting standards will replace national standards completely or be provided in parallel to these, the latter being more plausible considering the idiosyncrasies of the national systems (Cable 1999, 66). A move towards investor-oriented Anglo-Saxon accounting model can turn out to be the basis of the new global standards (Strange 1996, 139).

5 SUMMARY AND CONCLUSION

In this paper we outlined that the traditional German approach towards accounting regulation as it was predominant in the “golden age” of the nation and intervention state underwent major changes in recent decades. Private participation in accounting regulation has increased significantly and – more importantly – was institutionalised. However, the common perception that the public sector sacrificed competencies in standard setting is true only for a seven-year period after the legislator allowed listed groups to prepare their reports according to foreign accounting standards. Today, privately pronounced standards (IAS/IFRS) are subject to an endorsement procedure of the EU Commission with strong influences of the member states that proved its determination in the case of the rejected IAS 39. In the area of enforcement, both the public as well as the private sector gained influence with the adoption of a two-tier process that involves regular spot checks by a newly established panel that is backed up by an authority to intervene as a last resort. In disclosure, one witnesses increased influence of stock market operators.

Consequently, even though the state intervention in accounting has increased, the relative stake of private participation caused a shift in the public-private mix in favour of the latter. These changes correspond to the general move towards an Anglo-Saxon, investor-oriented accounting model that seems to dominate global accounting to an increasing extent. Taking these internationalisation tendencies into account, a new governance mode with increased complexity has been established. It is appropriate, we believe, to label these changes altogether as a shift from government towards governance.

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