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# Corporate Governance

Germany  
Law & Practice  
and  
Trends & Developments

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## Law and Practice

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## 1. INTRODUCTION

### 1.1 Forms of Corporate/Business Organisations

German law differentiates between capital companies and partnerships. The following chapter will focus on capital companies, as these are the most important and regulated forms of companies in Germany.

#### Capital Companies

Capital companies are legal entities, where the liability is limited to the assets of the company – ie, the shareholders' liability is limited to what they have invested in the company. The most common legal forms of capital companies are the limited liability company (*Gesellschaft mit beschränkter Haftung* or GmbH) and the stock corporation (*Aktiengesellschaft* or AG). Other forms of capital companies are the European stock company (*Societas Europaea* or SE) and the partnership limited by shares (*Kommanditgesellschaft auf Aktien* or KGaA).

The KGaA is a capital company, but also has some elements of a partnership.

#### Partnerships

Partnerships are characterised by the personal liability of the partners. The most popular legal form of a partnership is the limited partnership (*Kommanditgesellschaft* or KG), consisting of limited partners whose liability is limited to a certain amount agreed and disclosed in the commercial register, and general partners with unlimited liability. However, the general partner may have the legal form of a capital company, thereby limiting its liability.

German law also acknowledges the partnership under civil law (*Gesellschaft bürgerlichen Rechts* or GbR) and the general partnership (*Offene Handelsgesellschaft* or OHG), with unlimited liability of their partners.

### 1.2 Sources of Corporate Governance Requirements

The primary sources for corporate governance requirements for capital companies in Germany (GmbH, AG, KGaA, SE) are:

- the German Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* or GmbHG);
- the German Stock Corporation Act (*Aktiengesetz* or AktG);
- the European and German acts on SEs (in particular the European SEVO and the German SEAG);
- the German Commercial Code (*Handelsgesetzbuch* or HGB);
- the Reorganisation of Companies Act (*Umwandlungsgesetz* or UmwG);
- the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz* or WpÜG); and
- the Securities Trade Act (*Wertpapierhandelsgesetz* or WpHG).

Beyond this, for listed companies the German Corporate Governance Code (or DCGK) sets further corporate governance rules, which differentiate between recommendations and suggestions. In 2020, the DCGK introduced the new category of principles which precede the recommendations and suggestions regarding a certain subject matter and outline the fundamentals of the applicable law.

Moreover, non-governmental regulations such as applicable listing rules enacted by the stock exchanges also establish corporate governance requirements.

Certain industry sectors (eg, banks) are subject to further regulation with respect to, inter alia, their corporate governance.

### 1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares

Shares of an AG, SE and, less commonly, a KGaA may be listed on a stock exchange. The primary source for corporate governance requirements concerning listed AGs and KGaAs as well as, to a lesser degree, SEs is the AktG, as it differentiates between rules for listed and non-listed companies. Its requirements are mandatory. The HGB, WpHG, WpÜG, the European and German Securities Prospectus rules (the European WPVO and the German WpPG), the Stock Exchange Act (*Börsengesetz* or *BörsG*) and the Market Abuse Regulation (MAR) provide for further mandatory regulation, inter alia, in relation to listed companies' corporate governance.

To promote a high corporate governance standard, the DCGK contains corporate governance standards in the form of recommendations and suggestions for listed companies with a two-tier corporate governance system; however, the rules of the DCGK shall also be applied correspondingly by listed companies with a one-tier corporate governance system (see **3.1 Bodies or Functions Involved in Governance and Management**). The DCGK is not enacted by the legislator, but by the German Corporate Governance Commission and is therefore not a statute or an ordinance, but rather "soft law", so the standards set in the DCGK are principally voluntary. Recommendations shall be complied with and, if not, deviations have to be explained and disclosed (principle of "comply or explain") in a declaration of compliance (*Entsprechenserklärung*), to be resolved upon annually by the responsible corporate governance bodies of the listed company.

The declaration of compliance is to be included in the declaration on corporate governance which itself is part of the management report. The issuance of the declaration of compliance

is obligatory. Deviations from suggestions are allowed without disclosure. In practice, listed companies seek to comply with the standards set out in the DCGK, in particular the recommendations.

## 2. CORPORATE GOVERNANCE CONTEXT

### 2.1 Key Corporate Governance Rules and Requirements

Over and above the corporate governance rules this article will focus on, German law provides for the following particularity changing the (allocation of seats of the) supervising body of certain companies.

Under German law, there are two different kinds of employee representation in supervisory boards of an AG, KGaA and GmbH – the so-called co-determination (*Mitbestimmung*).

If an AG or a KGaA exceeds the threshold of, generally, 500 German employees, one third of the supervisory board members of the company must be employee representatives, ie, the one third participation (*Drittelbeteiligungsgesetz* or *DrittelbG*). If an AG, KGaA or GmbH and its controlled companies exceed, generally, 2,000 German employees in total, the supervisory board must consist of 50% employee representatives, ie, the parity co-determination (*Mitbestimmungsgesetz* or *MitbestG*).

Shareholder representatives on the supervisory board are generally appointed by the general meeting, while employee representatives in cases of co-determination are generally appointed by employee elections.

#### GmbHs

With respect to a GmbH, the establishment of a supervisory board is only required if co-determi-

nation rules become applicable. Thus, a GmbH with more than 500 German employees must establish a supervisory board with one third of the supervisory board members being employee representatives. Also, a GmbH with more than 2,000 German employees within it and its controlled group must establish a parity co-determined supervisory board with a minimum of six shareholder and six employee representatives.

## SEs

German co-determination rules do not apply to the SE. When incorporating an SE by way of the “*numerus clausus*” of incorporation, an agreement on the participation of employees in the SE (the so-called employee participation agreement) has to be negotiated with the special negotiating body, which is established particularly for such negotiation, representing employees from the German company, its subsidiaries and branches that are in EU and EEA member states other than Germany. The rules on co-determination are part of the agreement, with the general principle that the level of co-determination of the German company used to incorporate the SE shall be maintained (freeze of co-determination/prior to and after principle) – eg, if no co-determination exists and needed to exist prior to the incorporation of the SE, then no co-determination would need to be agreed upon in the employee participation agreement for the SE, etc.

## 2.2 Environmental, Social and Governance (ESG) Considerations

Under the HGB, larger listed capital companies with more than 500 employees are under the duty to issue a non-financial declaration that expands their management report. This declaration has to briefly describe the business model of the company. Moreover, it has to refer to other aspects of corporate social responsibility, at least to environment-related, employee-related and social matters as well as with respect for

human rights and fight against corruption and bribery.

Companies with limited liability and employee co-determined supervisory boards have to include in their annual report information on the achievement of their gender diversity targets.

There has been little legislation based on ESG to date. However, ESG criteria are becoming more and more important, especially in the voting guidelines of voting advisors.

## 3. MANAGEMENT OF THE COMPANY

### 3.1 Bodies or Functions Involved in Governance and Management

#### Management Board

The predominant board structure of an AG and an SE follows the two-tier corporate governance system, with a management board (*Vorstand*) managing and representing the company, and a supervisory board (*Aufsichtsrat*) supervising the management board, in each case accompanied by the third corporate body, the general meeting (*Hauptversammlung*). The management board manages the company under its own responsibility and at its own discretion. It is not subject to any instructions from the supervisory board or the general meeting.

However, the management board is subject to the prior approval of the supervisory board for certain business transactions and measures, either foreseen in the articles of association of the company or by the supervisory board itself, eg, in the rules of procedure for the management board.

#### Administrative Board

A one-tier corporate governance system primarily known in other jurisdictions with one board is

only allowed in Germany within an SE. The board is called the administrative board (*Verwaltungsrat*), and consists of executive and non-executive board members. The administrative board is responsible for the management and supervision of all material company matters (*Oberleitung*) as well as the determination of guidelines for the SE's business, and appoints managing directors (*Geschäftsführende Direktoren*), who are responsible for the day-to-day management of the company.

The managing directors may be members of the administrative board if and to the extent that the majority of the members of the administrative board continue to be non-executive. The administrative board is entitled to issue internally binding instructions to the managing directors.

### General Partner

The peculiarity of a KGaA is that the general partner is responsible for the management. The general partner, being a shareholder of the KGaA, may be one or more natural persons or, more common in practice, a capital company itself, eg, a GmbH, AG or SE. The corporate governance system of such capital company is to be differentiated from the corporate governance of the KGaA.

The corporate governance of the general partner company follows its applicable principle. The KGaA has in any case a supervisory board that is responsible for the supervision of the management, but in case of a capital company as general partner it is responsible for neither the appointment, dismissal and service contracts of the management of the general partner nor for the determination of the financial statements.

The general meeting of an AG, SE and KGaA has no corporate governance powers.

### Managing Directors

A GmbH generally has managing directors (*Geschäftsführer*) and the shareholders' meeting (*Gesellschafterversammlung*), but no statutorily required supervising body. The managing directors are responsible for the management and representation of the company. In principal, they decide autonomously.

However, the shareholders' meeting is – in contrast to the situation in the AG – the supreme decision-making body of the GmbH, and has the authority to issue internally binding instructions to the managing directors. In a GmbH, a voluntary supervisory or advisory board may be implemented. Apart from this, a supervisory board is to be installed only in case of co-determination (see **2.1 Key Corporate Governance Rules and Requirements**).

## 3.2 Decisions Made by Particular Bodies

### Management Board

In an AG and a two-tier system SE, the management board responsible for the management of the company decides upon any and all business transactions and measures within and outside the ordinary course of business under its own responsibility and discretion. However, material measures within and measures outside the ordinary course of business are subject to the prior approval of the supervisory board. For this purpose, applicable law provides that a catalogue containing those approval rights has to be established, either by the general meeting in the articles of association or, alternatively and – in practice – more relevant, by the supervisory board itself in the rules of procedure for the management board, which is an important part of supervising the management board.

Besides the supervision of the management board, the supervisory board is responsible for the appointment and dismissal of the members

of the management board, for their service contracts, and for the review and determination of the financial statements.

## Administrative Board

In a one-tier system SE, the administrative board is responsible for fundamental management issues, such as long-term business goals, the organisational structure, and the strategy and general guidelines of the SE, as well as the budgeting, whereas the managing directors are “only” responsible for the day-to-day management. The administrative board has the authority to issue internally binding instructions to the managing directors.

## General Meeting

Only selected decisions are reserved by law for the general meeting of an AG and an SE. With respect to the annual ordinary general meeting, such decisions include the appropriation of profits, the appointment of the auditor, the formal approval of action for members of both the management board and supervisory board and the vote on the annual remuneration report; with respect to fundamental, extra-ordinary decisions, such decisions include the election and removal of the supervisory board members, amendments to the articles of association, and resolutions on restructuring measures and the sale of substantially all of the corporation’s assets, as well as on corporate agreements (profit and loss pooling agreements).

## Managing Directors

Managing directors of a GmbH can principally make day-to-day management decisions without consulting the shareholders. However, as the shareholders’ meeting is the supreme body, a broader catalogue of decisions is reserved by law for the shareholders’ meeting of a GmbH than a general meeting of an AG: all decisions that the ordinary general meeting of an AG has to take plus the review and determination of

the financial statements and all fundamental, extraordinary decisions of the general meeting of an AG, as well as the right to instruct the managing directors.

## 3.3 Decision-Making Processes

### Management Board

The management board of an AG and a two-tier system SE generally decides in physical or electronically set-up meetings, if a certain quorum of – most of the time – more than half of the members of the management board are present or represented, by way of resolution, generally to be passed by a simple majority. However, qualifying majority requirements can be set, eg, in the rules of procedure for the management board. In practice, it is recognised and common that members of the management board are allocated certain individual responsibilities as part of their department (*Ressort*).

Decisions within each department are made by the responsible, single member of the management board, unless such decision is of material nature, in which case a resolution of the management board is necessary. This also applies in case another member of the management board is asking for it. Finally, the management board may form committees for specific tasks, although this is not that common in practice.

More or less the same decision-making process applies to managing directors of a one-tier system SE and a GmbH.

### Supervisory Board

The supervisory board of an AG, a two-tier system SE and a KGaA decides by way of resolution, generally with a simple majority. However, the articles of association or the rules of procedure for the supervisory board may foresee qualifying majority requirements. Supervisory board meetings shall be held as physical meetings from the statutory starting point.

Electronically set-up meetings as well as mixture forms are permissible, except for the meeting preparing the annual general meeting, which must be a physical meeting in the presence of the auditor. Supervisory board members not present in a meeting may not be represented by third persons or other supervisory board members, but can only give a written voting declaration (*Stimmbotschaft*). The meeting has a quorum if the majority of members are present – at least three.

The supervisory board is entitled to form committees from within itself, eg, an audit committee and a nomination committee. The DCGK expressly requires the formation of these two committees for listed companies. Committees are generally responsible for preparing supervisory board topics and consummating resolutions passed by the supervisory board. Sometimes, committees are also entitled to resolve instead of the supervisory board.

However, this is not allowed in statutorily foreseen topics, eg, upon the remuneration and service contracts of members of the management board. Rules applying to the supervisory board in a two-tier system also have to be adhered to by the administrative board in a one-tier system SE.

## **4. DIRECTORS AND OFFICERS**

### **4.1 Board Structure**

#### **Management Board**

There is no legally predefined structure for the management board of an AG or two-tier system SE, nor for the managing directors of a one-tier system SE or GmbH. The management board can consist of one or more natural persons, unless the articles of association require a mini-

mum number of members; the same applies for the number of the managing directors.

### **Supervisory Board**

The supervisory board of an AG, KGaA and a two-tier system SE, and the administrative board of a one-tier system SE, has to consist of at least three members or a higher number, up to nine, 15 or 21 members, depending on the registered share capital of the corporation, to be set in the articles of association. The number of members must not be devisable by three (any more), unless in case of co-determination (see **2.1 Key Corporate Governance Rules and Requirements**), in which the number of members must be divisible by three. In case of equal co-determination, the minimum number of supervisory board members is 12 and beyond this depends on the total number of German employees.

### **4.2 Roles of Board Members**

The applicable law does not predefine roles for members of the managing bodies. One member of the management board can be and usually is nominated as chairman or spokesperson. Apart from this, it is common for the tasks and duties of the management board and managing directors to be divided between them in several departments, either functional or operational divisions. Thereby, names like CEO, CFO and COO are generally attached to the members on their business cards, the website, and in the email-footer; however, these are neither statutorily foreseen nor do they trigger any special further rights or obligations.

With respect to the supervisory board of an AG and a two-tier system SE or an administrative board of a one-tier system SE, only the following rules have to be considered. Generally, each member has the same rights and duties, and must be familiar with the relevant business sector of the company. However, according to applicable law, boards of listed companies must have

one member with certain skills – for example, financing, reporting and auditing expertise.

### 4.3 Board Composition Requirements/ Recommendations

#### Management Board/Managing Directors

Beyond the requirements set out in **4.1 Board Structure** and **4.2 Roles of Board Members**, there are no other statutory rules governing the composition of the management board of an AG or a two-tier system SE, nor of the managing directors of a one-tier system SE or GmbH. However, if such a company is listed on a stock exchange or co-determined, the supervisory board must determine a target percentage for women on the management board as well as deadlines by when such percentage is to be reached. If at the time of the determination the percentage of women on the management board is below 30%, the target percentage may not be lower than the present percentage.

Furthermore, the management board shall make respective determinations with respect to the two management levels below it. These corporations have to include a declaration on corporate governance in their management reports. The DCGK restates these rules, and recommends that diversity is taken into account.

#### Composition of Supervisory Boards

In AGs, SEs and KGaAs that are parity co-determined and listed on a stock exchange, the supervisory board (or, in the case of a one-tier system SE, the administrative board) shall be composed of at least 30% women and at least 30% men. The minimum percentage shall be complied with by the shareholder and employee representatives on the board in its entirety. Furthermore, corporations that need to fulfil the aforementioned gender criteria must include information on whether the company has complied with the portion requirements for the appointment of women and men as supervisory

board members in their declaration on corporate governance.

With respect to the supervisory board of an AG and a two-tier system SE or an administrative board of a one-tier system SE that is listed on a stock exchange or co-determined, the supervisory board must also set a target for women on the supervisory board. The same rules apply with respect to the determination for the management board. The DCGK recommends, among other matters, that the supervisory board determines concrete objectives regarding its composition and prepares a profile of skill and expertise for the entire board, but taking diversity into account.

It is recommended that both are taken into account for the supervisory board's proposals to the general meeting. The DCGK further recommends that a certain number of members of the supervisory board as well as certain members, eg, the chairperson are independent (see **4.5 Rules/Requirements Concerning Independence of Directors**). The implementation status of the objectives and the profile of skill and expertise as well as the number of independent members deemed to be appropriate by the supervisory board are to be included in the corporate governance report.

### 4.4 Appointment and Removal of Directors/Officers

In an AG and an SE, the respective supervisory or administrative board is responsible for appointing and generally dismissing the members of the management board or the managing directors. The maximum term of office is five years in an AG and six years in an SE; a reappointment or extension is principally permitted.

The members of the supervisory and administrative board are appointed by the general meeting, for a maximum term of office of approximately

five years in an AG and six years in an SE. Reappointment is permitted. Dismissal could happen by resolution of the general meeting with a majority of at least three quarters of the votes cast, unless the articles of association provide otherwise.

The appointment and dismissal of the managing directors of a GmbH is, in principle, the responsibility of the shareholders' meeting. The term of office may be indefinite.

#### **4.5 Rules/Requirements Concerning Independence of Directors Management Board**

The members of the management board of an AG are subject to a duty of loyalty to the company, have to observe the best interests of the company and are bound by a non-compete obligation for the duration of office. They shall disclose conflicts of interest to the supervisory board without undue delay. The DCGK also makes statements to that effect. In certain situations, members of the management board should thus either abstain from casting votes or not even participate in the meeting or the relevant topic.

#### **Supervisory Board**

The members of the supervisory board of an AG and a two-tier system SE and of the administrative board of a one-tier system SE are also bound by a duty of loyalty, but there are no mandatory statutory provisions that require and define independence. However, a few restrictions aiming at independence prohibit an individual from becoming a member of the supervisory or administrative board – eg, where the individual is part of the management of a subsidiary of the company. Nevertheless, the DCGK requires a certain degree of independence to avoid conflicts of interest.

In this respect, the supervisory board shall determine an appropriate number of independent members. The DCGK gives new indicators for determining the independence of members of the supervisory board. These include personal or business relationships with the company, the management board, controlling shareholders and major competitors that may cause a substantial or not merely temporary conflict of interest.

#### **4.6 Legal Duties of Directors/Officers**

Members of management bodies shall conduct the company's affairs with the due care of a prudent and diligent businessman, in particular in accordance with the applicable laws and the articles of association (duty of legality, including and of ever-increasing importance the duty to establish and maintain an effective compliance management system). In case of entrepreneurial decisions, the so-called business judgement rule applies in order to eliminate hindsight bias when legally evaluating the management bodies' past conduct. This means that members of the management board may be exempt from liability if they reasonably had assumed that they were acting on the basis of adequate information and in the best interests of the company.

The same applies to the members of the supervisory and administrative board. However, their differing tasks and roles in the corporate governance of the respective company lead to a different emphasis of duties.

#### **4.7 Responsibility/Accountability of Directors**

In principle, members of management and supervising bodies owe their duties primarily to the company; they always have to act in the best interests of the company and its group. However, the interests of the company include, to a certain extent, the interests of all stakeholders (like creditors and employees) of the company

(German “stakeholder model” in contrast to the Anglo-Saxon “shareholder model”).

## 4.8 Consequences and Enforcement of Breach of Directors’ Duties

In an AG and SE (with a few exceptions in special statutory rules, eg, in the event of an insolvency, and in the context of wilful misconduct), creditors and shareholders cannot enforce a breach of duties of members of management and supervising bodies. The members of the bodies are rather jointly and severally liable in the internal relationship towards the company due to their joint responsibility. Thus, individual members of a management and supervising body may not alleviate themselves from liability because a certain task or responsibility was delegated to a different member internally.

Furthermore, such breach may lead to a dismissal and, with respect to the management members, a termination of their service contract.

In principle, the supervisory board is responsible and – according to case law – even has a duty to assert damage claims to the management board members. The company may waive its damage claims or enter into settlement arrangements on these claims only if three years have lapsed since the claim arose and the general meeting resolved thereupon without a minority of the shareholders (at least 10% of the share capital) raising an objection.

In the event that members of the supervisory board culpably breach their duties, the management board is responsible to pursue possible damage claims against the supervisory board members jointly and severally.

## Claims against Members of Corporate Governance

The rights and obligations on asserting claims against members of corporate governance bod-

ies in an AG, SE and KGaA are independent of whether or not the members of these respective bodies have been discharged. Another particular consequence of a breach of duty in a listed company is that the company may be obliged to disclose it to the capital market by way of ad hoc notification.

In case of a GmbH, the consequences of a breach of the duties of managing directors are, to a great extent, comparable to an AG. In general, the managing directors, like the management board members, are not directly liable to the creditors of the company. The shareholders’ meeting has the right to pursue damage claims and to decide about the dismissal of managing directors and the termination of the service contract.

In contrast to the situation in the AG, if the shareholders’ meeting has discharged the managing director knowing the facts underlying such breach, such discharge leads to an exclusion of liability.

## 4.9 Other Bases for Claims/ Enforcement against Directors/Officers

Certain special law remedies and, in case of wilful misconduct, general civil law remedies exist. From the company’s point of view, these do not generally extend claims any further than those under corporate law. Since shareholders do not have a direct claim against the members of management and supervising bodies under corporate law, in certain situations (eg, capital market fraud) general civil law remedies may give opportunity for claims of shareholders.

However, the courts have traditionally been cautious to recognise such claims.

## Liability

The liability of a member of a management and supervising body in an AG, SE and KGaA cannot

be limited, as this would in particular qualify as an impermissible waiver by the company upfront, ie, prior to the expiry of the three-year period (see **4.8 Consequences and Enforcement of Breach of Directors' Duties**). However, D&O insurance for the members of the management and supervising body is permissible and common in practice in order to protect them against risks arising from their professional activities for the company. Premiums are generally paid by the company, although members of the management board of an AG, SE and KGaA are obliged to bear a deduction of at least 10% of the damage to the utmost one-and-a-half times their annual fixed salary.

#### **4.10 Approvals and Restrictions Concerning Payments to Directors/Officers**

##### **Remuneration**

The remuneration of the management board members of an AG and a two-tier system SE is resolved upon by the supervisory board and contractually agreed upon in the service contract.

In listed companies the supervisory board has to determine the principles of the remuneration of the members of the management board in a remuneration system, which is subject to approval by the general meeting upon its introduction and any material changes thereto, at least every four years. However, the resolution on the approval is non-binding. If the general meeting does not approve the remuneration system, a reviewed remuneration system has to be presented at the next annual general meeting for approval.

##### **Contents**

With respect to the contents of the remuneration system, the AktG only requires few elements to be included in every remuneration system (eg, a maximum total remuneration of the management

board) but provides for further rules with respect to its contents relating to different aspects of the remuneration of the management board if those aspects are foreseen in the remuneration. However, the DCGK makes several recommendations with respect to criteria to be described in the remuneration system, eg, the ratio between the fix remuneration and the variable remuneration based on short- and long-term incentives as well as the performance and non-performance indicators to determine payment of variable remuneration.

The supervisory board then determines the actual remuneration of each member of the management board based on the remuneration system. The supervisory board and the management board have to prepare a remuneration report regarding the past financial year which is subject to a non-binding approval by the annual general meeting. Neither the resolution on the remuneration system nor the resolution on the remuneration report can be objected to by means of a contesting action or an action for annulment by a shareholder.

##### **Restrictions**

As regards restrictions on the remuneration of the members of the management board, the AktG requires that the overall remuneration of individual members of the management board is appropriate in relation to their tasks and performance as well as the economic situation of the company. In addition, the supervisory board shall make sure that the customary remuneration is not exceeded. Further, the remuneration in listed companies has to be aimed at a sustainable and long-term-oriented development of the company and variable remuneration should be granted based long-term incentives accordingly.

##### **Characteristics**

The DCGK makes further recommendations with respect to the characteristics of the remunera-

tion. For example, it recommends that the variable remuneration based on long-term incentives exceeds the one based on short-term incentives. Variable remuneration shall be predominantly invested in shares of the company or granted as share-based remuneration.

The DCGK further recommends that payments to members of the management board due to early termination of their activity do not exceed twice the annual remuneration (severance cap) and do not constitute remuneration for more than the remaining term of the contract. A new recommendation is that change-of-control clauses shall not be agreed upon.

## Management Board

The remuneration of the supervisory board members may be specified in the articles of association or granted by the general meeting. It should be appropriate in relation to the tasks of the members of the supervisory board and the company's economic situation. In listed companies, the general meeting has to resolve on the remuneration of the supervisory board members at least every four years, with the resolution including or referencing the same details that are to be included in the remuneration system of the management board with respect to the remuneration of the supervisory board members, if applicable. The DCGK further recommends taking the status as chair or deputy chair of the supervisory board or committee into consideration in this context. It is suggested that the supervisory board remuneration is a fixed remuneration.

## Managing Directors and General Partners

In a GmbH, the remuneration of managing directors is the responsibility of the shareholders' meeting, which must not adhere to any restricting rules.

In a KGaA, the general partners generally receive no remuneration for their activities, but are enti-

tled to receive a fee for taking over the liability of the KGaA vis-à-vis third parties. In case of a capital company as general partner, the remuneration of its management members is to be set according to the rules applying to the respective legal form of such capital company.

## 4.11 Disclosure of Payments to Directors/Officers

All capital companies are required to disclose the total remuneration of the management board in the annual financial statements. An exception is made only for capital companies that fulfil at least two of the following criteria (small capital companies):

- the balance sheet total does not exceed EUR6 million;
- the sales revenues within the last 12 months amount to less than EUR120 million; and
- the company employs, on an annual average, fewer than 50 employees.

In a listed company, the features of the remuneration system have to be described (see **4.10 Approvals and Restrictions Concerning Payments to Directors/Officers**). The remuneration system has to be published on the company's website for the duration of the application of the remuneration system, however, at least for ten years. In addition, the management board and the supervisory board of a listed company have to disclose certain information, such as the fixed and variable remuneration paid to each member of the management and the supervisory board, in the annual remuneration report.

The remuneration report is also published on the company's website for at least ten years. The AktG requires the remuneration report to be audited.

The AktG now also requires ad-hoc and annual disclosure of related party transactions, includ-

ing transactions of the company with its various members of corporate bodies.

## 5. SHAREHOLDERS

### 5.1 Relationship between Companies and Shareholders

The purpose of the company is determined by its shareholders in the articles of association. The shareholders can only exert influence on the decision-making process by way of resolutions. The general meeting of an AG, SE and KGaA has fewer rights and powers than the shareholders' meeting of a GmbH, in particular due to their ability to instruct the managing directors (see **3.2 Decisions Made by Particular Bodies**).

Furthermore, the shareholders have fiduciary duties towards the company and the other shareholders, and so have to promote the purpose of the company and may not act to its detriment.

### 5.2 Role of Shareholders in Company Management

The involvement of the shareholders in the management of a company differentiates according to the legal form of the company.

#### AGs, SEs and KGaAs

In an AG, SE and KGaA, the general meeting is entitled to appoint the members of the supervisory and administrative board, generally by simple majority, and to dismiss them by 75% of the share capital represented. However, the members of the management board and the managing directors in a one-tier system SE are appointed by the supervisory board, respectively the administrative board. The general meeting cannot instruct the supervisory or administrative board or the management board.

If the management board so requires, the general meeting is entitled to resolve upon management affairs. In practice, such requests do not happen. Apart from this, the general meeting does not have any influence on the management.

#### Listed Companies

Listed companies also do not engage with their shareholders, in particular not outside the general meetings. In preparing such meetings, the CEO has calls with shareholder representatives and potential proxy voters, but abstains from providing them with any information that has not already been disclosed in the invitation or that the CEO does not intend to disclose in the general meeting to all other shareholders. However, the DCGK suggests that the chairman of the supervisory board should, to an appropriate extent, be in regular conversation with investors on supervisory board-related issues.

#### Non-listed Companies

Vice versa, non-listed companies typically do engage with their shareholders.

#### GmbH

In a GmbH, the involvement of the shareholders in the management is also statutorily more extensive. In contrast to the AG, the shareholders' meeting resolves upon the appointment and dismissal of the managing directors and on the conclusion of their service agreements. Also, the shareholders of the GmbH are able to direct the managing directors to take or refrain from taking certain actions in the business by way of internally binding instruction.

### 5.3 Shareholder Meetings

#### Annual General Meetings

An annual general meeting is mandatory in an AG and KGaA within the first eight months of a financial year, and in an SE within the first six months of a financial year. The annual meeting has to resolve upon the ordinary topics (see **3.2**

**Decisions Made by Particular Bodies)** and upon the remuneration system, the latter resolution being non-binding (see **4.10 Approvals and Restrictions Concerning Payments to Directors/Officers**). Further extraordinary topics on fundamental decision can also be put on the agenda of the annual general meeting, or can be passed in an extraordinary general meeting.

Apart from this, general meetings are to be convened if necessary for the welfare and going concern of the company. The general meeting has to be convened no later than 30 days prior to the date of the general meeting, or no later than 36 days prior to the meeting if shareholders are required to register for the general meeting. In an AG and a two-tier system SE, the convening is generally the obligation of the management board, or exceptionally the supervisory board.

Within a one-tier system SE, the administrative board is responsible for the convening. However, shareholders whose share is equivalent to at least 5% of the registered share capital may also demand the convening of a general meeting. Shareholders whose share in the share capital is that high or corresponds to a nominal stake of EUR500,000 may demand that certain additional items are put on the agenda.

The demand has to be received by the company at the latest 24 days prior to the general meeting, or no later than 30 days prior to the general meeting for listed companies.

## COVID-19

For temporary changes to the above stated rules in response to the current COVID-19 pandemic, the federal government has enabled virtual general meetings to be held, ie, by way of audio and video streaming and the submissions of votes carried out either electronically or in written form, even where the articles of association do not provide for such meetings. The general meeting

has to be convened no later than 21 days prior to the date of the general meeting. Furthermore, the federal government has recently strengthened shareholder discussion and filing rights. In addition, the Annual General Meeting in an AG no longer has to take place within the first eight months, but can also be held later within the fiscal year.

## Annual General Meeting Invitation

The invitation has to fulfil a lot of formalities, like setting out the business name and seat of the company, the time and place of the general meeting, and the agenda. For listed companies, the invitation has to provide further information, eg, about the rights of the shareholders in respect to the general meeting.

## Votes and Resolutions

Unless stipulated otherwise in the articles of association, the general meeting should be held at the seat of the company. Resolutions may not be taken by written consent, but the articles may provide that shareholders may cast votes in written form. Shareholders may be represented by a proxy/proxy voter at the general meeting, or may exercise their rights via electronic communication; the latter option is only available if the articles of association allow this form of attendance and voting.

In listed companies, each resolution adopted by the general meeting is to be recorded in the minutes of the meeting prepared by a notary public. For non-listed companies, it is sufficient to have the minutes signed by the chairman of the supervisory board as long as no resolutions are adopted for which applicable law requires a majority of 75% of the votes cast or a greater majority.

## GmbHs

In a GmbH, the regulations in respect to the shareholders' meeting are not as strict as in

the AktG for AGs, SEs and KGaAs. Resolutions generally have to be passed in a meeting of the shareholders, but can also be made in writing. The shareholders' meeting generally has to be convened by the managing directors by registered letter.

In case of a meeting, the invitation has to be sent at least one week before the meeting, and the agenda of the shareholders' meeting has to be announced in the invitation. However, these formalities on the invitation can be waived or amended in the articles of association.

There are no special requirements for the holding and conduct of shareholders' meetings. Shareholders may submit their vote in writing or may grant proxy. It is also permissible to hold meetings via electronic communication.

Due to the COVID-19 pandemic, the federal government has simplified the submission of votes in writing. Therefore, in contrast to the AG, the federal government has not regulated the virtual shareholders' meeting by law. Virtual shareholders' meetings in a GmbH require a corresponding provision in the articles of association.

## 5.4 Shareholder Claims

Shareholders generally do not have any direct claims against members of corporate governance bodies (see **4.8 Consequences and Enforcement of Breach of Directors' Duties** and **4.9 Other Bases for Claims/Enforcement against Directors/Officers**).

### Appealing Resolutions

Any shareholder who holds only "one" share may appeal resolutions (*Anfechtungs- und Nichtigkeitsklage*) of the general or shareholders' meeting for breach of law or the company's articles of association. Another objection shareholders can try to bring forward in such lawsuits is the violation of the (majority) shareholder's duty of good

faith. As these duties are not statutorily defined, the chances of success are based on case law. The defendant is the company, not the other shareholder(s) who has (have) voted in favour.

By filing such objection and avoidance claims in court, minority shareholders can block the completion (ie, entry into the commercial register) of, for example, corporate and integration measures. Registration will take place when the minority shareholders' court challenges are overcome by a so-called release proceeding, which the company must file (*Freigabeverfahren*). The company will in particular prevail in the release proceeding and thereby achieve registration in the commercial register if minority shareholders cannot prove that they hold more than a nominal value of EUR1,000 of the registered share capital of the company since the announcement of the convocation of the general meeting.

If in the context of a resolution the company or a majority shareholder has to offer to acquire shares of minority shareholders at fair value based on an IDW S1-valuation, those resolutions cannot be objected (any more) to with the argument that the valuation is too low. However, minority shareholders are entitled to challenge the adequacy of the price at court in a special shareholder compensation proceeding (*Spruchverfahren*).

### Appointing a Special Auditor

Also, shareholders can request (by demanding either an invitation of an extraordinary general meeting or the adding of a topic on the agenda, see **5.2 Role of Shareholders in Company Management**) that the general meeting shall – with a simple majority of the votes cast – appoint a special auditor (*Sonderprüfer*) to analyse statutorily specified decisions of the executive and supervisory board. If the general meeting rejects the motion to appoint a special auditor, and if facts and circumstances justify severe breaches

of tasks and duties by the management, minority shareholders who together hold 1% of the registered share capital or a nominal value of at least EUR100,000 can file for the appointment of the special auditor in court.

## Damage Claims

Also, minority shareholders may influence the assertion of damage claims against management and supervisory board members following breaches of tasks and duties if, in a first instance, the general meeting resolves with a simple majority to assert such claims. Minority shareholders who together hold 10% of the registered capital or a nominal value of at least EUR1 million can then judicially file for the appointment of a special representative (*besonderer Vertreter*) to assert these claims. Minority shareholders who together hold 1% of the registered share capital or a nominal value of EUR100,000 or more can also apply in court for admission to assert these claims of the company in their own name.

## 5.5 Disclosure by Shareholders in Publicly Traded Companies

Shareholders of listed companies have to notify the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* or BaFin) and the issuer if their direct and/or indirect holdings exceed or fall below certain thresholds (3%, 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75%) and if their positions in financial instruments relating to shares exceed or fall below the aforementioned thresholds (except for the 3% threshold). The notification is to be published by the issuer and can be viewed on its website at any time.

## 6. CORPORATE REPORTING AND OTHER DISCLOSURES

### 6.1 Financial Reporting

Except for small partnerships, companies have to prepare an annual financial statement. Capital companies additionally have to prepare a management report, unless the company is a small company (based on the criteria set out in **4.11 Disclosure of Payments to Directors/Officers**). The annual financial statements and the management report differ in that the annual financial statements are primarily for presentation purposes, whereas the management report is more of an analysis and commentary.

The management report includes information on the risk profile of the company and its risk management system. For large listed companies, the HGB requires a declaration on corporate governance and a non-financial declaration including statements on environmental, social and labour-related concerns, among other matters.

In addition to preparing the annual financial statements and the management report, listed companies are also required to prepare and publish a half-year report. Some stock exchanges may require further reporting with respect to a certain market segment.

Certain industry sectors – for example, banks and other financial institutions – are subject to further reporting requirements.

### 6.2 Disclosure of Corporate Governance Arrangements

The declaration on corporate governance includes information on how the management board and the supervisory board conducted their duties, and also has to address other issues, such as whether quotas for female members of the management and supervisory board have

been met, and whether or not the company has a diversity concept (see **4.3 Board Composition Requirements/Recommendations**). Furthermore, listed companies have to publicly declare each year whether they comply with the DCGK (see **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**). The declaration is part of the declaration on corporate governance.

As described, the remuneration system as well as the remuneration report have to be published on the company's website for at least ten years. Further, the principal features of the management remuneration system and the remuneration of the management board and the supervisory board have to be disclosed in the annual financial statement and in the management report thereto.

The annual financial statement also has to include information on related party transactions that were not at arm's length. Certain related party transactions also have to be disclosed on an ad-hoc basis.

### 6.3 Companies Registry Filings

A company has to file the following with the commercial register:

- the articles of association, including the company's business name and legal form, registered seat, purpose of the enterprise and registered share capital;
- the names of the legal representatives, their place of residence and dates of birth;
- if existent, the name and place of residence of authorised officers (*Prokurist*);
- in an AG and SE, a list of supervisory and administrative board members;
- in a GmbH, a list of shareholders; and
- subsequent amendments to the above-mentioned points.

Those filings are publicly available at [www.handelsregister.de](http://www.handelsregister.de), which contains all entries in the commercial register filed since 2007.

## 7. AUDIT, RISK AND INTERNAL CONTROLS

### 7.1 Appointment of External Auditors

A company has to appoint an external auditor unless it is a small company (based on the criteria set out in **4.11 Disclosure of Payments to Directors/Officers**). The key requirements governing the relationship between the company and the auditor are set out in the HGB. The auditor is appointed by the general or shareholders' meeting. In an AG and two-tier system SE, the supervisory board is responsible for issuing the actual audit mandate, while in a one-tier system SE it is the administrative board and in a GmbH it is the managing directors.

### 7.2 Requirements for Directors Concerning Management Risk and Internal Controls

In an AG, SE and a KGaA, the management board must install a system to detect and monitor risks to the continued existence of the company. However, it is best practice to maintain several systems and refined rules (for example, through reporting lines and codes of conduct) to ensure internal compliance and effective risk management. The supervisory board will review the existence and effectiveness of such measures. Managing directors of a GmbH are also expressly obliged to take measures for the early detection of a crisis.

According to German case law, effective compliance management systems are also required in order to fulfil the duty of care owed to the company.

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## Trends and Developments

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### Introduction

The COVID-19 pandemic is again one of the dominant topics in this year's legislation on corporate governance, which already led to relevant changes to the last year's COVID legislation for stock corporations (*Aktiengesellschaft* or AG) and European stock corporations (*Europäische Aktiengesellschaft* or SE), as well as limited liability companies (*Gesellschaft mit beschränkter Haftung* or GmbH). Another relevant topic relates to the legislative proposals in response to the so-called "Wirecard scandal" that primarily focus on the requirements for companies' balance sheet controls and audits. Additional legislation to promote women in management positions is underway, following the bill enacted in 2015, and a lively discourse on the general improvement of corporate governance in Germany is pending. Many of those proposals could influence future legislation. Finally, the article will shed light on the new legislative proposals for partnerships.

### COVID-19 Legislation

While fundamental statutory changes in corporate law were implemented in 2020 for AG's, SE's and GmbH's due to the COVID-19 pandemic, this year primarily brought amendments and corrections to last year's COVID legislation.

#### *AG's and SE's general meetings*

General meetings of the shareholders (*Hauptversammlung*) of an AG and SE were required to be held physically prior to the COVID-19 pandemic. As a physical meeting has not generally been possible since the start of the pandemic, in March 2020 the Federal Government statutorily permitted these companies to alternatively hold the general meeting virtually by video conference.

In the course of the first virtual general meeting season, it became apparent that the rights of shareholders in virtual general meetings and the corresponding obligations of the companies need to be improved. In particular, provision of information by the management board (*Vorstand*) to interested shareholders in a virtual general meeting required further modification. The Federal Government, in particular, has enacted the following amendments:

#### *Shareholders' right to ask questions*

Until 19 February 2021, the shareholders only had an opportunity to address questions to the management board that the latter should answer at the virtual general meeting. These questions had to be submitted up to two days before the general meeting by means of electronic communication. The shareholders' position has now been strengthened by providing them with the statutory right to ask questions (instead of just the opportunity). Furthermore, shareholders can submit the questions up to one day before the general meeting.

#### *Answering obligations of the management board*

Corresponding to the opportunity for shareholders to ask questions, the management board could previously decide, at its discretion, whether or not to answer the shareholder's questions. Due to this year's change in law, the management board is obliged to answer all shareholders' questions unless it makes use of its right to refuse to grant information due to one of the few statutory exemptions (eg, if the answer to the question is likely to cause a significant disadvantage to the company). The only discretion that remains with the management board is to

what extent it answers timely and properly raised questions.

#### *Motions and election proposals*

Until 19 February 2021, it was unclear how companies should handle motions and election proposals from shareholders, as these were required to be submitted orally at the physical general meeting in order to become effective. An oral submission was not possible at virtual general meetings, and the initial COVID-19 legislation did not stipulate anything in this regard. Thus, the effectiveness or ineffectiveness of motions and election proposals was in question last year.

The amendment act on the COVID-19 legislation now regulates that electronically submitted motions and election proposals are to be treated as if they had been orally raised at the meeting (fictitious solution). The requirement for such fiction to come into effect is that the shareholder is duly authorised and registered to participate in the virtual general meeting.

#### *Shareholders' meetings of a GmbH*

The GmbH is the most common form of the capital company in Germany.

#### *Simplification of written voting by COVID-19 legislation*

The shareholders' meeting of a GmbH (*Gesellschafterversammlung*) is the supreme decision-making body with more responsibilities than the general meeting of an AG and SE. Contrary to the statutory regime for an AG and SE, shareholders' meetings of a GmbH could, but were not to be held in person. Resolutions could have also been passed in writing, if every shareholder agreed to such form of resolution passing. Against the background of the COVID-19 pandemic, it was not appropriate to hold meetings in person and as passing of resolutions in writing was already statutorily foreseen, the Fed-

eral Government decided to ease the passing of those written resolutions if supported by the simple majority of the shareholders last year. In contrast to the AG, the Federal Government has not, however, legislated the possibility of holding a virtual shareholders' meeting. The Federal Government hasn't changed the COVID-19 legislation this year.

#### *Virtual shareholders' meeting according to articles of association*

Thus, the holding of a virtual shareholders' meeting (or a combined meeting with partly present and partly virtually-connected shareholders) requires an explicit provision in the articles of association. Some GmbH's have already implemented a clause to ensure the ability of the shareholders' meeting to act in times of crisis, such as the current COVID-19 pandemic. In some cases, the provisions of the articles of association are more general and require an important reason (eg, a pandemic) or the approval of a certain quorum of shareholders for a virtual shareholders' meeting to be held. This is, however, subject to mandatory law, which in certain scenarios requires physical shareholders' meetings.

#### **Wirecard Legislative Proposal**

The Wirecard scandal is one of the largest German economic scandals. Wirecard provided payment services and was listed on the Dax 30 until August 2020. The scandal was triggered by the fact that Wirecard reported, among other things, a bank balance of almost EUR1.9 billion on its balance sheet. However, this bank balance did not actually exist. The supervisory body of Wirecard claims to have been unaware of any balance sheet manipulation.

In response to the Wirecard scandal, the Federal Government proposed the Act to Strengthen Financial Market Integrity in December 2020 (FISG). The FISG shall restore confidence in the German financial market, which was shaken by

the scandal. The provisions of the FISG affect not only auditors, but also in particular the corporate bodies of so-called public interest entities themselves.

These shall be defined as they are in the EU auditors' ordinance and, inter alia, shall cover listed companies. The draft was discussed in the German Parliament in April 2021 and certain amendment proposals have been addressed in May 2021. The FISG came into force on 1 July 2021.

### *Implementation of a control and risk management system*

According to the FISG, the management board of listed companies (and in the case of an SE with a one-tier-system (*Monistische SE*), its administrative board (*Verwaltungsrat*)) is required to establish an effective and appropriate internal control and risk management system (besides the obligation to implement a controlling system to detect developments that endanger the existence of the company). The appropriateness of the additional system is thus determined on the basis of the scope of business activities and the risk situation of the company. The internal control and risk management system shall be deemed effective if it is suitable for identifying, controlling and managing all material risks.

### *Strengthening of the supervisory board of a public interest entity*

The FISG strengthens the role of the supervisory board (*Aufsichtsrat*) of an AG and an SE with a dual-tier corporate governance system (*Dualistische SE*) (and in case of an SE with a one-tier-system of its administrative board) of listed companies.

### *Mandatory audit committee with special information and monitoring rights*

The supervisory board/administrative board is required to form an audit committee. Its creation

is also currently foreseen as a recommendation in the DCGK (Deutscher Corporate Governance Kodex) that could be followed (or not) by the public companies. Nearly all listed companies comply with this recommendation. The chairman of the statutory audit committee shall be granted special information rights, inter alia, vis-à-vis the head of internal control, risk management and internal auditing. Prior to the FISG coming into force, the supervisory board obtained its information solely from the management board (and in the case of a one-tier SE, the administrative board obtained information from its directors). However, if the audit committee requests information from a lower level, the responsible corporate management shall be informed immediately.

### *Expertise in accounting and auditing*

The audit committee is following the FISG also obliged to monitor the quality of the audit by the external auditor (not only considering its independence). This requires specific knowledge of its members in accounting and auditing. Therefore, at least one member of the supervisory board/administrative board needs to have expertise in accounting and one member in auditing. Prior to the FISG coming into force, only one member was required to have specific expertise in either accounting or auditing. This change will have a significant impact on the future composition of supervisory boards/administrative boards.

Overall, the supervisory board/administrative board has greater responsibility as a result of the FISG, which at the same time entails a higher liability risk. In addition, greater competence is required on the supervisory board/administrative boards. In parallel, the liability of external auditors is tightened.

### **Current Proposals for Improving Corporate Governance**

This year, several well-known legal and economic scholars have been discussing ways to improve the corporate governance of German companies and have published various proposals. Some of these proposals are already being implemented by various listed companies for various reasons. However, the following aspects are not (yet) mandatory:

#### ***Staggered board***

Alongside the expertise of the supervisory board members, a critical attitude towards the management board is always necessary for effective monitoring. For this purpose, the term of office of supervisory board members delegated by the shareholders should be staggered. There is an argument for the constant rotation of supervisory board members to allow new ideas to find their way onto the supervisory board on a more regular basis.

#### ***Investigations upon irregularities***

If certain facts give rise to the suspicion of irregularities, the supervisory board should be legally obliged to initiate investigations. This obligation already exists, both statutorily and on the basis of case law; however, this is not yet expressly required, which should be the case in future.

#### ***Independence of the chairmen***

The DCGK already calls for the independence of the chairman of the supervisory board and the chairman of the audit committee. These recommendations should become mandatory statutory law.

#### ***Limitation of maximum number of mandates***

In Germany, a supervisory board mandate is still regarded as a part-time position. This is reflected, in particular, by the fact that up to ten supervisory board mandates are permitted by law, whereby only the chairman position counts

twice. This is criticised because a responsible and thorough supervisory board mandate requires a certain (greater) time commitment. The maximum number of supervisory board mandates and, correspondingly, chairman positions should therefore be reduced.

#### ***More sources of information***

Currently, the supervisory board receives its information only internally and primarily from the management board. The supervisory board should also be entitled to request information from authorities, such as the German BaFin. In particular, this shall be useful for information about the auditor.

#### ***Greater autonomy of the supervisory board***

The supervisory board should be given the authority to engage external consultants and special auditors without the consent of the management board in order to strengthen its autonomy. The supervisory board would have to report to the general meeting on this. In addition, additional employees shall be assigned to the supervisory board to support the supervisory board's activities.

#### ***Special right of shareholders to information***

For reasons of transparency, the shareholders' right to information should be strengthened. In this respect, shareholders should have a right to information about the auditors and the supervisory board.

#### ***Women's Quota in Corporate Bodies***

On 25 February 2021, the German Parliament initially discussed the draft bill introduced by the Federal Government to supplement and amend the regulations for the equal participation of women in leadership positions (so-called Second Leadership Positions Act or "FüPoG II"). The draft aims to further develop the statutory provisions already established in 2015 with the so-called First Leadership Positions Act ("FüPoG I")

in order to increase the proportion of women in leadership positions and to close existing gaps.

FüPoG I introduced a fixed quota for supervisory boards of companies in the private sector, which are both publicly listed and subject to parity codetermination. Since then, flexible quotas (target sizes) have applied to supervisory boards, management bodies and the top two management levels of publicly listed or co-determined companies.

The current legislative proposal is based, in particular, on an evaluation of FüPoG I, which revealed that women continue to be largely under-represented in management positions and that a large number of companies have set themselves a target of zero for the proportion of women in management positions. Although FüPoG I is deemed to have set an important milestone on the road to greater equality, it is nevertheless considered necessary to improve the effectiveness of these measures through further mandatory legal requirements.

The most prominent proposal provides for the management board to appoint at least one woman and at least one man, provided that the management board consists of more than three members, ie, for a minimum participation requirement at management board level. It applies solely to companies that are publicly listed and at the same time subject to parity codetermination. Corresponding to the fixed quota on the supervisory board under FüPoG I, an appointment in violation of the minimum participation requirement is void (so-called *Leerer Stuhl* ("empty chair")).

The flexible quota is to be maintained for publicly listed or co-determined companies, for medium-sized companies or family-run limited liability companies, which should have more flexibility regarding the organisation of their respective

executive bodies. However, the draft of FüPoG II tightens the disclosure and justification requirements in this respect.

The determination of a zero target for the management board, the two top management levels below the management board and the supervisory board remains lawful – with the exception of the scope of the fixed quota and the minimum participation requirement. However, the proposed amendments establish the legal requirement that determination of a zero target must be explained. According to the proposed wording of the provision, the decision of the management board or supervisory board must be explained in a clear and comprehensible manner; the reasoning on which the decision is based must be explained in detail in the justification. According to the Federal Government, the statement of reasons should consider the exceptional nature of the zero target.

## Insolvency

In Germany, companies are obliged to file for insolvency in the event of over-indebtedness or illiquidity. The state has established various financial assistance programs to support companies affected by the COVID-19 pandemic. The obligation to file for insolvency had been completely suspended from March 2020 to September 2020 and from October 2020 to December 2020 for those companies that had been overindebted but were not illiquid. The obligation to file for insolvency then had been suspended from January 2021 to April 2021 for those companies that have filed under the assistance regimes between November 2020 and February 2021.

Due to the long suspension term since March 2020, there are fears many "zombie companies" may exist. It was therefore demanded that the market should be cleansed of these companies. As a result, the suspension of the obligation to

file for insolvency was not extended beyond April 2021. A wave of insolvencies is now expected.

### **Partnerships**

The Federal Ministry of Justice and Consumer Protection has published the so-called “Mauracher Draft”, which provides for extensive changes in the law on partnerships.

#### *New register for civil law partnerships*

One of the key proposals is the creation of a company register for those partnerships under civil law (GbR) acting externally. In the register, the key points of the company, such as the registered office, representation and partners, would then have to be registered in the same way as for a commercial partnership (*Kommanditgesellschaft* or KG). Registered GbR's would be entitled to be entered in other registers such as the land register or share registers of companies. This is intended to increase the commercial viability of those GbR's and, in particular, to increase transparency.

#### *Law on resolutions for partnerships*

The Mauracher Draft also proposes new law on defective resolutions for partnerships, as all those resolutions in partnerships are null and void and such defects can continue to be asserted due to lack of statutory deadlines. The draft aims to eliminate this legal uncertainty by aligning the new system for partnerships with the law for the AG. Accordingly, a distinction is made between the voidability (*Anfechtbarkeit*) and nullity (*Nichtigkeit*) of resolutions. Nullity is to be considered only in the event of significant violations. An assertion period of three months is proposed.

**POELLATH** is an internationally operating German law firm. More than 150 lawyers and tax advisers in Berlin, Frankfurt and Munich provide high-end legal and tax advice. The firm advises on all transaction-related areas, including corporate, M&A, private equity, funds, real estate, private clients, succession planning and tax-related matters. POELLATH's corporate advice includes corporate law and group company law, capital market rules, corporate litigation, reorganisations and compliance. POELLATH advises publicly listed and private companies

on preparing and conducting their general and shareholder meetings on all matters, including mergers, spin-offs and hive-downs, conversions of legal form; and on all corporate advisory matters related to corporate governance. A further core area is public takeovers with subsequent corporate integration. Key clients include Deutsche Telekom AG, shareholders of Porsche Automobil Holding SE, PUMA SE, Wacker Neuson SE, Eckert & Ziegler Medizintechnik, Nemetschek SE, CEWE COLOR, Fiege Group, KME Group and Groz-Beckert.

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