

Company Interest

The Public Interest of the Enterprise 'in Itself'

Gunther Teubner

1. An Enigmatic Concept

The 'enterprise-in-itself' is an awkward sounding word. It is a direct translation from the German *Unternehmen an sich*, a concept of corporate law doctrine which is vaguely resonant of Kantian epistemology (the 'thing-in-itself'). The concept exercised a great fascination over company and labor lawyers in Weimar Germany.¹ For them the 'enterprise in itself' was the incorporation of the spirit of capitalism in its purest form. While older concepts had defined the enterprise as an association of owners, the new concept expressed the enterprise's autonomy as a social system and an economic power centre.² Nowadays when the enterprise is seen as nothing but a 'nexus of contracts' among individual resource owners, a view which is shared not only by leading economists³ but also by influential legal scholars and judges,⁴ the 'enterprise in itself' seems only to belong in the

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- 1 Cf. esp. F. Haußmann, *Vom Aktienwesen und vom Aktienrecht*. Mannheim: Bensheimer, 1928, p. 27 ff.; O. Netter, 'Zur aktienrechtlichen Theorie des Unternehmens an sich', in: *Festschrift. Albert Pinner zu seinem 75. Geburtstag*. Berlin: de Gruyter, 1932, p. 507-612; A. Nußbaum, 'Zur neueren Entwicklung der Lehre vom Unternehmen', in: F. Klausung et al. (eds.), *Beiträge zum Wirtschaftsrecht. Ernst Heymann zum 6. April 1930*. Vol. 2. Marburg: Elwert, 1931, p. 492-504.
 - 2 See T. Raiser, 'The Theory of Enterprise Law in the Federal Republic of West Germany', *The American Journ. of Comparative Law*, 36 (1987), pp. 111-129, 112 ff.
 - 3 Despite their differences, both the neoclassical and the institutional approach share the assumption of the contractual nexus, O. Williamson, 'Comparative Economic Organization', *Administrative Science Quarterly*, 36 (1991), pp. 269-296; *id.*, 'The Logic of Economic Organization', *Journal of Law, Economics and Organization*, 4 (1988), pp. 65-93; A. Alchian and S. Woodward, 'Reflections on the Theory of the Firm', *Journal of Institutional Economics*, 143 (1987), pp. 110-136; S. Grossman and O. Hart, 'The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration', *Journal of Political Economy*, 94 (1986), pp. 691-719. The starting point for the nexus-concept were A. Alchian and H. Demsetz, 'Production, Information Costs, and Economic Organization', *American Economic Review*, 62 (1972), pp. 777-795.
 - 4 Most prominently, F. Easterbrook and D. Fischel, 'The Corporate Contract', *Columbia Law Review*, 89 (1989), pp. 1416-1448; the approach is criticized by D. Millon, 'Theories of the Corporation', *Duke Law Journal*, (April 1990), pp. 201-262; W. Bratton, 'The "Nexus of Contracts" Corporation: A Critical Appraisal', *Cornell Law Review*, 74 (1989), pp. 407-465; R. Buxbaum, 'Corporate Legitimacy, Economic

chamber of horrors of German legal history. Even those critical German company lawyers that are fond of experiment venture just a brief glance, before turning away, more in horror than as the result of engagement.⁵ It is only the grand old master of German company law, Professor Flume, who enterprisingly looks at this legal figure in somewhat more detail, even bringing out positive aspects. But then he banishes the enterprise in itself with one decisive word: 'Ideology'!⁶

It is indisputable that the enterprise-in-itself continues to exercise a fascination, despite (or because) of all the taboos. Let us, then, be tempted to have another go. Are the political experiences of the eighties with economic deregulation, de-unionization, and the accompanying contractualist theories of the firm not sobering enough to take us beyond the ever recurrent oscillations between shareholder-orientation and managerialism, to rethink the autonomy of the enterprise from a perspective of public responsibility?⁷ Are the conceptual resources of present-day legal theory not sufficient to discipline the legal figure of the enterprise in itself? Surely it can provide for reactions other than mere horror. Does it not give insight into the meaning of the enigmatic term of 'company interest', which becomes more and more

Theory and Legal Doctrine', *Ohio State Law Journal*, 515 (1984), p. 515 ff.

- 5 R. Wiethölter, *Interessen und Organisation der Aktiengesellschaft im amerikanischen und deutschen Recht*. Karlsruhe: Müller, 1961, p. 38 ff., esp. 41 ff.; T. Raiser, *Das Unternehmen als Organisation*. Berlin: de Gruyter, 1969, p. 2; F. Kübler, *Gesellschaftsrecht*. 3rd ed. Heidelberg: Müller, 1990, § 14 III 2a.
- 6 W. Flume, *Die Juristische Person*. Wien: Springer, 1983, p. 37 ff., 38.
- 7 See especially P. Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community*. Berkeley: University of California Press, 1992, p. 229 ff.; W. Streeck, 'Status and Contract: Basic Categories of a Sociological Theory of Industrial Relations', in: D. Sugarman and G. Teubner (eds.), *Regulating Corporate Groups in Europe*. Berlin: de Gruyter, 1990, pp. 105-145; G. Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person', *American Journal of Comparative Law*, 36 (1988), pp. 130-155; R. Buxbaum, 'Juridification and Legitimation Problems in American Enterprise Law', in: G. Teubner (ed.), *Juridification of Social Spheres*. Berlin: de Gruyter, 1987, pp. 241-272. For a public responsibility dimension in corporate law see Millon *op.cit.* (Fn. 4), p. 251 ff.

important in the contemporary debates, in the European Community⁸ as well as in national laws?⁹ As Kolvenbach writes,

The company law harmonization of the European Community has as its principal components the coordination, safeguarding, protection and equivalence necessary to protect shareholders, creditors, customers, potential investors and, last but not least, the employees of companies in the Member States¹⁰.

And the notion of 'company interest' is not only widespread in European national laws with a tradition in labor participation but has also found legislative recognition in Britain:

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- 8 The concept of the 'interest of the enterprise' has been explicitly introduced for European legal harmonization, cf. Art. 10 all, p. 1 of the proposed 5th company law directive in OJ No C 240, 9.9.1983, p. 2 ff. and Art. 74 II Proposal for Council Regulation on the Statute for a European Company, 32 OJ Eur. Comm. (No. C 263) 41 (1989). See W. Kolvenbach, 'EEC Company Law Harmonization and Worker Participation', *University of Pennsylvania Journal of International Business Law*, 11 (1990), p. 709 ff.; T. Abeltshauser, 'Towards a European Constitution of the Firm: Problems and Perspectives', *Michigan Journal of International Law*, 11 (1990), pp. 1235-1269, 1259 ff.; R. Buxbaum and K. Hopt, *Legal Harmonization and the Business Enterprise*. Berlin: de Gruyter, 1988, p. 200 ff.
- 9 For a comparative analysis of enterprise interest in different national laws, K. Kreuzer (ed.), *Die Haftung der Leitungsgorgane von Kapitalgesellschaften*. Baden-Baden: Nomos, 1991; D. Bakibinga, 'Directors' Duties to Act *Bona Fide* in the Interest of the Company', *International and Comparative Law Quarterly*, 39 (1990), pp. 451-460. For the recent German debate, M. Dreher, 'Unternehmen und Politik', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 155 (1991) pp. 349-377, 362ff.; F. Säcker, 'Unternehmensgegenstand und Unternehmensinteresse', in: H. Leßmann *et al.* (eds.), *Festschrift für Rudolf Lukes*. Köln: Heymann, 1989, pp. 547-557; C. Schmidt-Leithoff, *Die Verantwortung der Unternehmensleitung*. Tübingen: Mohr, 1989; E. Salm, *Das Unternehmensinteresse*. Tübingen: Diss., 1986; M. Jürgenmeyer, *Das Unternehmensinteresse*. Heidelberg: Recht & Wirtschaft, 1984; T. Brinkmann, *Unternehmensinteresse und Unternehmensrechtsstruktur*. Frankfurt/M.: Lang, 1983; W. Koch, *Das Unternehmensinteresse als Verhaltensmaßstab der Aufsichtsratsmitglieder im mitbestimmten Aufsichtsrat einer Aktiengesellschaft*. Frankfurt/M.: Lang, 1983. For the British debate, see W. Wedderburn, 'The Legal Development of Corporate Responsibility', in: K. Hopt and G. Teubner, *Corporate Governance*. Frankfurt: Lang, 1985, p. 20 ff. For the parallel debate in the US, J. Nesteruk, 'Legal Persons and Moral Worlds: Ethical Choices within the Corporate Environment', *American Business Law Journal*, 29 (1991), pp. 75-97; Millon, *op.cit.* (Fn. 4); D. De Mott, 'Beyond Metaphor: An Analysis of Fiduciary Obligation', *Duke Law Journal* (November 1988) pp. 879-924.
- 10 Kolvenbach, *op.cit.* (Fn. 8), p. 709.

The matters to which the directors of a company are to have regard in the performance of their function shall include the interests of the company's employees in general as well as the interests of its members.¹¹

In this article I come to the conclusion that if we speak of company interest we do not mean the interest of resource holders - whether capital or labor - but the interest of the enterprise 'in itself'. The ambiguity is deliberate. The formula combines two viewpoints: (i) the self-interest of the organization; (ii) the public interest in economic organization.

'Metaphysical essence', 'self-serving management', and 'personless corporation': these are the three well-known objections that served to justify the banishment of the concept, and which continue to do so today.¹² However, these objections lose their plausibility if the enterprise-in-itself is re-interpreted in the perspective of recent social theories, particularly in terms of self-reference and autopoiesis.¹³ The theory of self-referential systems allows the enterprise-in-itself to be treated, without organic metaphors, as a legal concept that is legitimate in terms of both social theory and legal doctrine. From this perspective, the enterprise appears as a self-referential system of interrelated communications which 'interferes' with external economic and political processes on the basis of its operative

11 Companies Act 1980 § 46(1).

12 On this debate, with further references, see generally D. Reuter, 'Probleme der Unternehmensnachfolge: Gewerblicher Erbhof, verfaßtes Familienunternehmen, Unternehmen an sich', *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 20 (1991), pp. 467-487; Flume *op.cit.* (Fn. 6), p. 37 ff.; W. Zöllner, *Die Schranken mitgliederschaftlicher Stimmrechtsmacht bei den privatrechtlichen Personenverbänden*. München: Beck, 1963, p. 67 ff.; E.-J. Mestmäcker, *Verwaltung, Konzerngewalt und Recht der Aktionäre*. Karlsruhe: Müller, 1958, p. 14. On the parallel debate in the U.S., see Bratton, *op.cit.* (Fn. 4), p. 424 ff.

13 On the paradigm change from open systems to self-referential systems, N. Luhmann, *Soziale Systeme*. Frankfurt: Suhrkamp, 1984; for the relation with organization and economy, *id.*, 'Organisation und Entscheidung', 'Organisationen im Wirtschaftssystem,' in: *id. Soziologische Aufklärung 3*. Opladen: Westdeutscher Verlag, 1981, p. 335 ff., 390 ff.; *id. Die Wirtschaft der Gesellschaft*. Frankfurt: Suhrkamp, 1988, p. 302 ff.; for the organization in classical systems theory T. Parsons and N. Smelser, *Economy and Society*. London: Routledge, 1956, esp. p. 101 ff., 252 ff. For a systems approach in organization theory D. Baecker, *Die Form des Unternehmens*. Frankfurt: Suhrkamp, 1993; W. Kirsch, *Kommunikatives Handeln, Autopoiese, Rationalität*. München: Kirsch, 1992; Wimmer, 'Der systemische Ansatz', in: *Managerie. Jahrbuch für systemisches Denken und Handeln im Management*, 1 (1992), pp. 70-104; D. Knyphausen, *Unternehmungen als evolutionsfähige Systeme*. Herrsching: Kirsch, 1988.

closure. This concept is clearly distinguished from the usual legal definitions of the enterprise ('a longterm combination of personal forces and material resources'¹⁴), and from the theory of the enterprise as a social association ('a group of co-operating people'¹⁵). People and things are transferred into the enterprise's environment and the enterprise is constructed in radical fashion exclusively as an ensemble of communications. That is why the term 'enterprise-in-itself' seems appropriate, underlining the self-reference and autonomy of the organization.

Self-referential closure changes the enterprise's relation to the environment. This can no longer be seen as exchange relation via input-output, but as the 'structural coupling' of an operatively autonomous organization to its economic and political environment.¹⁶ The enterprise autonomously decides about how to open towards the environment and how to translate environmental perturbations into its internal structure. In this respect the theory of a self-referential, closed, enterprise goes well beyond the more recent legal concept of 'enterprise as organization' which looks at the organization purely from an internal perspective.¹⁷ A view of the enterprise as a self-referential system abandons an organization theory perspective and establishes from the outset a social theory perspective which focuses on the complex relationships of the economic organization to society at large.

'Metaphysical essence'? Certainly not, since the enterprise-in-itself is then not some new kind of 'organic' entity somehow transcending human individuals, but just an ensemble of human communications that has its own

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- 14 E.g. K. Ballerstedt, 'Was ist Unternehmensrecht?', in: H.M. Pawlowski *et al.* (eds.), *Festschrift für Konrad Duden zum 70. Geburtstag*. München: Beck, 1977, pp. 15-36, 22.
- 15 E. Fechner, *Die Treubindungen des Aktionärs*. Weimar: Böhlen, 1942, p. 70; *id.*, *Das wirtschaftliche Unternehmen in der Rechtswissenschaft*. Bonn: Bonner Universitätsbuchdruck, 1942; for the contemporary debate: H. Steinmann, 'The Enterprise as a Political System', in: Hopt and Teubner, *op.cit.* (Fn. 9), pp. 401-428; O. Kunze, 'Unternehmen und Gesellschaft', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 147 (1983), p. 16 ff.; O. Nell-Breuning, 'Unternehmensverfassung', in: K. Biedenkopf *et al.* (eds.), *Das Unternehmen in der Rechtsordnung. Festgabe für Heinrich Kronstein aus Anlaß seines 70. Geburtstages*. Karlsruhe: Müller, 1967, p. 47-77.
- 16 For the concept of structural coupling, see H. Maturana and F. Varela, *The Tree of Knowledge*. Boston: New Science Library, 1987, ch. 5.
- 17 Raiser, *op.cit.* (Fn. 5), p. 83; but see *id.*, 'Unternehmensziele und Unternehmensbegriff', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 144 (1980), pp. 206-231, 229 ff. for the external reference to society.

inherent regularities and autonomy which the law has to take account of. 'Self-serving management'? Quite the contrary, the construct of the enterprise-in-itself is fundamentally misunderstood if it is seen merely as an ideology for legitimizing the shift in power from shareholders to management. This of course does not rule out its ideological abuse, but it shares this risk with other concepts. It is the very contrast with management interests, just as with other group interests, that gives the whole construct of the enterprise-in-itself its meaning. It rejects the opposition of shareholder-orientation and managerialism and favors an orientation toward the productive organization. 'Personless corporation'? Partly yes, partly no. That the communicative ensemble is effectively separated from acting individuals, whether shareholders, workers or management, is correct. However, this is compensated for by the link-up with the public ends towards which the economic organization is oriented. If the enterprise-in-itself is redefined in this way, then contemporary theoretical language can provide a link with one of the controversies of Weimar Germany, associated particularly with the name of Walter Rathenau.¹⁸ If the modern enterprise has gained a far-reaching autonomy from owners and management, what is its appropriate place in the larger society?

Disciplined in this way, the concept of the 'enterprise-in-itself' can provide some clarification of the extremely confused debate on the 'company interest'.¹⁹ Clarification can be hoped for in the following three areas. First, who is the 'subject' of the company's interest? Shareholders? Management? Workers? Second, the substantive and procedural principles of law to which the company interest is oriented. Third, the role that the whole concept plays in the interaction of company and labor law.

18 Walter Rathenau, a far-sighted manager and politician of Weimar Germany had forcefully argued that the interests of the owners of the corporation should be limited and that corporations should become subject to public control, W. Rathenau, *Vom Aktienwesen: Eine geschäftliche Betrachtung*. Berlin: S. Fischer, 1917. Rathenau argued that the corporation is 'no longer purely a system of private interests; it is rather, both individually and collectively, a national concern belonging to the community, which owing to its origin still bears, rightly or wrongly, the marks of an undertaking run purely for profit, but which for some time and to an increasing degree has been serving the public interest', W. Rathenau, *Gesammelte Schriften*, Vol. 5. Berlin: S. Fischer, 1918, p. 154.

19 A representative example is the report on the proceedings of the *German Enterprise Law Commission* (1980), p. 139 ff.

Although these are complex issues, it may help the argument to give my answers to these questions at this point. In a nutshell they may be expressed as follows:

- (i) The company interest cannot be identified with the interest of the shareholders. Moreover, it is different from the interests of the interest-groups involved. None of the resource-holders, whether shareholders, workers, or management, are the 'subject' of the company interest. It is the 'corporate actor' itself, that is to say the autonomous ensemble of communications in its orientation towards broader social expectations. At the same time this rules out the overall economic system and the political system as subjects of this interest.
- (ii) In substance, the company interest is oriented neither merely to profit maximization, nor to the satisfaction of consumer interests, nor towards an internal discursive process which brings diverse interests into communality. Instead, the enterprise interest is directed towards creating 'reflexive' procedural structures that will allow a mediation between the main social task of the enterprise and its various contributions to different sectors of social life.
- (iii) As a legal concept, finally, the company interest transforms broader social expectations of economic organization into principles and rules of law, as opposed to the combined self-interests of capital, labor and management. In the name of the enterprise interest, legal directives need to be developed that stress the public interest in economic organization and protect it against the combination of private interests. Or, putting it rather sloppily: it is in the public interest of the enterprise to exploit the greed of private interests and to extract their social 'surplus value' in terms of social guarantees for the future.

2. Subject or Procedure?

What do these abbreviated formulations mean in detail? I will answer this question by discussing two fundamentally opposed positions in the recent German debate on the company interest. These positions are of general relevance not merely because they both analyse the phenomenon with a praiseworthy depth of focus, but also because their language, style of thought and method of analysis make them representative of important differences in contemporary legal thinking about the enterprise.

The mainstream opinion focuses on the question of who is the 'subject' of the company interest.²⁰ Its central thesis is that the enterprise itself cannot be this 'subject', and that it can only be the owners of the enterprise, whether individual actors or groups of individual actors (individual entrepreneur, partnership, association of owners). This allows a unitary concept of the corporate interest to be formulated while nevertheless taking account of the multiplicity of company forms. For this position the criterion of legal practicability is always in the foreground of the argument. Difficult constructions of legal dogma, such as the identification of enterprise and legal person in an 'ideal whole'²¹ are considered. So occasionally are sociological approaches or references to economic theories of the firm. But they are all checked for their pragmatic use which ultimately leads to the company interest being assessed in a rather restrictive way. It is seen as a mere 'negative maxim of conduct'. In this view, the company interest is a legal principle that rules out certain extreme forms of behavior which are detrimental to the interests of the owners.

The minority position is quite different in content, style of thought and ambition. They focus not so much on the 'subject' of the corporate interest as on the normative meaning of the interest formula itself. 'Proceduralization' of the company interest is the central thesis.²² The enterprise interest - so the argument goes - cannot be 'juridified' through substantive legal rules, but only through procedural preconditions for a

20 With significant differences in detail, Jürgenmeyer, *op.cit.* (Fn. 9); F. Rittner, 'Der Bericht der Unternehmensrechtskommission und die GmbH', *GmbH-Rundschau*, 1981, p. 277, 288; H.P. Westermann 'Rechtsformunabhängige und rechtsformspezifische Mitbestimmung im Bericht der Unternehmensrechtskommission,' *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 10 (1981), p. 393 ff.; H. Wiedemann, *Gesellschaftsrecht* I. Beck: München, 1980, p. 626, see also p. 326 on formal enterprise objectives; W. Junge, 'Das Unternehmensinteresse', in: H. C. Ficker *et al.* (eds.), *Festschrift für Ernst von Caemmerer zum 70. Geburtstag*. Tübingen: Mohr, 1978, pp. 547-557.

21 Flume, *op.cit.* (Fn. 6), p. 31 ff.

22 Again with important differences among themselves K.H. Ladeur, *Postmoderne Rechtstheorie: Selbstreferenz - Selbstorganisation - Prozeduralisierung*. Berlin: Duncker & Humblot, 1992, p. 186 ff.; M. Blecher, *Zu einer Ethik der Selbstreferenz*. Berlin: Duncker & Humblot, 1991, p. 232 ff.; B. Nagel, *Paritätische Mitbestimmung und Grundgesetz*. Berlin: Duncker, 1988, p. 28 ff.; Raiser, *op.cit.* (Fn. 2); R. Wiethölter, 'Social Science Models in Economic Law', in: T. Daintith and G. Teubner (eds.), *Contract and Organization*. Berlin: de Gruyter, 1986, pp. 52-67; F. Kübler, 'Dual Loyalty of Labour Representation', in: K. Hopt and G. Teubner, *op.cit.* (Fn. 9), p. 440; Brinkmann, *op.cit.* (Fn. 9); S. Laske, 'Unternehmensinteresse und Mitbestimmung', *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 8 (1979), pp. 173-200.

reconciliation of conflicting internal interests. This position differs from the first one not only in its far more ambitious recourse to interdisciplinary theories of the firm but also in its use of this approach to develop a theory of 'enterprise law' which goes well beyond existing company law. As a theory of 'private government', it tends to include aspects of labor law as well as broader aspects of political regulation. It is concerned with the public constitution of the economic enterprise. This is captured by the conceptual formula: from company law to enterprise law.²³

The goal here is also that of application in legal practice but the practice is not seen as oriented to the traditional company law doctrine which has gradually developed within the legal system, but to an encompassing legal theory of the enterprise which should be arrived at through interdisciplinary analysis. In particular, bridges are built to organizational sociology,²⁴ to political science,²⁵ to the economic analysis of law,²⁶ to systems theory,²⁷

23 Raiser, *op.cit.* (Fn. 2), p. 113 ff.

24 Representative of organizational sociology analyses is: Raiser, *op.cit.* (Fn. 2); *id.*, 'Die Zukunft des Unternehmensrechts', in: M. Lutter *et al.* (eds.), *Festschrift für Robert Fischer*. Berlin: de Gruyter, 1979, p. 561-578.; *id.*, *op.cit.* (Fn. 5).

25 For approaches of 'private government': Steinmann, *op.cit.* (Fn. 15); C. Ott, 'Die politische Dimension des Unternehmens als Problem des Unternehmensrechts', in: O. Kießler *et al.* (eds.), *Unternehmensverfassung*. Köln: Heymann, 1984, pp. 23-37; *id.*, *Recht und Realität der Unternehmenskorporation*. Tübingen: Mohr & Siebeck, 1977.

26 For the economic analysis of enterprise law in Germany: E. Schanze, 'Contract, Agency, and the Delegation of Decision Making' in: G. Bamberg and K. Spreman (eds.), *Agency Theory, Information, and Incentives*. Berlin: Springer, 1987, pp. 461-471; *id.*, 'Potential and Limits of Economic Analysis: The Constitution of the Firm', in: T. Daintith and G. Teubner (eds.), *Contract and Organization*. Berlin: de Gruyter, pp. 204-219; P. Behrens, 'The Firm as a Complex Institution', *Journal of Institutional Economics*, 141 (1985), pp. 62-75; C. Kirchner, 'Ansätze zu einer ökonomischen Analyse des Konzernrechts', in: *Jahrbuch für Neue Politische Ökonomie*, 3 (1984), p. 223 ff.; *id.*, 'Ökonomische Analyse des Unternehmensrechts', in: *Jahrbuch für Neue politische Ökonomie*, 2 (1983), p. 137 ff.; T. Brinkmann and F. Kübler, 'Überlegungen zur ökonomischen Analyse des Unternehmensrechts', *Journal of Institutional Economics*, 137 (1981), p. 681 ff.

27 For systems theory considerations in enterprise law: Blecher, *op.cit.* (Fn. 22), p. 232 ff.; T. Abeltshauser, *Strukturalternativen für eine europäische Unternehmensverfassung*. Berlin: Duncker, 1990, p. 171 ff.; G. Vardaro, 'Before and Beyond the Legal Personality: Group Enterprises and Industrial Relations', in: Sugarman and Teubner, *op.cit.* (Fn. 7), pp. 217-251; G. Teubner, 'Unitas Multiplex: Corporate Governance in Group Enterprises' in: Sugarman and Teubner, *ibid.*, pp. 67-104; *id.*, *op.cit.* (Fn. 7); *id.*, 'Corporate Fiduciary Duties and their Beneficiaries', in: Hopt and Teubner, *op.cit.* (Fn. 9), p. 149 ff.; *id.*, 'Corporate Responsibility' als Problem der Unternehmensverfas-

and to critical theory.²⁸ In this way it covers the spectrum of a whole series of recent enterprise-law studies that have sought to make the interdisciplinary debate fruitful for the development of an enterprise constitution that integrates company law, labor law and the public regulation of the enterprise.

The contrasts between the two positions certainly call for resolution. However, to be more than merely taking sides, the question of possible amplifications has to be raised, in terms of both method and content. Can a legal concept of enterprise interest be theoretically formulated that can at the same time be applied effectively in practice and meets normative requirements? And can a concept of enterprise interest be found in which views on its 'subject' and its 'proceduralization' can complement each other?

3. Who is the Subject of the 'Corporate Interest'?

'The primary approach to corporate governance continues to be the question of the social and economic functions and tasks of the enterprise.'²⁹ Such an approach seems to be wise in seeking to determine the subject of the corporate interest. It puts us in a position to move both single-interest and multiple-interest approaches into the background and bring out the public elements of corporate interest, its relation to the whole of society. In fact, it would seem to be plausible not merely to relate such a central concept to the legal protection of 'legitimate' partial interests or their balancing through compromise, but instead to formulate it from a social theory perspective.³⁰

sung', *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 12 (1983), p. 34 ff.

28 For critical legal theory, the idea of proceduralization and its perspectives in the law of enterprises: R. Wiethölter, 'Proceduralization of the Category of Law', in: C. Joerges and D. Trubek (eds.), *Critical Legal Thought*. Baden-Baden: Nomos, 1989, p. 501 ff., 508; *id.*, *op.cit.* (Fn. 22), p. 52 ff.; *id.*, 'Privatrecht als Gesellschaftstheorie', in: F. Baur *et al.* (eds.), *Funktionswandel der Privatrechtsinstitutionen. Festschrift für Ludwig Raiser zum 70. Geburtstag*. Tübingen: Mohr & Siebeck, 1974, pp. 645-695.

29 Jürgenmeyer, *op.cit.* (Fn. 9), p. 85.

30 For all the differences in approach, this is the common starting point of Mestmäcker, *op.cit.* (Fn. 12), p. 36; Wiethölter, *op.cit.* (Fn. 5); Zöllner, *op.cit.* (Fn. 12); M. Lutter, *Unternehmensverfassung und Wettbewerbsordnung*, Betriebsberater, 30 (1975), p. 613 ff.; Ballerstedt, *op.cit.* (Fn. 14), p. 15, 29 ff.; P. Ulrich, *Die Großunternehmung als quasi-öffentliche Institution*. Stuttgart: Poeschel, 1977, p. 189 ff.; H.J. Mertens, 'Zuständigkeit des mitbestimmten Aufsichtsrats', *Zeitschrift für Gesellschafts- und Unternehmensrecht*, 6 (1977), p. 270 ff.; Junge, *op.cit.* (Fn. 20); Raiser, *op.cit.* (Fn. 17, 1980), p. 224 ff.; *id.*, *Recht der Kapitalgesellschaften*. 2nd ed. München: Vahlen,

This straightaway rules out the traditional approach of identifying the corporate interest with shareholder interests, whether individually or collectively. As the German debate over codetermination showed, the concept of 'corporate interest' has been suspected in two ways of being a 'clever ideology'. It was not merely seen as serving as an ideological formula for displacing shareholder interest through labor demands,³¹ but also of the reverse - of serving to discipline worker interests in the profit interest of shareholders.³² If one is interested in a theoretical basis for the corporate interest in law, neither version of such ideological criticism should be taken seriously.

However, it gives one pause for thought to find a leading German company law textbook arguing that there does not exist any autonomous 'subject' of the corporate interest. The argument follows therefore that in cases of conflict it needs to be decided whether the shareholder interest or worker interest has primacy and that ultimately, the protection of shareholders as a group prevails.³³ To be sure, this identification of the corporate interest with shareholder interest is justified not by the higher value of the interest of an owner, but from the viewpoint of the economy as a whole. Shareholder interest is held to embody the 'business orientation of the enterprise'. However, here lies a multiple misunderstanding. For even accepting the restriction that corporate interest is to be equated with the 'business orientation', it is still not permissible to equate the business orientation of the enterprise as organization with the business orientation of the shareholders, in whatever aggregated form. From the viewpoint of society as a whole, it is an additional misunderstanding to equate corporate interest with 'the goal of the company', and this in turn with profit making plus distribution to shareholders.

'A more spacious conception of membership can make sense only if we reject the moral and legal primacy of the shareholder'.³⁴ This statement by Philip Selznick should be the starting point for a theory of the enterprise

1992, § 14 IV 2; Kübler, *op.cit.* (Fn. 5), § 14 II; Teubner, *op.cit.* (Fn. 27) 1983, p. 34 ff.

31 For instance W. Flume, 'Unternehmen und juristische Person', in: O. Sandrock (ed.), *Festschrift für Günther Beitzke zum 70. Geburtstag*. Berlin: de Gruyter, 1979, p. 49, 65; Wiedemann, *op.cit.* (Fn. 20), p. 402.

32 P.-H. Naendrup, in: F. Fabricius (ed.), *Gemeinschaftskommentar zum Mitbestimmungsgesetz*. Neuwied: Luchterhand, 1976, § 25 Rdn. 190.

33 Wiedemann, *op.cit.*, (Fn. 20), p. 626. See also p. 326 on formal enterprise objectives.

34 Selznick, *op.cit.* (Fn. 7) p. 346.

interest. Indeed, the identification of any partial interests, whether of capital owners, workers or management, with the corporate interest should be ruled out. Although early social association theory suggested taking 'human existence' as the central purpose of the enterprise³⁵ and concepts of managerialism tended to equate management interests with the interest of the enterprise, an emphasis on production and distribution tasks for the economy as a whole ought to put an end to such errors.³⁶

The difference between enterprise interest and 'public interest' is harder to treat though. Our approach would suggest the formulating of the corporate interest in terms of the whole of society. However, as Zöllner has rightly warned, the idea of the public interest should not be used 'uncritically'.³⁷ It is not yet sufficiently critical if one points to the indeterminacy of the public interest or mentions possible conflicts of objectives between 'big politics' and the micropolitics of the enterprise.³⁸ Only a sufficiently clear separation of the several system references involved can take us further. Neither the numerous regulations formulated for economic organizations within the political system, nor the political interests formulated within the economic system are of relevance here. Rather, it is the main social task of the enterprise and its various contributions to different sectors of social life that can serve as starting point for closer definition of the corporate interest.

It is the intermediate collective level that must therefore be confronted in order to avoid either a reductive identification with individual partial interests or an overreaching one with public, political or governmental interests. But it is easy to aim for this intermediate level, only to miss by a fraction. The difficulty is that of avoiding the usual oscillation of legal doctrine 'between the attempt to subsume the enterprise within the paradigm of the individual subject and the attribution of the enterprise to the public sphere which is separated from the market',³⁹ which happens if one attributes the corporate interest to the corporation understood as association of owners.⁴⁰ Looking into the causes of this, we come across two of the

35 Fechner, *op.cit.* (Fn. 15), p. 68.

36 Selznick, *op.cit.* (Fn. 7), p. 351.

37 Zöllner, *op.cit.* (Fn. 12), p. 78.

38 Dreher, *op.cit.* (Fn. 9), p. 365 ff.; Jürgenmeyer, *op.cit.* (Fn. 9), p. 65 ff.

39 Ladeur, *op.cit.* (Fn. 22), p. 189.

40 For example, Jürgenmenyner, *op.cit.* (Fn. 9), p. 176 ff.

fundamental taboos of company law: the holding on to the 'individualist basis' of the enterprise, and the dread of the 'personless corporation'.⁴¹

The 'individualist basis' cannot be criticized sharply enough. It stands in the way not only of an adequate legal concept of the enterprise, but even of its own intentions. Only human individuals - the argument goes - can be the 'subject' of interests, since only they have emotional attitudes, wishes, desires and objects of will. At the same time a humanistic intention is recognizable: interests must ultimately always be traceable back to real people.⁴² We cannot at this point go into the theoretical bases for the separation in principle between social and psychic meaning but one conclusion should be drawn.⁴³ All the 'interests' that can be taken into account by the law are not originally given by individuals but are in the strict sense socially constructed, that is to say constituted only by social communication. It follows that it does not make any difference in principle whether the endpoints for social attribution of these interests are 'individuals' or 'collectives'. Both the 'artificial' interests of organizations and the 'natural' interests of individuals are equally social constructs of reality. Organizations too, understood as autonomous systems of action, can be constituted as subjects of social interests. At the same time, the feared 'dehumanization' need not necessarily arise. On the contrary, only a theoretically sharp separation of the logics of sociality and individuality can begin to make clear the difficulty of the problem, which is obscured by formulations of its 'individualist basis'. The problem is that of how to make social institutions more sensitive, 'responsive', to human needs.⁴⁴

Accordingly, in order to identify intermediary subjects of interest attribution this individualist fixation has first to be broken down. A legal interest analysis has not only to deal with interests of individuals and the general public interest, but it has to take into account interests of 'intermediate' organizations which cannot simply be interpreted out of the way by humanistic sentimentality. In a first approximation, this intermediate interest is oriented towards preserving social identity, the continuation of the enterprise's self-reproduction as an organization. This aspect is rightly perceived by those authors who equate corporate interest with the

41 These taboos go back to F. Rittner, 'Öffentlichrechtliche Elemente der Unternehmensverfassung', *Planung*, 5 (1971), pp. 59-110, 70 ff.; F. Brecher, *Das Unternehmen als Rechtsgegenstand*. Bonn: Röhrscheid, 1953, p. 122.

42 Jürgenmeyer, *op.cit.* (Fn. 9), p. 140, 166 ff.

43 A fundamental work is Luhmann, *op.cit.* (Fn. 13, 1984), p. 158 ff.

44 Selznick, *op.cit.* (Fn. 7), p. 345 ff.

'organizational interest of the corporate actor in maintaining its existence, in power, resources and autonomy'.⁴⁵

In our language, we can say that within the general communicative context of society, organized sets of actions emerge that refer in their operations always only to themselves and recursively reproduce themselves in their elements with the sole 'objective' of continuing their operations. In an economic enterprise, organizational decisions always produce organizational decisions, ultimately oriented towards maintaining the enterprise as an autonomous flow of communication vis-à-vis markets, politics and persons. And the corporate interest gives expression to this interest in maintaining 'self-reference' and 'autopoiesis'. Indeed, the interest-formula provides it with additional intrinsic dynamics since, with the help of this formula the organization observes itself as a unity. More exactly, corporate interest is not an analytical construct of science, whether economics or legal science. Instead, it is a social abstraction. It emerges from the social reality of the enterprise itself and serves as the organization's self-description. It is, then, not to be located on the plane of real systems operations, but on that of abstractions that the social process produces itself. The mere reproduction of organizational decisions cannot lead to the integration of the unity of the enterprise. This unity must additionally be introduced through a self-description in order to be available as a reference point for the self-referential processing of organizational decisions. The enterprise interest thus symbolizes the unity of the enterprise as a reference point of self-referential operations.⁴⁶

45 R. Mayntz, *Verbände zwischen Mitgliederinteressen und Gemeinwohl*. Gütersloh: Bertelsmann, 1992, p. 17. With important enrichments of detail see also Dreher, *op. cit.* (Fn. 9), p. 363; F. Rittner, *Wirtschaftsrecht*. 2nd ed. Heidelberg: C.F. Müller, 1987, § 8, 27 ff.; M. Lutter and G. Krieger, *Rechte und Pflichten des Aufsichtsrats*. Freiburg i.Br.: Haufe, 1981, p. 81; P. Raisch, 'Zum Begriff und zur Verdeutlichung des Unternehmensinteresses als Verhaltensmaxime von Vorstands- und Aufsichtsratsmitgliedern', in: R. Fischer *et al.* (eds.), *Strukturen und Entwicklungen im Handels-, Gesellschafts- und Wirtschaftsrecht. Festschrift für Wolfgang Hefermehl zum 70. Geburtstag*. München: Beck, 1976, pp. 347-364.; T. Raiser, 'Das Unternehmensinteresse', in: F. Reichert-Facilides *et al.* (eds.), *Festschrift für Reimer Schmidt*. Karlsruhe: Versicherungswirtschaft, 1976, p. 101-119, 109; H.J. Mertens, 'Aufsichtsrat und Arbeitskampf', *Die Aktiengesellschaft*, 22 (1977), p. 306 ff., 308.

46 For a similar concept of the 'state' as self-description of politics, see N. Luhmann, *Political Theory in the Welfare State*. Berlin: de Gruyter, 1990, p. 117 ff.

Here, if not before, however, will begin the dread of the 'personless corporation'.⁴⁷ An enterprise detached from its human basis, that exists only 'for itself', that applies its decisions only towards its own continued existence, that circulates only within itself as it were in 'autistic' self-reference, can hardly advance to become the subject of a normatively evaluated 'enterprise interest'. Here is the justified core of all the objections to the enterprise-in-itself. But it is precisely these 'ecological' objections that are dealt with if one takes seriously the idea of 'structural coupling' as a necessary complement of autopoietic closure. With self-reference and autopoiesis what we have is not closed self-reproduction without an environment - *creatio ex nihilo*, as it were - but on the contrary, the linkage of operational closure and environmental openness. This linkage is to be found specifically in the external orientation of the enterprise which is based on its operational closure. Internally reconstructing its main social task and its contributions to other sectors of social life, the enterprise defines its self-interest - this in turn is relevant to both general social theory and legal policy and doctrine.

The enterprise interest should be conceived of as one of those 'compensatory institutions' which have the potential to correct the information failures of the price-mechanism by systematically connecting economic action to society via different channels:

the information which the price mechanism provides for the economy is systematically distorted concerning the effects of economic action in its social and natural environment... [with the result that] ...economic success endangers society and nature.⁴⁸

The corporate interest is, then, autonomous *vis-à-vis* other individual and collective interests. It is the self-interest of the organization that reconstructs its orientation towards the external social context into internal self-reproducing operations of the organization.

As against the 'methodological individualism' dominant among economists, jurists should not, then, give up the hard won conceptual figures of collective actors, in the debate on the legal person, but make them fruitful not only for the attribution of names, actions, rights and duties, but also for

47 For a recent discussion of the 'personless corporation' in legal theory, see M. Dan-Cohen, *Rights, Persons and Organizations*. Berkeley: University of California Press, 1986, p. 41 ff.

48 Luhmann, *op.cit.* (Fn. 13, 1988).

the newer legal thinking in terms of 'interests'. This may be described as the interest of the 'ideal whole', as Flume puts it in somewhat old-fashioned language borrowing from Savigny.⁴⁹ However, one need not succumb to the exaltations of German idealism nor give in to the organic metaphors of the real associational personality if one declares the 'corporate actor' itself to be an interest bearing subject. The enterprise, by contrast with Wiethölter's well-known formulation, is not only 'a reference point and coordination center of interests'⁵⁰, but over and above that an endpoint of social and legal attribution which reconstructs broader public interests within the idiosyncratic language of the organization.

This capacity of the organization to be a subject of its own interests has legally been recognized in some decisions of the German Federal Court in which the court stressed the primary duty of management 'to take account of the concerns of the enterprise as such'.⁵¹ It perhaps finds its purest legal expression in the famous codetermination decision of the German Supreme Court where the court had to decide on the constitutionality of the new regime of labor participation in the boardroom. The overriding criterion for the Supreme Court was the '*Funktionsfähigkeit des Unternehmens*', a phrase which is perhaps best translated as the viability of the enterprise as a public institution.⁵²

Similar tendencies are emerging from the international take-over debate, especially in the American anti-takeover statutes and in some court decisions.⁵³ They declare management defenses against hostile takeovers to be legitimate, if and insofar as they can be based on management's fiduciary duties as owed to 'the corporation and its shareholders'. As Millon suggests in his comments on the famous Time-decision⁵⁴ which allowed Time's

49 Flume, *op.cit.* (Fn. 6), p. 9. For an opposite position from the viewpoint of methodological individualism denying anything like a corporate interest, see A. Großmann, *Unternehmensziele in Aktienrecht*. Köln: Heymann, 1980, p. 87 ff.

50 Wiethölter, *op.cit.* (Fn. 5), p. 41.

51 Note the priorities of the court: 'The duties of management are not exhausted by taking exclusively into account the concerns of the enterprise as such; they also owe a duty of loyalty to the shareholders.' BGHZ 15, 71, 78.

52 *Bundesverfassungsgericht* BVerfGE 50, 290, 352. For recent decisions of the High Federal Court on the enterprise interest: BGHZ 36, 296, 306, 310; BGHZ 64, 325, 330f.; BGHZ 83, 144, 147, 149; BGHZ 106, 54, 65.

53 For a theoretically informed account see E. Orts, 'Beyond Shareholders: Interpreting Corporate Constituency Statutes', *The George Washington Law Review*, 61 (1992), pp. 14-135, 31 ff.; Millon, *op.cit.* (Fn. 4), p. 232 ff., 251 ff.

54 *Paramount Communications v. Time, Inc.* (1989 Transfer Binder) Fed. Sec. L. Rep. (CCH) 94, 514 (Del. 1990).

management to block a hostile offer, although the offer was highly attractive to Time's shareholder, the 'corporate interest' cannot be identified with 'shareholder interests':

Since the advent of hostile takeovers, this assumed identity of interest has no longer been tenable. Takeovers in which the transaction depends on busting up the company or taking an enormous debt burden present in dramatic relief a conflict between the shareholders' desire to cash in immediately by accepting a hostile bid and the continued welfare of non-shareholder constituencies. A policy judgment is unavoidable and *Time* subordinates short-term shareholder interests to corporate interests.⁵⁵

Sometimes the constituency statutes go not only beyond shareholder interests but even beyond the interests of 'nonshareholder constituencies' and determine a fiduciary duty of management to 'the prospects for potential growth, development, productivity and profitability of the corporation'.⁵⁶ And it is most striking that the main argument of the *Time* decision was not based on the interests of constituencies other than the shareholders, but on the interest in maintaining a 'distinctive and important "Time culture"'. This is the corporate self-interest in its orientation to the public task of the enterprise:

...this culture appears in part to be pride in the history of the firm - notably *Time Magazine* and its role in American life - and in part a managerial philosophy and distinctive [corporate] structure that is intended to protect journalistic integrity from pressures from the business side of the enterprise. ... the 'Time culture' importantly includes directors' concerns for the larger role of the enterprise in society.⁵⁷

Everything then depends on what is to be understood by the reconstruction of larger public interests within the organization. If something more, and different, is to be meant than the aggregation of interests of individual

55 Millon, *op.cit.* (Fn. 4), p. 255; similarly Selznick, *op.cit.* (Fn. 7), p. 347.

56 This is the formulation of New York's statute, N.Y. Bus. Corp. Law § 717(b) (McKinney Supp. 1991). In the literature, it is especially Wallman, 'The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties', *Stetson Law Review*, 21 (1991), p. 163 who stresses that these statutes refer to the enlightened self-interest of the organization and not only to other constituencies. Orts, *op.cit.* (Fn. 53), p. 26, criticizes this interpretation as 'reification'.

57 *Paramount v. Time* (Fn. 54) 93, 267.

resource holders on the one hand or the mere maintenance of the organization's existence on the other, is what is then at stake merely a diffuse general interest in economic activity? Or is it orientation towards goals of economic policy that is meant? Or perhaps the profit-orientation of the enterprise-in-itself in contradistinction to the profit orientation of shareholders? Or a discursive balancing of interests? Or corporate social responsibility?

4. What is the Content of the 'Corporate Interest?'

Such questions aim to clarify the content of the interest formula. They are dealt with extensively by the minority position in the German debate which examines a broad range of ideas from legal theory and organization theory insistently looking at what can be wrung from them for a interdisciplinarily defensible legal conceptualization of the corporate interest.⁵⁸ The result is as impressive as it is convincing. A substantive legal definition of the corporate interest, the argument goes, has few prospects of success. Instead, the point is to 'proceduralize' it. The idea is to structure decision-making procedures in such a way that successful balancing of interests becomes possible.

What is the reason why the enterprise interest cannot be defined substantively? According to the 'proceduralists' it is the result of a mixture of market failure and organizational failure.⁵⁹ Neither classical market models nor rational models of economic organization have been able to meet expectations for defining a substantive corporate interest. On the contrary, the result of recent developments in market and organizational structures is alleged to be a pluralization of enterprise objectives, which makes it impossible to substantively define an empirical or normative corporate interest a priori. These writers therefore propose treating the corporate interest purely procedurally as an institutional guarantee backed by the law for an overall interest constituted in the multiple interest conflicts of the micropolitics within the enterprise.

In my view there are good reasons to endorse such a procedural interpretation. I would emphasize, however, a slightly different aspect. In my view it is the highly advanced autonomy of the organization that makes any attempt at control from outside other than procedural ones largely

58 See the references in footnote 22.

59 Brinkmann, *op.cit.* (Fn. 9), p. 101 ff.

illusory.⁶⁰ If the enterprise consists in a multitude of self-referring recursive organizational decisions then no external observer, whether economic or organization theory and far less legal doctrine, can determine which decisions are in its interest and which not. This can only be done through self-observation internal to the organization, which can, if you wish, be termed 'pluralist' micropolitics within the enterprise. External control by law makes sense only in an indirect manner as the regulation of self-regulation. It is in this that I see the justification for treating the corporate interest procedurally as a legal concept.

At one important point, however, the proceduralist position should be pushed further. Its weakness lies in the inability to choose between the criteria for different procedures? Here the proposals are remarkably vague, pale and indefinite. Is it adequate to adduce the formulation 'integration through conflict' as developed in sociological conflict theories? What is gained if one refers to the interest in 'integration', for a successful integrative balancing of interests? It is almost with relief that we finally note that the German legislator on the co-determination statute appears, *deus ex machina*, to declare 'equal-sided' codetermination in the firm to be the effective normative foundation.⁶¹ However, the relief has to give way to criticism. For this means nothing other than politically overdetermining the theoretically underdetermined enterprise interest, almost by way of compensation.

The reason for the shortcoming is that the central references to social theories are ultimately confined to the purely internal perspective of the organization. However clearly processes of decision-making within the organization may be depicted from an organization theory viewpoint, the overall social dimension of economic enterprise does not appear. Legal conceptions of the enterprise based on organization theory have become astonishingly refined in the analysis of internal differentiation processes, but nevertheless ultimately remain rooted in a plurality of internal interests, without making the attempt at a broader social theory.⁶² Without this kind

60 Likewise Ladeur, *op.cit.* (Fn. 22), p. 200 ff.; Blecher, *op.cit.* (Fn. 22), p. 232 ff.; Kübler, *op.cit.* (Fn. 22), p. 440 ff.; Wiethölter, *op.cit.* (Fn. 22, 1985). For the present debate on regulation and the autonomy of regulated fields cf. G. Teubner and A. Febbrajo (eds.), *State, Law, Economy as Autopoietic Systems*. Milano: Giuffrè, 1992. 1992.

61 Brinkmann, *op.cit.* (Fn. 9), p. 203 ff., 230, 236 ff.

62 See the critique of the lack of overall social reference in current organization-theory approaches in Luhmann, *op.cit.* (Fn. 13, 1981), p. 390 ff.

of overall social perspective, however, no legally defensible concept of corporate interest can emerge, even in a modern proceduralized form.

The proceduralists, to be sure, are well aware of this problem. One can virtually feel how they continually wish to break the bounds of an internally oriented approach when they refer to social responsibility, inclusion in the mixed economy and so on.⁶³ The theoretical foundations of organization theory, however, do not provide for this, or at any rate do not allow it any systematic treatment.

This objection applies still more strongly to a somewhat different proceduralist approach which relates the enterprise interest explicitly to a 'dialogue model' in the sense developed by the German philosophers Jürgen Habermas and Karl-Otto Apel.⁶⁴ They model decision-making within the enterprise as a procedure of 'public deliberation' to which conditions of communicative rationality and the universalization of moral principles apply. They thus establish a link with practical philosophy, but at the cost of losing the link with economic reality and social theory. The idealizations of the dialogue model are problematic not only because, as one commentator puts it with reticent goodwill, they point only to 'conditions' of a normatively justifiable order of conduct⁶⁵ (p. 221), but also because they do not treat the intrinsic context of economic action. Apel himself objects to this 'tremendous idealization':

... under the conditions of our present economic system we are forced to thematize the 'intrinsic logic' of economic system rationality and its social integration which is not founded on the intentions of human actors ...⁶⁶.

63 Particularly Raiser, *op.cit.* (Fn. 2); Brinkmann, *op.cit.* (Fn. 9), p. 199, 209, 212, 307; Kübler, *op.cit.* (Fn. 22).

64 See the volume by B. Biervert and M. Held (eds.), *Ökonomische Theorie und Ethik*. Frankfurt/M.: Campus, 1987, particularly P. Ulrich, 'Die Weiterentwicklung der ökonomischen Rationalität', pp. 122-149; H. Steinmann, 'The Enterprise as a Political System', in: Hopt and Teubner, *op.cit.* (Fn. 9), p. 401 ff.; Laske, *op.cit.* (Fn. 22), p. 173 ff.; see also the cautious reaction by K.O. Apel, *Diskurs und Verantwortung*. Frankfurt: Suhrkamp, 1988, p. 270 ff., where he expresses his 'ambivalent feelings' about such an application of his ideas (p. 291 ff.).

65 Brinkmann, *op.cit.* (Fn. 9), p. 221.

66 Apel, *op.cit.* (Fn. 64), p. 302; see also the variations of communicative rationality when it comes to economic action in J. Habermas, *Faktizität und Geltung*. Frankfurt: Suhrkamp, 1992, p. 204 ff.

To be sure, the dialogue model makes sense for the context of moral reasoning and scholarly debate in which it has been developed. But transferring it directly to economic decisions not only makes it extremely idealistic and practically irrelevant but also fails from a theoretical standpoint. Even Habermas teaches today that it is impossible to develop a universal form of justification, a general moral discourse, a universally valid decision making procedure which is applicable to all kinds of social reflection or capable of transfer from one social context to another.⁶⁷ Reflexive processes in an economic context require specific 'subsystem-appropriate' procedures and legal rules. The crucial point is not to orient discourse within the enterprise towards a diffuse aggregation of the participants' interests but towards the broader public dimension of the enterprise. This idea, however, gets lost when a general proceduralization of enterprise interest borrows directly from practical philosophy.

There is an additional, even more worrying objection. In view of power structures within the enterprise, the 'dialogue model' no doubt amounts to the sacrificing of the corporate interest to combined producer interests at the expense of consumer and other social interests. This idealistic kind of proceduralization thus ultimately ends up once again with the orientation difficulties of a 'multiple-interest' approach, which cannot get beyond the mere combination of internal interests. Although proceduralists see, and explicitly wish to avoid, these dangers, many of their formulations come dangerously close to this kind of pluralism of interests with no orientation.⁶⁸ But to what is 'integration interest' or the 'regulatory idea of a successful combination of interests' to be oriented if not to mere integration or combination?

The point must therefore be to orient the proceduralization towards the overall public dimension of the enterprise. Does this mean a 'consumer perspective'?⁶⁹ The normative starting point for this perspective would not be the interests of shareholders, workers or managers, but the consumer interests in the optimum satisfaction of their needs. According to this model, consumer needs are communicated to the organization via market mechanisms and then converted into organizational objectives via the

67 Habermas, *op.cit.* (Fn. 66), p. 196 ff.

68 Brinkmann, *op.cit.*, (Fn. 9), p. 226 ff.

69 As developed by D. Krause, *Ökonomische Soziologie*. Stuttgart: Enke, 1989; *id.*, 'From Old to New Monism' in: Daintith and Teubner (eds.), *op.cit.* (Fn. 22), p. 219 ff.; *id.*, 'Corporate Social Responsibility: Interest and Goals', in: Hopt and Teubner, *op.cit.* (Fn. 9), p. 96 ff.

organization's profit motive. Finally they are converted into the economic actions of individual members via internal property rights and organizational mechanisms. The interest of the economic organization is thus directed at meeting consumer interests by instrumentalizing the organization's profit orientation. This approach is remarkable for two reasons. Firstly, by contrast with the narrow theories of property rights which work exclusively with individual actors, it consistently attributes the enterprise interest to the organization itself as an impersonal context of action that guides the actions of those involved in a particular direction ('corporate actor'). Secondly, it seeks the orientation of the enterprise interest neither in the maintenance of the organization's existence, nor in the pluralism of the interests of those involved, but in its broader social task: society's interest in satisfying consumer needs.

But here also lies the weakness of this approach. It over-estimates the consumer perspective and idealizes the profit principle. It is only in idealized conditions that the profit approach, even shifted from the private capitalist to the organization, is capable of adjusting the organization's action responsively to consumer needs. In real world conditions, profit orientation and consumer needs are largely autonomous from each other. A normative enterprise interest, however, cannot make itself dependent on ideal conditions, but must be applicable even under conditions of enterprise concentration and 'mixed economy'. Put more abstractly, the problem is to adequately separate the main task of the enterprise ('function') from its contributions to other social sectors ('performance'), before recombining them as the corporate interest.

Accordingly, the satisfying of consumer needs appears only as 'performance', that is to say one among many things that the firm does *vis-à-vis* its social environment. This cannot be identified with its 'function'. Consumer-oriented theories fall short where they define the social function of economic organizations to be that of adapting their output optimally to consumer needs. A highly 'responsive' organization that - say as regards product quality - focuses maximally on customer wishes, will maximize this reference, but may still fail to achieve the main social task of the economy: providing guarantees of the future for society (as a whole).⁷⁰ The one does not go well without the other. An economic organization is oriented towards its social function only if, apart from its output to its environment, that is the

70 Luhmann, *op.cit.* (Fn. 13, 1988), p. 13 ff.; *id.* 'Das sind Preise', *Soziale Welt*, 34 (1983), p. 153 ff.; *id.*, *op.cit.* (Fn. 13, 1981); *id.*, 'Wirtschaft als soziales System', in: *id.*, *Soziologische Aufklärung 1*. Opladen: Westdeutscher Verlag, 1970, p. 204 ff.

direct production of goods and services and the satisfying of needs of consumers, it produces a contribution to a still undefined future guarantee for society. If this is seen as the main social task of the enterprise then cost-effective organization and the profit orientation of the enterprise acquire a broader meaning. Economic enterprises have their social function in creating a guarantee for the future of society, on a broad basis of needs, through suitable institutional arrangements. Only a de-differentiation of the economic system as such would distribute this function diffusely over other social institutions - and not make it superfluous.

As a result, the external orientation of the enterprise should therefore be detached from the too-narrow perspective of satisfying the specific interests of consumers, workers, or shareholders, and oriented towards the securing of as high as possible a yield from the production process for the guaranteeing of future satisfaction of society's needs. In practice this is realized in terms of profits, taxes and wages.

At this point, one must not go to the other extreme, and equate enterprise interest with the maximization of this function. Such misunderstandings are in fact easy. It would be a purely 'technocratic' view to identify the enterprise interest with the 'profitability goal'⁷¹, even if taxes and wages are included. I mean technocratic here not in a polemical but in the strict sense of the word, since the problem thereby becomes a simple means-end relationship which can be 'calculated' technically, as it were. On a systems-theory view, however, to maximize 'function' is just as irrational as to maximize 'performance'. It would be wrong to stress the main social task (extraction of future guarantees) at the expense of contributions to other social sectors (for example, satisfaction of consumer needs or protection of the environment), and vice versa. What is necessary is a mediation between the 'function' and 'performance' of the enterprise. Legally, this necessitates a weighing of interests. In the words of the German Federal Court:

... the obligation of management to further the interest of the enterprise does not exclude that in their decisions they also take adequate account of macro-economic aspects and of the public good in the limits of their responsibility and the statutory goals of the enterprise⁷².

71 Junge, *op.cit.* (Fn. 20); similarly Wiedemann, *op.cit.* (Fn. 20), p. 326 ff., 627 ff.

72 BGHZ 69, 334, 339.

This however presupposes that, in order to grasp the enterprise interest fully, three dimensions have to be simultaneously taken into account: 'function', 'performance', 'reflection':⁷³

- (i) 'Function' refers to the enterprise's relationship to the economy and society, that is to the securing of as high a yield as possible to guarantee the satisfaction of future needs in society.
- (ii) 'Performance' refers to the enterprise's relationship to its various environments, such as its relationship to consumers, suppliers, capital providers and workers, but also to other social, psychic and natural environments.
- (iii) 'Reflection' refers to the enterprise's relationship to itself. This is the self-observation and self-regulation through which the enterprise defines its social identity.

And it is mainly internal reflexive processes that are in a position to mediate between these. Beyond a given degree of functional differentiation the separation of function and performance goes so far that they can only be balanced internally. In this connection, reflection does not of course mean a quasi-academic debate on the enterprise's good. It means all those communications within the enterprise that orient the selection of organizational decisions towards the social identity of the organization.

Against this background it now becomes clear why a legal concept of enterprise interest can essentially only be defined procedurally. The balance between function and performance cannot - as already stated - be calculated externally, whether in terms of economics, sociology or legal doctrine. It works only through reflexive processes within economic practice. However, what remains possible for external observers is the recognizing of the conditions of these reflexive processes, and - perhaps - influencing them to a certain degree. That is why it also makes sense to formulate the corporate interest as a legal term. Understood as a legal procedure, the corporate interest is not therefore simply directed at the internal, discursive process of integration of the interests involved, nor at the maximum satisfaction of consumer needs or profit maximization. It aims at creating organizational structures for discursive processes that make possible a balancing of enterprise performance (for consumers, workers and shareholders, but also

73 On this see N. Luhmann, *Funktion der Religion*. Frankfurt: Suhrkamp, 1977, p. 54 ff.; for the application of these dimensions in enterprise law see Teubner, (Fn. 27, 1985), p. 162 ff.

for the political and natural environments) on the one hand, and function (ensuring the satisfaction of future social needs) on the other.

The arguments developed in the *Times*-decision perhaps come closest to such a concept of the enterprise interest. The court used the term 'business plan' and declared it to be a legitimate object of legal protection:

where the board ... continues to manage the corporation for long-term profit pursuant to a preexisting business plan that itself is not primarily a control device or scheme, the corporation has a legally cognizable interest in achieving that plan.⁷⁴

Thus, in principle, substantive criteria can be defined for such a procedure from two perspectives. It is in the interest of the enterprise on the one hand to 'tax' any enterprise's output with a social 'surplus value'. On the other it is in its interest to examine the functional orientation in search of equivalents of output provision in regard to corporate social responsibility.⁷⁵ It is clear that this search for alternatives takes place mainly within the firm. It is clear at the same time that such a search will not happen spontaneously, but only as the result of strong external pressures, including pressures from politics and law. The legal concept of corporate interest is accordingly one of those external pressures.

More precisely, the role of the corporate interest as a legal concept is to provide a corrective of corporate action where this is not socially adequate. Profits, taxes and wages are the external creaming-off mechanisms, each legally guaranteed separately by company law, tax law and labor law, which compel the corporation to produce future guarantees. Since, however, these external pressures each have interests of their own, they do not work precisely enough.⁷⁶ This is the point at which the legally defined corporate interest can play a corrective role. If it does not promote the public interest over the social subinterests, then at least it establishes it as a valid legal expectation. It is, then, for the corporate interest to satisfy social subinterests only insofar as this is necessary to produce an adequate motivation to make them fulfil their social function of external pressure on the economic organization. It is evident that this formula cannot easily be reduced to a concrete legal formulation. But it conveys directions and indications.

74 *Paramount v. Time* (Fn. 54) 93, 283.

75 Selznick, *op.cit.* (Fn. 7), p. 347 ff.

76 Luhmann, *op.cit.* (Fn. 13, 1981), p. 406.

5. Guidelines for Judicial Decisions

For the legal concept of corporate interest, the outcome of the considerations so far seems paradoxical. We cannot do without it but we cannot define it. Corporate interest as a legal concept is simultaneously necessary and impossible. It is necessary as a corrective to the combined private interests, in the public interest of the enterprise function and performance. It is impossible, however, as a legal concept in the sense that is incapable of being rendered as a precise and substantive legal standard. This paradox explains the reticence shown by many legal scholars when it comes to its legal application. 'Negative maxim of conduct' is the mainstream formula,⁷⁷ while the minority position advocates defining corporate interest not as a criterion of company law doctrine but as an abstract normative principle.⁷⁸ The paradox lies in the matter itself. 'Corporate interest' as a social construct is in itself self-referentially structured. Why? It employs the enterprise's output as a regulator of its own construction. This leads to all the problems that stem from the paradoxes of self-reference.⁷⁹ The juridification of the enterprise interest partly frees the economic organization from the paradox, but at the same time it burdens the legal system with it. How are jurists to deal with the paradox?

A proven technique of de-paradoxification is to introduce a difference: distinguish different levels and the paradox will 'vanish'.⁸⁰ Mertens, for instance, distinguishes the 'normative' from the 'actual' level of enterprise interest.⁸¹ How profitable even such a simple operation can be for juristic purposes can be demonstrated if the legal definition of the enterprise interest depends on the legal form of the company. Flume, for instance, correctly sees the enterprise as an autonomous interest center, but when he distinguishes various legal forms of company law he arrives at problematic solutions. The reason is that he does not maintain the distinction of levels. In a *Gesellschaft mit beschränkter Haftung* (*GmbH*, private company with limited liability, typically medium sized firms) all shareholders are legally

77 For example Jürgenmeyer, *op.cit.* (Fn. 9), p. 213 ff.

78 Brinkmann, *op.cit.* (Fn. 9), p. 226.

79 See e.g., J.P. Dupuy and G. Teubner (eds.), *Paradoxes of Self-Reference in the Humanities, Law and Social Sciences*. Saratoga: Anma, 1992.

80 G.P. Fletcher, 'Paradoxes in Legal Thought', *Columbia Law Review*, 85 (1985), p. 1263 ff., 1279.

81 Mertens, *op.cit.* (Fn. 45), for similar separations of levels, see also Jürgenmeyer, *op.cit.* (Fn. 9), p. 137 ff. and Brinkmann, *op.cit.* (Fn. 9), p. 216 ff.

entitled, he says explicitly, 'to make management decisions according to their own interests, even against the interests of the company, i.e. against the corporate interest'. However, in the case of the *Aktiengesellschaft* (AG, public company with limited liability, typically large scale firms) the corporate interest is to be respected as an autonomous interest *vis-à-vis* shareholder interests.⁸²

Had he distinguished between 'normative' and 'actual' interests he probably would not have arrived at the absurd conclusion of defining the corporate interest of a public company differently from that of a private company or partnership. The 'normative' corporate interest needs to be defined in a way that spans legal forms from the large public company to the small business to the partnership, in terms of the above formula of function and performance. Indeed, it takes on greater importance in precisely those cases where family and economy have not been adequately differentiated. In its practical manifestation as the 'actual' corporate interest, however, it is clearly dependent on legal form, on the specific legal organization of the decision-making processes. Then, however, the problem lies precisely in the tension between 'normative' and 'actual' interests. For the private company, this means that the 'actual' corporate interest is defined differently from the public company because of the shareholders' stronger position, but that - by contrast with Flume - the normative corporate interest is treated in the same way. If it comes to a dysfunctional operation of the external pressures, then it also becomes a legal problem whether, for instance by using the concept of fiduciary duties, greater account can be taken of corporate interest *vis-à-vis* 'private interests'.

Distinguishing between the normative and the actual also proves to be helpful in the conflict between new statutes on codetermination and classical company law which is occurring in both national and European Community law.⁸³ This is seen especially in relation to the numerous controversial questions regarding the composition and competences of the supervisory

82 Flume, *op.cit.* (Fn. 6), p. 56 ff.

83 See the most important decisions of the German Federal Court, *Bundesgerichtshof*, BGHZ 83, 106; BGHZ 83, 144; BGHZ 83, 151; BGHZ 89, 48. In general on the legal problems of codetermination and company law see P. Badura, 'Mitbestimmung und Gesellschaftsrecht', *Beiträge zum Handels- und Wirtschaftsrecht* (1991), pp. 1-16; K. Hopt, 'New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards', *Michigan Law Review*, 82 (1984), pp. 1338-1363. For the same conflict in Community Law, Kolvenbach, *op.cit.* (Fn. 8); Abeltshauser, *op.cit.* (Fn. 25), p. 1257 ff.; R. Buxbaum and K. Hopt, *op.cit.* (Fn. 8), p. 259 ff.

board under codetermination. The mainstream position defining enterprise interest as the interest of the owner association, gets into difficulties in the case of those enterprises that are codetermined by labor. Mainstream doctrine would be compelled by the Codetermination Law to integrate interests other than the owner association into the concept of enterprise interest. As a result the mainstream discovers the paradox: that the enterprise interest is a meaningless concept - even if applied as a procedural category - since the result of the procedure could not at the same time be a maxim for its premises.⁸⁴ Logical enough! In its turn, the minority position solves the problem by shifting the paradox into politics, by declaring the basic legislative decision in favor of labor-capital-parity to be the ultimate normative foundation of the enterprise interest.⁸⁵ Democratic enough!

But neither logic nor democracy are satisfactory here. It is rather the distinction between two levels - the 'actual' and the 'normative' interests - that allows the paradox of definition through the definiendum to be defused and reduced to the following sober formulas. The legislative decision concretized the 'actual' enterprise interest and handed it over to the interplay of codetermined supervisory board, general assembly and executive board. Thus, the internal constitution of the supervisory board as a whole is also tied, in its details, to the legislative compromise of equal sided representation of interests - with, in some cases, less than equal conflict resolving mechanisms. This legislative decision is binding, as the actualization of enterprise interest, and cannot be disregarded in individual questions not regulated by the Codetermination Law, by appealing to private autonomy as the classical principle of company-law. On the other hand it is not possible to use the 'normative' enterprise interest in order, through interpretation, to bring about full parity in internal constitutional questions of the supervisory board, beyond the legislative actualizing compromise. The 'actual' corporate interest calls for the loyal following through of the legislative compromise, and should rule out 'interest jurisprudence' in either direction. Over and above this, however, the 'normative' enterprise interest can develop a force of its own even *vis-à-vis* the 'actual' interest by checking the various existing interpretations to see whether they are suitable as procedures of reflexive balancing of corporate function and performance.

The most important consequence of this is that the shareholder assembly cannot claim any 'organizational prerogative', especially as regards questions

84 See Jürgenmeyer, *op.cit.* (Fn. 9), p. 212.

85 Brinkmann, *op.cit.* (Fn. 9), p. 230.

of the internal constitution of the supervisory board.⁸⁶ If the shareholders, as the embodiment of the 'profit principle' for defining corporate interest, are replaced by the self-interest of the organization in the above-defined sense, then the consequence of the supervisory board's institutional autonomy - combined with duties of cooperation - is inescapable.⁸⁷

Such a twofold formulation of the legal concept of corporate interest suggests the following interpretation as regards individual questions of the composition of the supervisory board. The internal order of the supervisory board, especially the question of the formation, composition and procedures of committees, falls within the organizational autonomy of the supervisory board.⁸⁸ No derivation of competence from the general assembly to the supervisory board can be assumed. This rules out the possibility that the articles of association might regulate the composition of the supervisory board's committees. For the same reason, the articles of association cannot specify corporate objectives binding on the supervisory board. That would impermissibly prejudice the autonomous reflection on corporate function and performance by the supervisory board. The same is true for the 'external' definition of the issues subject to business secrecy.⁸⁹ Here too the exclusion of determination from elsewhere within the enterprise lies in the enterprise's interest in autonomous reflection. Moreover, the specific composition of the supervisory board committees is adumbrated in the Codetermination Law's actualization of the enterprise interest.⁹⁰ Functional alternatives are entirely

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- 86 But thus H. Wiedemann, 'Grundfragen der Unternehmensverfassung', *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, (1975), p. 385, 426 ff.; W. Hölters, 'Die zustimmungspflichtigen Geschäftsführungsmaßnahmen im Spannungsfeld zwischen Satzungs- und Aufsichtsratsautonomie', *Betriebsberater*, 33 (1978), p. 640 ff., 662; ff. Rittner, 'Die Satzungsautonomie der Aktiengesellschaft und die innere Ordnung des Aufsichtsrats nach dem Mitbestimmungsgesetz', *Der Betrieb*, 33 (1980), p. 249 ff., 250, and for the interpretive principles also F. Säcker, 'Allgemeine Auslegungsgrundsätze zum Mitbestimmungsgesetz 76', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 148 (1984), p. 153 ff.; K.P. Martens, 'Zum Verhältnis von Mitbestimmungs- und Gesellschaftsrecht', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 148 (1984), p. 183 ff.
- 87 For this trend, BGHZ 83, 106ff., - Siemens; BGHZ 89, 48 on the codetermined GmbH.
- 88 BGHZ 83, 107 by contrast allows autonomy in the articles of association for the procedure of all supervisory board committees, within certain limits.
- 89 BGHZ 64, 325, 329 - Bayer.
- 90 On this e.g. E. Steindorff and H. Jach, 'Die ersten Urteile des Bundesgerichtshofs zum Mitbestimmungsgesetz', *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 146 (1982), pp. 336-345.

possible, but only within the framework of the formula: equal-sided composition - though with the possibility of less than equal conflict-solving mechanisms. Going below parity is thus possible, but only justified in exceptional cases, confined to situations where there is an urgent need for a conflict-solving mechanism.

Ultimately even the well-known dispute, as to whether in the codetermined *GmbH* the instruction right of shareholders continues to exist or has to be restricted, because of the institutional weight of the supervisory board, is structured by the above evaluation of corporate interest.⁹¹ Certainly, the interest formula alone cannot decide all the manifold alternatives in restricting the voting right, but the organizational interest in the supervisory board as an autonomous reflexive center makes the restriction as such inescapable.

Specific substantive criteria for conduct take only second place against such procedural requirements for the corporate interest, although these have still to be expanded in particular with procedures for information and cooperation.⁹² The corporate interest can only contribute in extreme cases to the concretization of duties of care and fiduciary duties.⁹³ In principal, the balancing of corporate function and performance is a process internal to the organization that cannot reasonably be controlled from outside. External control is of course procedurally possible, but substantively only in extreme cases. The public law formula of 'misuse of discretion' offers an illuminating parallel.⁹⁴

It should not, however, be overlooked that important shifts in meaning arise if, as a guide in concretizing duties of care and fiduciary duties, shareholder interest is replaced by the self-interest of the enterprise. The difference lies in both the reference to function and to performance. In relation to function, the duties are shifted from the profit interest of shareholders to the public interest in profitability of the enterprise. In relation to performance, the enterprise interest calls for a different weighing within the balancing process inside the corporation. Taking appropriate account of corporate relationships to the environment in the context of its

91 On this with references e.g. P. Ulmer, in: P. Hanau and P. Ulmer, *Kommentar zum Mitbestimmungsgesetz*. München: Beck, 1981, § 30, 20.

92 On this see Teubner, 'Corporate Fiduciary', *op.cit.* (Fn. 27, 1985), p. 166 ff.

93 As Jürgenmeyer, *op.cit.* (Fn. 9), p. 213 ff. and Brinkmann, *op.cit.* (Fn. 9), p. 199 ff. concur in putting it.

94 A good treatment is in Großmann, *op.cit.* (Fn. 49), p. 167 ff.

social function - from worker interests via consumer interests to ecological interests - falls within the legitimate area of the enterprise interest.

This has been fundamentally misunderstood by a recent decision of the *Hamburger Oberlandesgericht*.⁹⁵ The court used the concept of enterprise interest to confirm the expulsion of a member of a supervisory board. The Minister for Ecological Affairs of a German Land was at the same time member of the supervisory board of the *Hamburger Elektrizitätswerke* (HEW). In his capacity as supervisory board member, he requested an immediate halt to nuclear energy production within HEW. The enterprise struck back. It expelled the Minister from his position within the firm. The courts of two instances confirmed the decision. His political activities in the ecological area which aimed at stopping an important part of the enterprises' activities violated, according to the courts, the 'corporate interest' of the HEW group. The courts based their concept of corporate interest on the consensus of the owners. Certainly, they could not avoid taking into account the plural interests of the enterprise, embodied in the composition of the supervisory board. They overruled this political argument, however, with the economic argument of 'sunken costs' - the enterprise had invested a large amount of capital in nuclear energy production. From this 'objective reason', the courts argued, that it is a violation of the enterprise interest if an official member of the supervisory board asks for an immediate halt of nuclear energy production as a fundamental change of the enterprise's policy.

Obviously, the courts are right if they were to identify the HEW interest with the short term profit interests of the shareholders. To ask for an immediate halt of nuclear energy production would severely damage their profits. However, the situation changes drastically if one takes the idea of the enterprise's self-interest, in its orientation towards 'function' and 'performance', as the starting point. Then the enterprise has a serious interest in maintaining and even expanding an internal political deliberation process in which radical ecological demands can also be effectively raised. It is in the vital interest of the enterprise to cultivate a vivid political process which deliberates on how the enterprise acts upon its environment and how this in its turn acts back upon the enterprise. The enterprise needs a thorough internal calculation of alternative courses of action that takes environmental risks seriously and tries to find strategies that make ecological prevention compatible with the firm's long-term survival. The courts should use all means to compel enterprises to keep such political muckrakers within their

95 OLG Hamburg - 23.1. 1990 - 11W92/89.

supervisory board, which is after all the reflection center of the enterprise. Radical political opposition in the corporate decision-making centers does not violate - and indeed it serves - the public interest of the enterprise 'in itself'.