

## The Last Word? - The July 22, 2004 Acquittals in the Mannesmann Trial

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[*Editors' Note:* This short note concerns the most recent acquittals in the Mannesmann criminal trial against former Mannesmann CEO, Klaus Esser; Deutsche Bank's CEO (*Vorstandssprecher*) and then Member of Mannesmann's supervisory board, Josef Ackermann, and other members of the Supervisory Board. The *Landgericht* [Regional Court] *Düsseldorf* acquitted all six defendants on 22 July 2004, and this timely note provides but for a first rendition of the circumstances, the reactions and the thrust of the judgment. For more extensive background to the criminal proceedings against Esser, Ackermann et al. and the importance that domestic and international observers have regularly been assigning to this case in the context of a worldwide corporate governance debate, see already Peter Kolla's article in the 1 July 2004 Issue of *German Law Journal*. *German Law Journal* will publish a more extensive case commentary in the coming months. Meanwhile, the Mannesmann proceedings have, once more, highlighted to German, European and International observers the particular features of law and politics in "Germany Inc.", "Rhenish Capitalism", or "Rhineland Capitalism". As begun in the aftermath of Josef Ackermann's inthronization at the head of Deutsche Bank and Ackermann's subsequent transformation of the Board's control structure, *German Law Journal* has published several contributions to the ongoing changes in German corporate governance and its embeddedness within the specific German economic and legal system. In this issue, we are publishing a fine piece by Jürgen Hoffmann, Professor of Sociology in Hamburg, on the current interdisciplinary debate over the future fate of so-called Rhineland Capitalism. In the next issue, to be published on 1 September 2004, Professor Christopher Allen of the University of Georgia will further deepen this inquiry and place the contemporary debate over the possible end of Rhineland capitalism in the historical context of Germany's development in the 20<sup>th</sup> Century. The Editors of *German Law Journal* are very pleased and honored to be able to provide for a further forum for this important debate, bringing together lawyers, economists, political scientists and sociologists, for a much needed exploration of the historical and political origins as well as of the legal framework of Germany's much criticized and, at the same time, ardently praised system of corporate governance and industrial relations. We invite our readers to contribute to this debate, which has so far found too little resonance in Germany itself. *The Editors.*]

## A. Introduction

In an outstanding and spectacular criminal trial six employees of the Mannesmann company had been accused of perfidy (*Untreue*) because of their behavior in connection with the hostile takeover of the company by Vodafone. It was the first criminal trial in Germany against leading persons of a stock corporation, concerning members of the firm's board as well as such of its supervisory board.<sup>1</sup> After about six months of hearings and testimony, the *Landgericht* (Regional Court) Düsseldorf came to a decision in this case: all six defendants were acquitted. The judgment offers the occasion to recapitulate the background, beginning, procedure, and result of this unique law suit, and, while it is admittedly too early for a set of full-blown conclusions,<sup>2</sup> it might provide a starting point for a cautious outlook on future developments and possible consequences of the judgement.

## B. Background

### *I. The Situation of hostile takeover*

The main events in the action of hostile takeover started on 22 October 1999, when British newspapers reported Vodafone AirToch PLC planned the purchase of Mannesmann mobile radio, from which it held already 34 %. By this time Vodafone was the largest mobile operator worldwide. The day before Klaus Esser, the chief executive officer of Mannesmann, had announced the purchase of Orange, a British mobile enterprise, which was a strong competitor to Vodafone. The Mannesmann-Stock closed at 144 euro in Frankfurt that day.

About two weeks later, newspapers reported Vodafone and France Telecom were planning a hostile takeover of Mannesmann mobile, and another week after this, on 14 November, Vodafone presented a first all-paper tender offer to Mannesmann-shareholders, offering 43.7 own stocks for one Mannesmann-stock, by which the offer's total extent converted into Euro aggregated to 100 billion. The next day CEO Esser rejected this offer as downrightly incommensurate.

Vodafone's CEO Chris Gent reacted and announced on 16 November 1999 that he was willing to take over Mannesmann even against Mr. Essers will, whereupon the stock price raised to 209.90 euro. Three days later the offer was directed straight to

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<sup>1</sup> See on the Mannesmann Proceedings, Kolla, 5 GERMAN L. J. No. 1 (1 July 2004).

<sup>2</sup> See only the thoughtful comments in SÜDDEUTSCHE ZEITUNG, 29 July 2004, 23.

the shareholders and raised to 53.7 own stocks for one Mannesmann-stock, by which its value now amounted to 124 billion euro, therewith being the highest ever in economic history. But Mr. Esser rejected it again.

In an official takeover offer from 23 November, Chris Gent conceded 47.2 % from the joint company to Mannesmann-owners. As a measure of defense, Mr. Esser tried a confederation with Vivendi, but finally quit negotiations with that enterprise. Besides he planned a participation in AOL Europe in order to avoid the hostile takeover. But on 2 February 2000, Hutchison Whampora's Chief, Mr. Canning Fok, hurried Esser for his consent to a takeover, who eventually signaled his willingness to negotiation and went on to reject AOL Europe's offer in the afternoon. In the evening, Fok offered an appreciation award to Esser amounting to 10 million pound sterling (ca. 16 million euro), and the same amount for Esser's team. The next day they agreed, after Esser had given up his resistance because negotiations with Vivendi had failed. Until then Esser had spent 432 million euro for the fight against the hostile takeover.

In the end Mannesmann participated to 49.5 % from the new enterprise. Each Mannesmann-share was worth 58.9646 Vodafone-shares now, by which the takeover's price amounts to 178 billion euro in stocks. Fok earned about 5 billion euro by the takeover. Mannesmann's supervisory board consented on 4 Februar and at the same time the supervisory board's committee granted special contributions to Funk, Esser und further four members of the board, aggregating to 24 million euro in total. Two weeks later Esser was prematurely released due to his own wish as from 31 July 2000 and contemporaneously granted a further compensation of 15 million euro.

On 27 March 2000, the of Mannesmann's supervisory board committee consented to "alternative-pensions" for pensioned members of the board of about 32.5 million euro. The takeover of Mannesmann by Vodafone became legally binding on 17 April 2000.

## *II. The Criminal Prosecution*

A week later two lawyers from Stuttgart launched a charge against Esser before the criminal prosecuting authorities (*Staatsanwaltschaft*) in Düsseldorf for perfidy (§ 266 German Criminal Code - *Strafgesetzbuch* - StGB), but this was rejected for absent initial suspicion on 21 March 2000. According to the *Staatsanwaltschaft*, Esser's compensation of 15 million euro for one year as CEO was inadequately low retrospectively and in addition the total package of about 30 million euro had been appreciated in several rounds of opinion taking.

At the beginning of April the lawyers made use of the complaint against the decision by the *Staatsanwaltschaft*, and after having gained access to the relevant documents they pointed out irregularities in the supervisory board's protocols. On 12 March 2001 the district attorney acceded to the lawyer's complaint and advised the prosecution in Düsseldorf to initiate legal proceedings against Esser and further former functionaries of Mannesmann because of the suspicion of perfidy. Ascertainments are not only led against Esser, but as well against two other former members of Mannesmann's supervisory board.

### C. The Trial

The prosecution in Düsseldorf accused six persons, the former Mannesmann-CEO Dr. Klaus Esser, the former chairman of Mannesmann's supervisory board Prof. Dr. Joachim Funk, supervisory board member Dr. Josef Ackermann and further three former employees of Mannesmann. The newly founded 14th criminal division set the first date of trial for 21 January 2004.

#### I. The Accusation

Having granted the appreciation award to Mr. Esser and the payments to the already pensioned former members of Mannesmann's board, due to the prosecution the members of the supervisory board had made themselves culpable of severe perfidy. Esser himself was culpable by receiving the payment due to this thesis. The prosecution asserted that the payments violated the German stock corporation law (§ 87 AktG - *Aktiengesetz*), because the payments were deemed inappropriate and the persons were conscious of their violation of the law. Therefore they should be guilty of perfidy, § 266 StGB. In total, the *Staatsanwaltschaft* was of the opinion that the supervisory board had wasted 57 million euro of the shareholders'. Esser was accused of being buyable, because he had changed his behaviour in the takeover struggle after having been granted an appreciation award. After an initial (and sustained) fight against the firm's takeover, Esser had unexpectedly given up his resistance.

#### II. The Proceedings

From the beginning the defendants vehemently rejected the accusations against them as downrightly false and received massive support from the majority of the

tesifying witnesses. On 31 March 2004, in a so-called “legal conversation” (*Rechtsgespräch*), which itself is unusual in German criminal procedure, the leading judge in the case, Brigitte Koppenhöfer, announced that she assumed the defendants not to be guilty of any criminal offence. Henceforward the prosecution widened the accusation, but was not able to bring forward convincing evidence.

### *III. The Judgment*

In the middle of June 2004 the hearing of evidence ended after a duration of almost six months and 36 days of trial. The prosecution demanded prison sentences between one year and three years, whereas thje defense demanded their clients to be acquitted.

According to the *Staatsanwaltschaft*, the former chairman of the supervisory board, Joachim Funk, having granted payments including for himself, which justified to demand the highest punishment, namely three years of prison. Mr. Esser should go to jail for two and a half years. The other defendants’ punishments should be put to probation.

After six months the trial ended on 22 July 2004 with acquittals for all six defendants. The acquittals themselves, while being announced under extensive media attention, fell short of being much of a surprise, as the court’s interim declarations and the trial’s proceedings had been suggesting a likewise outcome. In the end, the *Staatsanwaltschaft* had not been able to prove the assertions of perfidy. This, however, is only one side of the coin, as Judge Koppenhöfer made strikingly clear in her more than three hours of orally rendering the Court’s opinion.

In fact, the Court alleged that, while not finding the defendants guilty of a criminal offence as they all erred on the permissibility of their conduct, the payments nevertheless were found to violate the German stock corporation law, because they did not – according the Court – lie in the firm’s, i.e. Mannesmann’s, interest. The members of the supervisory board had unpermissably trespassed the confines of discretion that the law provided, when they consented to granting the appreciation awards.

In its oral declaration on 22 July 2004, Judge Koppenhöfer explicitly criticized the exertion of influence on the Court and on herself by numerous self-declared legal “experts” who themselves had not bothered to come to the courtroom and who did not know the files. Phone terror and threats had been further attempts of taking influence on the decision while politicians had shown a critical level of public influence taking on the proceedings that found extensive media coverage in the German

and the International Press. The *Staatsanwaltschaft* as well as the defense had tried to exploit the high level of press coverage for their purposes. Furthermore, the judge pointed out that it was the court's obligation to decide whether the defendants' behaviour was relevant for criminal law, not to estimate corporate culture by making moral or value judgements.

#### E. Prospects

The day following the announcement of the six acquittals, the *Staatsanwaltschaft* appealed against the judgment to the *Bundesgerichtshof* (Federal Court of Justice), but a decision can hardly be expected before next year. Until then, much legal uncertainty with regard to granting golden handshakes or parachutes and likewise payments to leading managers will remain, as the Düsseldorf Court did not define or clarify the adequacy of extraordinary payments. This could now only be reached in a private law suit. There are, however, only very small chances for such a suit to ever take off, as only Vodafone could act as a plaintiff, but the firm's management has already come out to declare that they are not envisioning to sue to get their money back. There are slim chances of a suit by Vodafone shareholders, but even that is highly improbable given the firm's current corporate structure.

But while legal uncertainty remains, the debate over executive compensation is ready to leave the stronghold of the tabloid and other media parasites. In fact, recent years have seen an increase of very sophisticated scholarship on the issue and it is time, that the debate in Germany, too, takes this turn. Maybe the trial's result will lead to a more deliberate behaviour in the payment of manager's salaries, inviting all parties to be more cautious and to take the firm's wider, i.e. societal interests into account. Otherwise, it must be feared that salaries will again make headlines.