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## Corporate Governance Today for Listed and Non-Listed Companies

Corporate governance comprises all aspects of the management and supervision of a company. In contrast to the internal regulations (Binnenordnung) of the company, i.e. as laid down in the articles of association, corporate governance also encompasses questions of the company's legal and factual integration into the environment, such as the capital market. In this respect, the initial interest concerned the (large) listed companies. Increasingly, however, other legal forms and medium-sized companies are being analyzed regarding their specific requirements for good corporate governance. This applies in particular to companies in the hands of financial investors and family-run businesses.

Corporate governance is not new. The debate about the efficiency of management bodies such as the supervisory board, but also the debate about co-determination in Germany has a long history. In recent years, however, the discussion about appropriate aspects of company management and supervision has gained unprecedented importance nationally and internationally. The drivers are numerous cases of maladministration and corporate distress. Globalization of the economy and the liberalization of the capital markets provided additional impetus for efficient forms of corporate management. Finally, in the recent past, national and international investors have questioned the governance modalities of stock market securities, with sometimes unpleasant consequences for companies.

The starting point of the problem is the company as a bundling of (legal) relationships of different nature, contributions of different stakeholders (e.g. shareholders, creditors, employees and suppliers) and their different interests. This offers the various stakeholders opportunities and motives for opportunistic behavior, to act in their own interest and, if necessary, to the detriment of other stakeholders. The German legislator and provider of the regulatory framework for corpo-



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rate governance requirements is therefore well advised to continuously address corporate governance issues in order not only to provide companies in Germany with a framework for safe actions, but also to keep them competitive in the international investment world, even if a positive correlation between good corporate governance and corporate success cannot be empirically proven. What this means for the corporate governance of listed, but also in particular of non-listed companies, will be outlined below on the basis of individual aspects.

## **I. Principles of corporate governance, in particular forthcoming new developments**

The interests of stakeholders are the essential basis of corporate governance and, at the same time, the limit to the actions of companies, insofar as they are contractually and legally fixed. The fundamentals of corporate governance also consist of various elements of a legal and factual nature.

The most important legal system elements include the company's superordinate key objectives (*shareholder or stakeholder orientation*), structural features such as a dualistic constitution (*two-tier system*) with a management board and a supervisory board or a monistic constitution (*board system*) with an administrative board and a directorial (*CEO*) or collegial (*management board*) management organization, the anchoring of employees (*participation through operational and entrepreneurial co-determination*) and the primary orientation of publicity and auditing according to the market value or prudence principle (*US-GAAP or IFRS/IAS vs. HGB*). The factual system elements include in particular indicators of the ownership structure (*share concentration or majority ratios in case of non-listed companies and/or such ratios in relation to the free float in case of listed companies*), the ratio of equity and debt financing of the companies, the role of the banks and the existence of personal ties within a company as well as between companies operating together. Also of importance is the "governance atmosphere" in a company (*tone from the top*), which contains the correspond-

ing values of the respective company, and e.g. determines which management remuneration is still regarded as appropriate and to what extent opportunistic behavior is reprehensible.

### ■ Legal regulations

The legal system elements of corporate governance are based on the various legal regulations, depending on the legal form, the structural features selected by the company for top management and any mandatory or voluntary supervisory bodies as well as the transparency requirements specified and selected by the company. Primary legal bases are the Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG*), the Stock Corporation Act (*Aktiengesetz, AktG*), the European and national requirements for the SE, the German Commercial Code (*Handelsgesetzbuch, HGB*), the Act on Co-determination of Employees (*Gesetz über die Mitbestimmung der Arbeitnehmer, MitbestG*), the Act on One-Third Participation of Employees on Supervisory Boards (*Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat, DrittelbG*) and the Securities Trading Act (*Gesetz über den Wertpapierhandel, WpHG*).

### ■ Innovations by ARUG II

The Act Implementing the Second Shareholders' Rights Directive (*ARUG II*) implements the Second Shareholders' Rights Directive ((*EU*) 2017/828) in Germany.<sup>1</sup>

#### **Transparency on transactions with related companies or persons**

With regard to good corporate governance, ARUG II aims, among other things, to strengthen transparency in transactions of listed companies with related companies or persons. Major transactions are to be conducted independently of irrelevant interests and free outflows of assets in favor of related companies or persons are to be prevented. A major transaction exists if its economic value comprises at least 2.5% of the company's assets in the current fiscal year, unless it

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<sup>1</sup> Not yet in force at the time of going to press; therefore reference to Government Draft (RegE) of 20 March 2019, BT-Drs. 19/9739.

is carried out in the ordinary course of business and on customary market terms. In future, major transactions will be subject to the approval of the supervisory board or a supervisory board committee. Furthermore, in order to monitor the aforementioned requirements, the company must, on the one hand, establish an internal control procedure and, on the other hand, publically notify the conclusion of significant transactions. The notification must take place immediately upon conclusion of the contract and aims to provide shareholders with rapid and reliable information.

### ■ German Corporate Governance Codex

In addition to the statutory regulations, the so-called *soft law* is also of considerable importance in the field of corporate governance. Following the insolvency of Philipp Holzmann AG, the Federal Ministry of Justice formed the *Government Commission on the German Corporate Governance Code* in September 2001. This is an independent self-regulatory body financed by German business. It does not include representatives from government or politics, nor can the Federal Government issue instructions to it. The first version of the German Corporate Governance Code (GCGC) was developed in 2002 under the direction of Gerhard Cromme and published in the electronic Federal Gazette on 30 August 2002. Since then, the Government Commission has annually reviewed whether the GCGC continues to comply with best practice in good corporate governance or whether it needs to be adjusted. The current version of the GCGC has been in force since 24 April 2017.

The GCGC addresses listed companies and companies with access to the capital market. In its current version, the GCGC reflects the key statutory provisions governing the management and supervision of German listed companies and provides recommendations and suggestions for internationally and nationally recognized standards of good and responsible corporate governance. Recommendations of the code are identified in the text by the use of the word “*shall*”. The companies may deviate from this, but are then obliged pursuant to Section 161 AktG to disclose this annually in their so-called Declaration of Conformity (*Entsprechenserklärung*) and to give reasons for the deviations (*comply or explain*). This enables the companies to take into account sector-specific or

company-specific needs. Furthermore, the code contains suggestions that can be deviated from without disclosure; for this purpose, the code uses the term “*should*”.

In terms of content, the GCGC clarifies the duties of the management board and the supervisory board, the cooperation between the two bodies and specifies their areas of responsibility. In addition, it makes statements on the remuneration structure of the management board and provides guidelines for dealing with any potential conflicts of interest, in particular for supervisory board members. Finally, the GCGC takes up transparency vis-à-vis shareholders and defines requirements with regard to accounting and auditing.

### ■ Innovations in the GCGC 2019

The named objectives of the current GCGC reform 2019 are the improvement of transparency and the comprehensibility of the system of good corporate governance in Germany. The reform aims in particular to strengthen the confidence of investors and other stakeholders as well as the confidence of the public in the management of the company. Under this heading, the GCGC 2019 also wants to be clearer and more accessible. In addition to the known categories of recommendations and suggestions, the GCGC 2019 now also contains so-called *principles* for this purpose. Instead of the previously extensive legal repetitions, the principles provide information on the essential legal requirements for responsible corporate management. Last but not least, the reform aims to improve the quality of corporate governance in German companies.

In particular, new regulations that are in line with ARUG II include *recommendations on management board remuneration*. Accordingly,

- a remuneration system is to be defined that determines
  - the target and maximum total remuneration;
  - the relative proportion of the fixed remuneration as well as the short-term and long-term variable remuneration in the targeted total remuneration;
  - which (non-)financial performance criteria are to be used to grant variable remuneration;

- the variable remuneration on the basis of the achievement of previously agreed performance criteria; and
  - when and in what form the management board member can dispose of the variable remuneration amounts granted.
- for each member of the management board
    - a specific target and maximum total compensation shall be determined individually;
    - the performance criteria for all variable compensation components shall be bindingly fixed for the forthcoming fiscal year;
  - the proportion of long-term variable compensation shall exceed the proportion of short-term variable compensation and shall predominantly consist of shares of the company or be granted on a share basis.

The reform of the GCGC 2019 came to a standstill due to the reasonable intention of harmonizing the GCGC 2019 with the amendment to the AktG by ARUG II. The competence of the (annual) general meeting to reach a resolution on the remuneration of the management board (so-called *say-on-pay*) proposed by the Second Shareholders' Rights Directive considerably delayed the legislative procedure on ARUG II until today. In particular, the opposition parties were divided after the submission of the government draft as to whether the vote of the (annual) general meeting should be binding or non-binding – in this respect, the directive leaves the implementation to the EU member states.

Apart from this, the GCGC 2019 will specify the *requirements for the independence of shareholder representatives on the supervisory board*. Potential conflicts of interest may arise from the proximity of shareholder representatives to the company or its management board, from self-interest (e.g. as customer, supplier, lender or due to personal proximity), from the length of membership on the supervisory board and last but not least from the position as controlling shareholder. Internationally, it is common to combine the definition of independence with a catalogue of specific facts. The GCGC 2019 chooses to list a catalogue of indicators for the lack of independence of shareholder representatives on the supervisory board. To answer the question of independence, two points of

view need to be considered: On the one hand, the supervisory board member must be independent of the management board or company and, on the other hand, of the controlling shareholder. The distinction between the two relations of independence is therefore important because in future more than half of the shareholder representatives shall be independent of the Company and the management board. If the company has a controlling shareholder, it is recommended that a supervisory board with more than six members shall have at least two shareholder representatives who are independent of the controlling shareholder; in the case of a smaller supervisory board, at least one.

The GCGC 2019 addresses the problem of so-called *overboarding* by restricting the number of supervisory board mandates to five in non-group listed companies or comparable functions; one supervisory board chair counts twice. In the GCGC 2019, the initial appointment term of three years is no longer structured as a suggestion but as a recommendation. However, this is rather an adjustment to the already established practice of a three years' appointment term compared to the statutory maximum duration of five years, at least at the time of the first appointment.

It is to be welcomed that the previous recommendation to publish a *separate Corporate Governance Report* (in addition to the Declaration of Conformity (*Entsprechenserklärung*), the Supervisory Board Report (*Aufsichtsratsbericht*), the Management Report (*Lagebericht*) and the Corporate Governance Declaration (*Erklärung zur Unternehmensführung*) has been dropped due to the fact that the Corporate Governance Declaration will be the central instrument for reporting on corporate governance.

## **II. Considerations of structuring according to statutory requirements depending on the legal form**

### **■ Statutory requirements depending on the legal form**

The division of powers between the individual bodies is determined by law for each type of legal entity. While the AktG offers little flexibility due to the

so-called *strictness of the articles of association* (*Satzungstreng*), the German Limited Liability Company has extensive autonomy in the articles of association (*Satzungsautonomie*).

### **German Limited Liability Company (*Gesellschaft mit beschränkter Haftung, GmbH*)**

The statutory organs of the GmbH are the managing directors and the shareholders' meeting. The shareholders' meeting can implement further organs in the articles of association, such as in particular an optional supervisory board (with including or excluding the provisions of AktG). Regarding the application of regulations governing co-determination (in particular pursuant to the MitbestG, DrittelbG), however, the formation of a (co-determined) supervisory board is also obligatory for a GmbH.

#### ■ **Managing directors**

The GmbH has one or more managing directors appointed by the shareholders' meeting. The appointment of the managing director can be revoked at any time without cause. The managing directors are responsible for managing the company's business and representing the company externally. The power of representation can only be limited internally, i.e. the managing director is obliged to comply with the restriction, but it has in general no legal effect vis-à-vis third parties. If several managing directors are appointed, the law provides for joint representation of the company by all managing directors. In practice, this is regularly deviated from by granting managing directors joint power of representation in pairs or individual power of representation either in the articles of association or by shareholder resolution.

The primary task of the managing directors is to manage the company's business. They are therefore responsible in particular for the ongoing management of the company, the information of the shareholders, the proper accounting and preparation of the annual financial statements as well as the convening of the shareholders' meeting. The managing directors are bound by the instructions of the shareholders' meeting. In addition, at the request of a shareholder, the managing directors must without delay provide information on the affairs of the company and allow inspection of the company's books; the articles of



association may not deviate from this information right and its refusal in a single case requires a shareholders' solution.

#### ■ Shareholders' meeting

The rights of the shareholders, especially with regard to the management of the business, are basically determined by the articles of association. By law, the shareholders have in particular the following tasks: the adoption of the annual financial statements and the utilization of the profit, the decision on the approval of the financial statements prepared by the managing directors, the appointment and dismissal of managing directors and the discharge of managing directors, the procedures for auditing and monitoring the management and the assertion of claims for compensation by the company against managing directors or shareholders. In addition, case law extends the decision-making competence of the shareholders to circumstances which are of extraordinary importance or of special significance for the company.

#### **Stock Corporation (*Aktiengesellschaft, AG*)**

The management board, the supervisory board and the annual general meeting are the statutory bodies of the German AG.

#### ■ Management board

The management board consists of one or more persons. It is appointed by the supervisory board for a maximum term of five years, whereby a recurring appointment or extension of the term of office is permissible under certain conditions. The appointment to the management board can only be revoked for cause. Like the GmbH's managing directors, the AG's management board is responsible for the management of the company and its external representation. In an AG the power of representation of the management board in external relationships can also not be restricted and, subject to divergent provisions in the articles of association, the joint representation of the AG by all members of the management board applies. In practice, however, the articles of association also regularly determine a joint power of representation in pairs or authorize the supervisory board to determine a deviation to this effect by resolution.

The management board manages the company in its own responsibility. In addition to managing the operating business, its responsibilities include the preparation and execution of resolutions of the (annual) general meeting, the proper keeping of the accounting books and reporting to the supervisory board. In contrast to the managing directors of a GmbH, the management board of an AG is not bound by instructions, neither by the supervisory board nor by the (annual) general meeting. In this respect, the management board is independent in accordance with the legal guidelines and must manage the company on its own responsibility.

#### ■ **Supervisory board**

The supervisory board, elected by the (annual) general meeting, consists of at least three members. The articles of association may stipulate a higher number, which must no longer be divisible by three (except in the case of co-determined supervisory boards). Supervisory board members cannot be appointed for a period longer than until the end of the (annual) general meeting which resolves on the discharge for the fourth fiscal year after the beginning of the term of office; this corresponds, in case of no change of the fiscal year, to a maximum term of appointment of just under five years.

The supervisory board is the controlling body of the AG. In order to monitor the management of the company, the management board is obliged to report to the supervisory board on an ongoing basis, in particular on the intended business policy, fundamental questions of corporate policy, the profitability of the company as well as the turnover and status of the company. In addition, the supervisory board has the right to demand a report from the management board at any time on the affairs of the company, its legal and business relationships with affiliated companies and on business transactions at these companies which have a significant influence on the situation of the company. The supervisory board mandates the auditor to examine the annual financial statement and the consolidated financial statement.

#### ■ **(Annual) General meeting**

The shareholders exercise their voting, resolution and information rights at the (annual) general meeting. In particular, the (annual) general meeting has

the authority to pass resolutions on the appointment of the members of the supervisory board (insofar as they are not delegated to the supervisory board or elected as employee representatives in accordance with the provisions of co-determination law), the appropriation of distributable profit, the appointment of the auditor, amendments to the articles of association and capital measures as well as on the discharge of the members of the management board and supervisory board.

The (annual) general meeting is convened by the management board. In exceptional cases, a shareholder may also submit a request to convene a general meeting if he has held at least 5% of the share capital for 90 days prior to submitting the request. If a shareholder holds at least 5% of the share capital or a proportionate amount of at least EUR 500,000 of the share capital, he is entitled to request a so-called request for additions to the agenda (*Tagesordnungsergänzungsverlangen*), subject to applicable deadlines. Finally, the supervisory board must convene a general meeting if it is in the best interests of the company.

### **European stock corporation (*Societas Europaea*, SE)**

The SE is the only legal form in Germany that grants the choice between a monistic or a dualistic corporate governance system.

#### ■ **Dualistic organizational constitution**

The dualistic SE with management board and supervisory board (so-called *two-tier system*) largely corresponds to the dualistic German AG. Subject to European requirements, a dualistic SE must therefore be treated like an AG in Germany. The GCGC applies to the listed dualistic SE.

#### ■ **Monistic organizational constitution**

The monistic SE has an administrative board (so-called *one-tier system*) and executive directors. The administrative board has the direction authority of the company, in this respect the management function, and supervises the implementation of the main principles determined by it. The administrative board, elected by the (annual) general meeting, must appoint one or more ex-

ecutive directors for the operational management and external representation of the monistic SE. These can either be members of the administrative board (so-called internal executive directors), as long as the majority of the seats in the administrative board are occupied by non-executive members of the administrative board, or persons who do not belong to the administrative board (so-called external executive directors). Another special feature of the monistic SE is the authority of the administrative board to give instructions to the executive directors.

#### ■ Co-determination in the SE

The German co-determination acts (in particular MitbestG, DrittelbG) are not applicable to the SE. Rather, the co-determination of the employees is to be negotiated. The so-called *special negotiating body* (*besonderes Verhandlungsgremium*), elected by the employees, negotiates with the management body a co-determination concept of entrepreneurial and operational co-determination which is adapted to the type and size of the company with the aim of concluding a so-called *participation agreement*. If the negotiations fail, a SE works council must be established in accordance with the statutory fallback regulation and the supervisory or administrative board of the SE is to be composed of as many employee representatives in accordance with the before-and-after principle that the number of employee representatives does not fall below the previously existing level of co-determination; if there was no former co-determination, this means that no employee representative on the supervisory board or board of directors will be required in the future. Employee representatives on the administrative board of the monistic SE also have the potential to influence the management of the company through the greater competence of the administrative board.

#### Corporate & Co. Limited Partnership (*Kapitalgesellschaft & Co. KG*); Partnership Limited by Shares (*Kapitalgesellschaft auf Aktien, KGaA*)

In the case of a limited partnership with a corporate entity (*Kapitalgesellschaft*) as a personally liable shareholder (*general partner (Komplementär)*), the limited partners (*Kommanditisten*) are generally excluded from the management according to the legal model and cannot represent the company externally. Further-

more, limited partners may not object to an action of the general partner unless it goes beyond the ordinary course of business.

In addition to natural persons, any form of a corporate entity can be a general partner, according to current practice. The management and representation of a corporate & Co. KG and its supervision follows the respective corporate governance system of the general partner described above.

The KGaA may also appoint a corporate entity as general partner on the basis of the jurisdiction of the German Federal Supreme Court (*Bundesgerichtshof*). The corporate & Co. KGaA differs from the KG primarily at the level of the limited liability shareholders, to whom the AktG applies in part, but for the most part as to the limited partners of the KG the HGB applies. In addition, the AktG provides for individual special features in the distribution of competences between the supervisory board and the general meeting of the KGaA.

### ■ Structuring possibilities

#### GmbH

##### ■ Relationship between managing directors and shareholders' meeting

Subject to the mandatory tasks assigned to the managing directors, the responsibility of the shareholders is largely subject to the autonomy of the articles of association and the instructions. In practice, this is done by a so-called *approval catalogue*, i.e. a list of transactions requiring approval, prior to which a consent has to be obtained. The catalogue can be contained in the articles of association (rather seldom), in rules of procedure for the management (usual practice) and/or in the management service contract. In practice, the place of regulation often depends on considerations of confidentiality and transparency as well as the need for a high degree of adjustment flexibility. With regard to the individual adjustment of certain limits and facts, a tailor-made solution for the specific company is always required. It is important that the existing approval catalogues are coordinated with each other with regard to the individual facts and that they are implemented stringently in relation to subsidiaries. While the catalogue items cover abstract, gen-

eral situations, instructions are issued predominantly in specific, individual case decisions. The managing directors are equally bound by approval catalogues and instructions. However, neither the one nor the other have any externally legal effect – the company is effectively obligated in its external relationship by the actions of the managing director even in the event of a breach of an approval requirement or an action contrary to instructions, apart from individual cases.

#### ■ **Optional supervisory board / advisory board**

If the GmbH does not already have a supervisory board on the basis of co-determination requirements, operational monitoring can be supplemented by the establishment of an advisory board. This can be useful in case of a larger number of shareholders – if not even necessary to maintain the ability to act properly – as well as for simple shareholder structures, if the company requires an increased degree of industry knowledge and specific know-how. While the obligatory supervisory board has mandatorily assigned tasks (e.g. personnel competence via the managing directors), the transfer of competence to the advisory board – subject to mandatorily assigned competencies to the managing directors (e.g. representation of the company, accounting obligation) or the shareholders – can be flexibly installed. Particulars shall be implemented in the articles of association or in the rules of procedure for the advisory board.

## AG

The AG has far more limited organization freedom due to the strictness of the articles of association. The highest maxim is to maintain the division of responsibilities between the management board and the supervisory board. In addition to the aforementioned reporting obligation of the management board to the supervisory board, the supervisory board must, however, specify a catalogue of transactions requiring approval for the management board either in the articles of association and/or otherwise (e.g. in rules of procedure). In practice, these catalogue items are very comparable with those in a GmbH. However, when selecting and formulating the specific circumstances for the management board, the supervisory board must take care not to interfere with the management board's

competence; the independent, free management of the AG by the management board must be maintained. Also in the AG, the specific arrangement is a question of the individual enterprise.

### **Societas Europaea (SE)**

The corporate governance of the dualistic SE basically does not differ from that of the AG. With regard to the corporate governance of a monistic SE, it is particularly important to establish a clear regulation with regard to the (internal) cooperation in the administrative board and the relationship between executive directors and non-executive directors. In contrast to the case of the dualistic AG, statutory provisions stipulate that the articles of association shall include circumstances on which the administrative board decides in their entirety. Further circumstances, on the other hand, which should not be transparent in the commercial register as provision in the articles of association, must then be included in the rules of procedure for the executive directors.

### **III. Considerations regarding the implementation of a good corporate**

Starting from the causes of the governance problems (different legal relationships, different interests of the stakeholders and, as the case may be, opportunistic behavior of individual stakeholders), it is possible to identify certain organizational principles of corporate governance. Among the most important are the separation of powers, transparency, a reduction of conflicts of interest and the safeguarding of qualifications as well as the motivation of board members to value-oriented behavior.

#### **■ Fields of regulation**

Good corporate governance should include provisions on the following three areas:

- the determination of the primary objectives of the company, which offer top management a guiding principle for action and at the same time make it possible to manage conflicts of interest in general or in individual cases,

- the corporate governance structures and processes with which this objective is to be achieved, and
- proactive corporate communication in order to gain and consolidate the trust and thus the support of the relevant stakeholders, which is ultimately necessary for the company's existence, by creating transparency.

### ■ **Company interest as guiding principle**

Although corporate governance regulations can reduce the scope and motivations for opportunistic behavior, they cannot solve all conceivable conflicts between stakeholders preventively. Required is therefore a guiding principle that offers top management an orientation for action. This addresses the core issue of corporate governance, in whose interest the company is to be managed.

In principle, the various stakeholders have a common interest in the sustained economic success of the company, since ultimately only a profitable company can meet their demands. In detail, however, they pursue group-specific objectives, which can be different and in some cases even contradictory. In any case, there can be no doubt that a high level of target achievement by certain stakeholders at least partially affects the interests of others. Thus, generous wage concessions made by top management to employees reduce the profit claims of shareholders. Even the stakeholders of the same group often have different and contradictory individual interests, e.g. ordinary and activist shareholders, investors and family owners as well as management participants or secured and unsecured creditors.

The management board and supervisory board are legally obliged to safeguard the interests of the company, which result from the appropriate consideration of the various individual interests of all stakeholders. The legal obligation of the management organs to act in the company's best interest is not only to be considered *de lege lata*, but also well justified by the above outlined interrelationships of the company. If the governance rules want to establish efficient framework conditions for sustainably productive value creation and fair value distribution, it is clear that the management must not consider stakeholder interests unilaterally, but must instead balance them to increase the sustainable value of the company in the sense described above and thus act in the interests of the company.



### ■ Which advantages are offered by the GCGC 2019?

The chosen goal of the GCGC 2019 is “*to make the German Corporate Governance system transparent and understandable. (...) It aims to promote confidence in the management and supervision of German listed corporations by international and national investors, customers, employees and the general public*”. The GCGC 2019 offers “*principles, recommendations and suggestions governing the management and monitoring (...) that are accepted nationally and internationally as standards of good and responsible corporate governance*”.

Practice shows that international investors regard the GCGC as a ‘gold standard’. In addition, national courts also apply the GCGC recommendations as a yardstick for good corporate governance in litigations. Although non-listed and capital market-oriented companies are neither obliged to report deviations from the GCGC, nor are they given guidelines on how they could or should implement their corporate governance, the GCGC also provides these companies with guidance on the aspects that can be used to shape corporate governance that complies with national and international standards.

This may apply in particular with regard to the introduction of a remuneration system with the above mentioned features and the concept of a target and maximum total remuneration. Potential conflicts of interest among members of the management and mandatory as well as optional supervisory bodies could be prevented by selecting independent members on the basis of the catalogue of indicators of lack of independence or by dealing with non-existent independence in individual cases. It could also be considered to issue a (streamlined) corporate governance statement in the form of a *Corporate Governance Report light*.

The measures to be considered are, of course, strongly dependent on the respective company structure. As far as individual advantages are recognized, it would at least be unwise not to make use of these potentials, some of which can be easily exploited. Although there are no generally applicable guidelines for good corporate governance for owner-managed companies, it is worthwhile to test (possibly already existing) companies’ governance regulations. The GCGC requirements applicable to listed companies can provide valuable indications of

good corporate governance. Sometimes a voluntary implementation of individual regulations is also worth considering if the expectations of investors are to be anticipated in the event of a resale or an IPO of the investment.

### ■ **Portfolio companies – selected aspects**

Reporting obligations and catalogues of approval for the management are an important element of the support provided by financial investors to portfolio companies, which are generally found in practice. In this respect, the corporate governance of portfolio companies generally does not require improvement.

### ■ **Conflicts of interest**

Conflicts of interest can arise between private equity investors and portfolio companies, but also through investments in different portfolio companies that compete with each other. The financial investors can react to these constellations using the new version of the GCGC 2019 and regulate the catalogue of indicators for a dependency of a supervisory or advisory board member in the corresponding rules of procedure as well as a guideline regarding non-participation or abstention in meetings and resolutions in case of potential conflicts of interest. The portfolio company could also make transparent such constellations and how they are dealt with for the benefit of other stakeholders.

### ■ **Remuneration structure**

In the case of the management of a portfolio company incentivized by participation, nuances such as remuneration could be adjusted in individual cases on the basis of the long-term success of the company (and not primarily on the basis of the investor's possibly short-term interest) in accordance with ARUG II.

### ■ **Owner-managed companies – selected aspects**

Depending on the specific ownership structure, owner-managed companies are often able to optimize various aspects of their corporate governance in individual cases. This applies in particular to the separation of (third-party) management, operational monitoring, e.g. through catalogues of transactions requiring approval, and ownership rights, and thus at the same time to potential conflict

of interest issues as well as internal and external transparency. However, the potential must be analyzed sensitively in each individual case due to the special features and the implementation of individual or several measures must be weighed intensively.

### IV. Impact

It is nevertheless difficult to make reliable statements on the positive effects on the company's success regarding the various forms of corporate governance that are individually adapted to the respective legal form, since governance systems consist of numerous system elements that themselves feature a high degree of complexity and interact with each other in a variety of ways. The success of a company also depends on numerous other factors, such as the business field and the company's competitive strategy. The still uncertain knowledge about the success consequences of corporate governance thus calls for caution when making corresponding efficiency statements. However, in view of the difficult nature of the evidence, it does not per se speak against the formulation, adherence to and ongoing updating of corporate governance standards with the aim of permanent improvement. As long as the standards are plausible and are already being practiced by numerous companies (without any discernible damage), they may claim a certain presumption of efficiency as '*best practice*'.

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