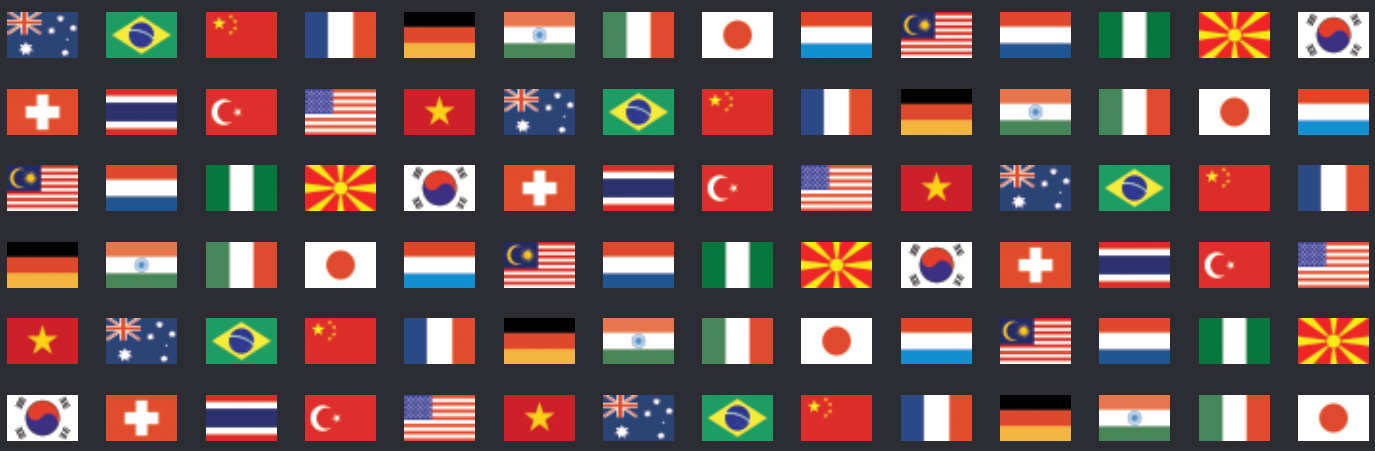
Corporate Governance 2021

Contributing editor
Holly J Gregory



LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the twentieth edition of *Corporate Governance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Australia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Holly J Gregory, for her continued assistance with this volume.

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Getting The Deal Through

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SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

1 What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

The primary sources of laws and regulations that must be complied with by both listed and non-listed capital companies in Germany are:

- the German Limited Liability Companies Act;
- the German Stock Corporation Act;
- the European and German acts on European stock corporations;
- the German Commercial Code;
- the Reorganisation of Companies Act;
- the Takeover Act (implementing the EU Takeover Directive (Directive 2004/25/EC));
- the Securities Trade Act; and
- the Anti-Money Laundering Act.

Listed companies also have to comply with the applicable listing rules and the German Corporate Governance Code (DCGK). The DCGK differentiates between recommendations, which must be complied with or otherwise the company must explain why it chose not to comply and disclose such an explanation on its website and as part of its corporate governance reporting ('comply or explain' policy), and suggestions, from which deviations are allowed without disclosure, excluding new general principles, which must be adhered to.

Responsible entities

2 What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder or business groups, or proxy advisory firms, whose views are often considered?

The primary government agencies are the federal parliament and, to an increasing extent, the European Union's legislators. The DCGK and its amendments are prepared and issued by the Government Commission for the German Corporate Governance Code. The listing rules are usually set by the stock exchanges or other listing entities. Capital markets laws and regulations are enforced by the Federal Financial Supervisory Authority.

Shareholders' associations, most notably the German Association for the Protection of Capital Investors and the German Society for the Protection of Securities Holders, are usually present in general meetings to voice their members' questions and concerns. Statements by 'proxy advisors' have become increasingly noticeable in the market but are not yet often considered.

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS AND EMPLOYEES

Shareholder powers

3 What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

Under German law, one must differentiate between the two most popular legal company forms: the stock corporation (AG) and the company with limited liability (GmbH).

The members of an AG's supervisory board (ie, non-executive directors) are elected by the shareholders during a general meeting. The members of the management board (executive directors) are appointed by the supervisory board – not by shareholders. This basic structure cannot be altered. Unless the articles of association provide otherwise, members of the supervisory board are elected by a simple majority of votes and can be removed with a 75 per cent majority. Unless the AG has entered into a control agreement with its parent company, the supervisory board and the management board act independently and cannot be required by the shareholders to pursue a particular course of action.

Unless its articles of association stipulate otherwise, a GmbH only has managing directors and no supervisory board. The managing directors can be appointed and removed by shareholders at a shareholders' meeting with a simple majority vote. The shareholders' meeting can require the managing directors to pursue a particular course of action.

The legal forms of a European stock corporation (SE) and a partnership limited by shares (KGaA) are, to a large extent, comparable to an AG.

Shareholder decisions

4 What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

The following selected decisions are reserved by law for the shareholders of an AG:

- election and removal of the supervisory board members;
- appointment of an auditor;
- appropriation of profits;
- formal approval of action for members of both the management board and the supervisory board;
- in listed companies, approval of the remuneration policy and the annual remuneration report; and
- fundamental decisions, in particular:
  - amendments to the articles of association;
  - liquidation of the corporation;

- mergers and demergers;
- changes of legal form;
- sale of substantially all the corporation's assets; and
- conclusion of corporate agreements (eg, control agreements, and profit and loss pooling agreements).

The following decisions are reserved by law for the shareholders of a GmbH:

- election and removal of the managing directors and conclusion of their service agreements;
- approval of annual accounts;
- appointment of an auditor;
- appropriation of profits;
- formal approval of action for managing directors;
- fundamental decisions; in particular, amendments to the articles of association, liquidation of the corporation, mergers, demergers, changes of legal form, sale of substantially all of the corporation's assets and conclusion of corporate agreements (control agreements, profit and loss pooling agreements); and
- instructions to the managing directors.

Matters that are subject to a non-binding shareholder vote are uncommon in German law, except for resolutions on say-on-pay.

Disproportionate voting rights

5 | To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

In an AG, one share cannot carry more than one vote (in the case of shares without nominal value) or one vote per euro of nominal value (in the case of shares with a nominal value). The articles of association of a non-listed AG can provide for limits on exercising voting rights.

In a GmbH, disproportionate voting rights or limits on exercising voting rights are allowed.

Shareholders' meetings and voting

6 | Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

In an AG, an SE and a KGaA, shareholders cannot act by way of written consent without a meeting. Meetings of shareholders in which attendees are present physically and by using electronic means are permitted if provided for in the company's articles of association and subject to the Covid-19 Law. The articles of association can provide for a requirement to register within a time frame of at least six days prior to the general meeting. In the case of listed companies, this registration must be made by way of a specific depositary statement referring to the shareholding on the 21st day prior to the general meeting.

In a GmbH, all shareholders and subject to the Covid-19 Law the majority of shareholders can act by way of written consent without a meeting. Virtual meetings of shareholders are permitted.

Shareholders and the board

7 | Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

In an AG, an SE and a KGaA:

- shareholders holding at least 5 per cent of the registered share capital can require meetings of shareholders to be convened; and
- shareholders holding at least 5 per cent of the registered share capital or shares with a nominal value of at least €500,000 can require resolutions to be put to a shareholder vote against the wishes of the supervisory board or the management board, if this request is received by the company 24 days prior to the general meeting or, in case of a listed company, 30 days prior to the meeting.

Shareholders' requests to add items to a general meeting's agenda must be published, typically together with a statement from the management and supervisory board.

Counterproposals made by shareholders to resolution proposals made by the management and supervisory boards must be submitted to the shareholders, potentially together with a statement of the management and supervisory board. In the case of listed companies, counterproposals and the company's statements regarding them must be published on the company's website.

In a GmbH, shareholders holding at least 10 per cent of the registered share capital can require shareholders' meetings to be convened or resolutions to be put to a shareholder vote against the wishes of the company's managing directors.

Controlling shareholders' duties

8 | Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

All shareholders have a fiduciary duty towards the company and other shareholders. The fiduciary duty of controlling shareholders is more intense than that of non-controlling shareholders.

In an AG with a controlling shareholder, the controlling shareholder and its boards are subject to certain additional statutory duties. Enforcement actions can be brought against controlling shareholders and, under certain circumstances, their representatives for breach of these duties.

Shareholder responsibility

9 | Can shareholders ever be held responsible for the acts or omissions of the company?

Based on corporate law, shareholders can only be held responsible for acts by or omissions of the company under exceptional circumstances. This may happen where the company acts through its shareholders. For example, if the GmbH has no managing directors, the shareholders are obliged to file for insolvency if the company is insolvent. Failure to do so will result in liability of the shareholders.

There are certain other areas of law that provide for the responsibility of shareholders for acts or omissions of their company, including antitrust law, data protection law and criminal law.

Employees

10 | What role do employees have in corporate governance?

The management board is obliged to implement proper corporate governance and to continuously supervise its functions. Employees have a role in the following areas. The management board is allowed to deploy employees by way of vertical instruction and so is dependent on their employees fulfilling their tasks and duties. This fulfilment is itself subject to supervision by the management board. In addition, recommendation A.2 of the German Corporate Governance Code recommends giving employees the ability to report legal violations in the company in a protected manner (most commonly through a whistle-blower system).

This should enable employees to give anonymous reports of legal violations by or within the company.

If an AG, a KGaA or a GmbH exceeds the threshold of generally 500 employees within German territories, one-third of the company's supervisory board members must be employee representatives (the One-Third Participation Act). If it exceeds 2,000 employees within German territories, 50 per cent of the supervisory board must be comprised of employee representatives (the Co-Determination Act).

CORPORATE CONTROL

Anti-takeover devices

11 | Are anti-takeover devices permitted?

In public takeover bids, the management board is allowed to take pre-bid and certain post-bid defensive measures in accordance with the Takeover Act.

Pre-bid defences

The target's shareholders' meeting can authorise the management board to take action to prevent the success of any takeover bid, subject to the approval of a defensive action (if and when it is taken) by the supervisory board. This authorisation is valid for 18 months and requires a qualified majority (75 per cent of the share capital represented at the general meeting). Furthermore, a shareholders' meeting can decide on capital measures, or authorise the management board to acquire the company's own shares or to issue convertible bonds. As payments for the early termination of contracts of management board members should not exceed twice members' annual remuneration limits the defensive effect of compensation claims (the 'golden parachute' defence).

Post-bid defences

After a takeover announcement, the management board must refrain from taking any frustrating action. However, it can seek alternative bids (a 'white knight' defence) or take actions that a prudent and conscientious director of a company not subject to a public takeover bid would have taken. Moreover, it can take defensive actions approved by the target's supervisory board or shareholders' meeting, or call a shareholders' meeting following a takeover announcement where a vote on defensive action can be held. The notice periods of these meetings are significantly shorter than ordinary shareholders' meetings. If such a meeting is convened, the offer period is extended to 10 weeks to allow the shareholders' meeting to take place before the offer expires. Finally, the boards can advise the shareholders to refuse a hostile takeover bid when giving their reasoned opinion. In this respect, the management board and the supervisory board must consider the transparency principle and avoid misleading statements.

European opt-in

A German listed company can opt out of the German rules for defensive actions and opt in to the rules set out in the EU Takeover Directive (Directive 2004/25/EC), which was implemented in the Takeover Act, by amending the company's articles of association. A target that does not opt in is automatically subject to the rules of the Takeover Act on defensive actions.

Breakthrough

The articles of association of a German listed company may apply the 'breakthrough clause' of the EU Takeover Directive, as implemented in the Takeover Act, under which certain transfer restrictions and restrictions on exercising voting rights in certain contracts do not apply in certain circumstances.

Publication of defence measures

All companies listed in Germany must give detailed information on all existing defence mechanics in the management report that forms part of the company's annual financial statements. The supervisory board must comment on this information in its own statement for the annual general meeting.

Issuance of new shares

12 | May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

The general meeting of a stock corporation (AG), a European stock corporation (SE) and a partnership limited by shares (KGaA) can authorise its management board, subject to the approval of the supervisory board, to issue new shares (authorised capital). Authorised capital may not exceed 50 per cent of the registered share capital.

Statutorily, shareholders have pre-emptive rights. With a 75 per cent majority pre-emptive rights can be excluded, even under a management board's authorisation to issue new shares. Yet, proxy voters only approve these authorisations for exclusions of pre-emptive rights under certain requirements and to a certain percentage of the authorised capital (usually 20 per cent). Often, the authorisation will provide that the management board may, with the approval of the supervisory board, exclude pre-emptive rights without cause if the shares to be issued amount to less than 10 per cent of the registered share capital and are not issued significantly below the current stock market price.

Similarly, the shareholders' meeting of a company with limited liability (GmbH) can authorise its managing directors to issue new shares (authorised capital). This authorised capital may not exceed 50 per cent of the registered share capital. Under applicable case law, shareholders of a GmbH have pre-emptive rights to acquire newly issued shares, subject to certain exceptions and exclusion mechanisms.

Restrictions on the transfer of fully paid shares

13 | Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Restrictions on the transfer of fully paid shares in listed stock corporations (ie, AG, SE or KGaA structures) are not permitted. Restrictions on the transfer of fully paid shares in non-listed companies are permitted and customary. In closed companies, including GmbHs, the transfer of shares is usually subject to the prior approval of the supervisory board, a shareholders' meeting or a general meeting. Other customary restrictions include rights of first refusal or tag-along rights.

Compulsory repurchase rules

14 | Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

Compulsory share repurchases are not common in German law and practice. They may be allowed in certain exceptional cases.

Dissenters' rights

15 | Do shareholders have appraisal rights?

Shareholders have the right to sell their shares to the company at a fair value (in which case a valuation based on the Institute of Auditors in Germany's IDW S1 standard on the principles for the performance of business valuations is required) in the case of certain types of mergers or similar transactions (eg, entering into a domination or profit-and-loss pooling agreement, a change of legal form, a squeeze-out or a delisting).

RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

16 | Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The predominant board structure of stock corporations (AG), European stock corporations (SE) and partnerships limited by shares (KGaA) follows the two-tier system, with a management board that manages and represents the company and a supervisory board that supervises the management board. In Germany, only SEs are allowed a one-tier system with one board (an administrative board) that consists of executive and non-executive board members.

Most companies with limited liability (GmbHs) only have managing directors, who are all executive directors, but they can have a supervisory or advisory board, resulting in a two-tier structure. However, a supervisory board is compulsory in a GmbH in cases of co-determination. A GmbH cannot have a one-tier board that includes executive and non-executive directors.

Board's legal responsibilities

17 | What are the board's primary legal responsibilities?

The supervisory board has the power to appoint and dismiss members of the management board, and is responsible for supervising the management board's activities. A supervisory board is entitled to regularly or irregularly request reports from the management board and define certain transactions and measures in the management board's rules of procedure or in individual cases that are subject to the supervisory board's approval (eg, regarding significant transactions and measures exceeding a certain threshold). This definition may also be made by the shareholders in the company's articles of association. However, this approval does not have any effect on the transactions or measures with regard to third parties, but only on the internal relationship between the two bodies and the liability of members of the company's management board.

Board obligees

18 | Whom does the board represent and to whom do directors owe legal duties?

The supervisory board does not represent anybody in fulfilling its own legal duties; rather, the supervisory board is independent to a large extent. According to the German Corporate Governance Code (DCGK), in the case of listed companies, the supervisory board shall, in its opinion, propose a reasonable number of independent members. When proposing individuals for election to the supervisory board, the individuals' independence from controlling shareholders, the management board and other groups (eg, competitors) are factors the supervisory board has to consider. Supervisory board members, who may be delegated or elected from a certain shareholder majority, are not allowed to pass on any information received in their function as members of the supervisory board to the respective shareholder. Consequently, supervisory board members must always act in the best interest of the company, which itself is defined by the 'stakeholder model' (the opposite of the Anglo-Saxon shareholder model, in which board members must act in the best interest of the shareholders). The members of the management board and managing directors of a GmbH also owe their legal duties to the company and must, therefore, only act in the best interest of the company (ie, its stakeholders).

Enforcement action against directors

19 | Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed? Is there a business judgement rule?

Managing directors of a GmbH may be instructed to take or to refrain from taking certain measures by way of shareholder resolutions. Management board members of an AG and an SE are, conversely, entitled to manage the company at their own discretion. Consequently, neither the general meeting nor the supervisory board is allowed to adopt management decisions or bring forward enforcement action against members of the management board. However, the supervisory board is entitled and, according to case law, obliged to assert liability claims against the management board if the company suffered damage owing to a breach of tasks and duties by the management board. Members of both the supervisory and management board, as well as managing directors of a GmbH, may be exempt from liability if at the time of their action they could have reasonably been assumed, based on adequate information, to have acted in the company's best interest (the business judgement rule). The scope and application of the business judgement rule have been refined by numerous court decisions.

Care and prudence

20 | Do the duties of directors include a care or prudence element?

Managing directors of a GmbH and management board members of an AG, an SE and a KGaA do have to apply the care of a prudent and diligent business person. In addition, in supervising the management board of an AG or SE, the supervisory board has to follow this principle.

Board member duties

21 | To what extent do the duties of individual members of the board differ?

Generally, supervisory board members have the same rights and duties. However, applicable law and the DCGK provide for the requirement of appointing individual members with certain skills (eg, finance, reporting and auditing expertise). Thus, these members' duties differ from the other members' duties. The differences in duties do not reflect higher liability exposure.

The tasks and duties of the management board of an AG, SE or KGaA are usually allocated to several functional or operational departments for which individual members of the management board are responsible. However, all members of the management board remain jointly responsible for the management of the company. Therefore, members of the management board also have a duty to reasonably be aware and oversee the operation of departments for which they are not directly responsible.

Delegation of board responsibilities

22 | To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

The supervisory board is not allowed to assume management responsibilities, nor is it allowed to delegate supervisory functions to the management board or to other persons. The supervisory board is, however, entitled to implement committees comprising of its members. In some instances, such as regarding the management board members' service agreements, the committees are statutorily not entitled to resolve on these matters in place of the supervisory board, but only to prepare the respective resolutions for the supervisory board

and to supervise their execution. In addition, the board may ask a board member to prepare a certain topic. However, the responsibility to decide upon this topic remains in any instance with the supervisory board.

The tasks and duties of the management board of an AG, an SE or a KGaA are usually allocated to several functional or operational departments for which individual members of the management board are responsible. Decisions within each department are made by the responsible member of the management board unless a material decision requires a resolution of the entire board. Similar structures may be implemented among managing directors of a GmbH; however, designation of a spokesperson is less common.

Non-executive and independent directors

23 Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

In the case of a one-tier system within an SE, applicable law requires that the majority of the board's members be non-executives. Members are non-executive if they are not registered as managing directors of the SE with the commercial register. If they are registered as managing directors, they have the power to manage and represent the company. Non-executive members are not allowed to do so and are only entitled to supervise the executive directors (ie, the managing directors) within the company's internal relationship.

Board size and composition

24 How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

The supervisory board of an AG, an SE and a KGaA must have at least three members. Unless the stock corporation is co-determined (meaning that one-third or half of the board members are elected by the employees), the supervisory board's members may number a statutorily higher amount of up to nine, 15 or 21 members – depending on the registered share capital of the corporation. In the case of statutory co-determination, the number of members must be divisible by three. In the case of equal co-determination, the total number of supervisory board members is dependent on the total number of German employees.

Shareholder representatives on the supervisory board are generally appointed by the general meeting and employee representatives; in cases of co-determination, generally by employee elections. In the case of vacancies, under certain circumstances, members can, upon filing, also be appointed by a court.

In AGs, SEs and KGaAs that are co-determined and listed on a stock exchange, the supervisory board (or in the case of a one-tier system SE, the administrative board) must comprise of at least 30 per cent women and at least 30 per cent men. The minimum percentage must be complied with by the supervisory board in its entirety. Furthermore, corporations that need to fulfil the aforementioned gender criteria for their boards must include a declaration on corporate governance in their management report. This declaration must include information on whether the company has complied with the requirements for appointing male and female supervisory board members.

There is no minimum number of members required for a management board, unless the company's articles of association provide otherwise. Members of the management board must fulfil basic statutory requirements regarding personal reliability (eg, no criminal record). In a listed or co-determined company, the supervisory board must determine and annually report on a target percentage for women on the management board and deadlines by which this percentage is to be reached. The DCKG makes several recommendations regarding diversity of the management board and the tenure of its members. 'Diversity' is not defined, but does also include criteria such as nationality and expertise.

Board leadership

25 Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

In the German two-tier system, the chief executive (and other members of the management board), who manages and represents the company, is strictly separated from the functions of the supervisory board. Neither body is allowed to assume functions of the respective other body. In the case of a one-tier system, within an SE, the CEO and chair of the board may be the same person as there is no separation requirement.

Board committees

26 What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

A supervisory board is entitled to establish committees from its members. In some instances, the committees are statutorily not entitled to resolve on matters instead of the supervisory board, but to only prepare resolutions of the supervisory board and supervise their execution. The DCGK recommends that listed AGs, SEs and KGaAs implement an audit committee and a nomination committee for nominating the candidates for election to the supervisory board. Committees of the management board or of a GmbH's managing directors are less common.

Board meetings

27 Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

Supervisory boards of listed companies are statutorily required to hold at least four meetings a year. Supervisory boards of non-listed companies are entitled to resolve on holding only two meetings per year. In any case, the supervisory board must report on the number and main topics of its meetings in its annual report to the general meeting. There is no minimum number of meetings to be held by the management board, but it will usually meet on a regular basis (eg, monthly).

Board practices

28 Is disclosure of board practices required by law, regulation or listing requirement?

A supervisory board is statutorily obliged to report on its constitution, its meetings, the attendance of its meetings and its supervisory activities in an annual report to the general meeting. The same applies to the work of its committees. There is no obligation for a management board to report on its practices, but some information will likely be included in the annual management report.

Board and director evaluations

29 Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

No such evaluations are provided for, either statutorily or according to regulation or listing requirements. This applies to both the management and supervisory board. However, the DCGK recommends that the supervisory board self-evaluates its own effectiveness regularly and reports on the self-evaluation in the corporate governance declaration. In compliance practice, self-evaluations are also often implemented for the management board.

REMUNERATION

Remuneration of directors

30 How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

The German Stock Corporation Act (AktG) and the German Corporate Governance Code (DCGK) provide for specific rules the supervisory board must adhere to when resolving upon the remuneration policy to be proposed to a general meeting for its approval, and when resolving upon the fixed and variable remuneration of management board members (the variable remuneration is differentiated between short-term and long-term incentives) as well as on loans or other compensatory arrangements (eg, stock options). For example, the DCGK recommends that the majority of variable remuneration is connected to long-term incentives and is granted in either shares or share-based instruments.

The supervisory board must determine the remuneration of the management board in a remuneration policy. The AktG requires only a few elements (eg, a determination of the maximum total remuneration of the management board) to be included in every remuneration policy, but provides for extensive 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. The DCGK makes several recommendations with respect to aspects to be regulated in the remuneration policy; such as the ratio between the fixed and variable remuneration based on short- and long-term incentives and the performance and non-performance indicators to determine the payment of variable remuneration.

The general meeting is entitled to resolve on the approval of the remuneration policy and on any material changes thereto at least every four years. The supervisory board must prepare an annual remuneration report that is also subject to a resolution by the general meeting. However, the resolution on the approval of both the remuneration policy and report are of a declaratory nature only (ie, thereby, the supervisory board's responsibility to decide upon the remuneration remains unaffected).

Service contracts may be entered into for five years at the most, with a right of renewal. According to the DCGK, the service contracts of management board members shall provide that payments, including fringe benefits, made to a management board member in the case of an early termination of the contract do not exceed twice their annual remuneration (the severance cap) and do not constitute remuneration for more than the remaining term of their employment contract. The DCGK further recommends that service contracts of management board members do not include clauses granting these members benefits in the event of a termination of their contract because of a change of control. Remuneration of the members of the supervisory board is usually determined in the articles of association and comprises of fixed remuneration.

Remuneration of senior management

31 How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

The law gives the responsibility for deciding upon senior management's cash compensation to the management board. The supervisory board can, however, foresee own approval requirements with respect to cash compensation and other advantages, such as granting company cars. According to applicable law, granting stock options to senior management requires a resolution of a general meeting, which must fulfil certain statutory requirements, and a supervisory board's approval.

Say-on-pay

32 Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

A general meeting of a listed stock corporation (AG), European stock corporation (SE) and partnership limited by shares (KGaA) must vote on the remuneration policy and on any material change thereto at least every four years. If the general meeting dismisses a resolution proposal on the remuneration policy, the next annual general meeting must resolve on a reviewed remuneration policy. The resolution must be published online for the period of the application of the remuneration system – at least 10 years.

The annual general meeting must also resolve on the approval of the remuneration report for the previous financial year, with the exception of small and medium-sized corporations within the meaning of section 267(1) and (2) of the German Commercial Code, if the remuneration report is presented as a separate item on the agenda of the annual general meeting. Neither the vote nor resolution on the remuneration policy or on a remuneration report can be objected to by means of a contesting action or an action for annulment. The remuneration policy does not affect the remuneration of senior management, which remains in the capacity of the management board.

DIRECTOR PROTECTIONS

D&O liability insurance

33 Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Directors' and officers' liability insurance is permitted and is common practice for management and supervisory board members in listed companies. However, it is also becoming more popular in non-listed companies. Premiums are generally paid by the company. However, members of the management board of a stock corporation are obliged to bear a deduction of between 10 per cent of the damage and one-and-a-half times their fixed salary.

Indemnification of directors and officers

34 Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

Besides granting directors' and officers' insurance coverage, indemnifications by a stock corporation (AG), European stock corporation (SE) and partnership limited by shares (KGaA) are not permitted as the company is only allowed to waive or settle on liability claims against management board members three years following their accrual and only subject to a general meeting's approval without an objection of a shareholder minority jointly representing 10 per cent of the registered share capital.

In a company with limited liability (GmbH), as German law follows the stakeholder model, according to which managing directors must act in the best interest of the company (and not the shareholder or the majority of shareholders), indemnification agreements are subject to constraints on fiduciary duties. In addition, a GmBH may not indemnify any managing director breaching capital protection rules.

Advancement of expenses to directors and officers

35 To what extent may companies advance expenses to directors and officers in connection with litigation or other proceedings against them or in which they will be a witness?

Members of the management board or managing directors may be entitled to request that the company advances expenses in connection with litigation or other proceedings initiated by a third party against the respective member based on his or her service contract and under general law. However, this claim only exists where the action that is subject to the litigation or other proceeding with a third party does not also constitute a breach of duty. If it is found that the action did indeed constitute a breach of duty, the supervisory board must reclaim all expenses from the respective member of the management board. Naturally, where the company (represented by the supervisory board) initiates litigation against a member of the management board, there is no claim for an advance or reimbursement of expenses. Similar principles apply with respect to members of the supervisory board. However, because its members are not involved in the day-to-day management of the company, litigation against the members of the supervisory board is less common.

Exculpation of directors and officers

36 To what extent may companies or shareholders preclude or limit the liability of directors and officers?

A preclusion is not allowed within an AG, an SE or a KGaA. The supervisory board is responsible and, according to case law, obliged to assert liability claims against management board members. Shareholders of a GmbH are more flexible in that regard and may, with certain statutory exceptions, waive claims against managing directors for a breach of duty.

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

37 Are the corporate charter and by-laws of companies publicly available? If so, where?

The deed of incorporation and the articles of association of German companies are publicly available. They are available through the commercial register, which is administered and managed by the local courts. The online commercial register includes and allows the downloading of all commercial register documents submitted since 2007. The articles of association of listed companies are generally also available through their websites.

The by-laws of a company (meaning the rules of procedure for its supervisory board, supervisory board committees, management board or managing directors) are generally not publicly available. Some listed companies voluntarily publish their by-laws on their websites.

Company information

38 What information must companies publicly disclose? How often must disclosure be made?

Companies must publicly disclose their annual accounts. Listed companies may be required to disclose more financial documents, such as half-year or quarterly reports.

Companies must publicly disclose certain information regarding changes to their shareholder structure and certain other information (eg, capital increases).

Companies must file certain information and documents with the commercial register, which can be accessed by the public. In addition, companies whose shares are listed in an organised market must disclose:

- insider information through ad hoc notification;
- subject to receiving information from shareholders regarding:
  - increases and decreases of their shareholdings by 3, 5, 10, 15, 20, 25, 30, 50 and 75 per cent; and
  - increases and decreases of positions in their financial instruments by 5, 10, 15, 20, 25, 30, 50 and 75 per cent;
- subject to receiving notification of a director's dealings, information on these; and
- an annual statement on compliance with the German Corporate Governance Code (comply or explain) as part of the report on corporate governance to be included in the management report.

Under the German Money Laundering Act, legal persons organised under private law and registered partnerships must collect, retain and keep up-to-date information on its beneficial owners and supply this information electronically to the German transparency register. There are, however, exceptions to this obligation if the identity of the beneficial owner can already be discerned from other publicly available information or publicly available registers.

HOT TOPICS

Shareholder-nominated directors

39 Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

As the members of the management board of a stock corporation (AG), a European stock corporation (SE) and a partnership limited by shares (KGaA) are not elected by the shareholders' meeting, as shareholders of a stock corporation do not have the ability to nominate members of the management board. Candidates for membership of the supervisory board may be proposed to a general meeting by the supervisory board, however, shareholders are entitled to make counterproposals. A stock corporation's articles of association may also confer shareholders with the right to designate a supervisory board member; however, this right is restricted to designating up to one-third of a supervisory board's members and is very uncommon, at least in listed companies. Apart from this, the model of a shareholder-nominated director is not provided for in German law and regulations.

Shareholders of a company with limited liability (GmbH) have the ability to nominate managing directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense.

Shareholder engagement

40 Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

Listed companies generally do not engage with their shareholders, in particular, not outside the ordinary or extraordinary general meetings. In preparing these meetings, the chief executive holds calls with shareholder representatives and potential proxy voters but abstains from providing them with any information that he or she has not already disclosed in the invitation to or does not intend to disclose in the general meeting to all other shareholders.

However, the German Corporate Governance Code (DCGK) suggests that the chair of the supervisory board should, to an appropriate extent, be available for conversations with investors on supervisory board issues. If a listed company chooses not to follow this proposal, it does not have to explain its choice or its reasons.

Closed companies typically engage with their shareholders, as is the case in the majority of jurisdictions. Shareholders of a GmbH may at any time demand information on company matters and access to the company records from the managing directors.

Sustainability disclosure

41 Are companies required to provide disclosure with respect to corporate social responsibility matters?

Under the German Commercial Code, companies that meet certain criteria concerning their size are under a duty to issue non-financial statements that expand on their management report. This statement must briefly describe the business model of the company. Moreover, it must refer to certain aspects of corporate social responsibility, at least to environment-related matters, employee-related matters, social matters, respect for human rights, and the fight against corruption and bribery.

As part of the EU Action Plan for Financing Sustainable Growth, the new EU Disclosure Regulation (Regulation (EU) 2019 (2088)) will apply in Germany from 10 March 2021. The regulation only applies to financial market participants and financial advisors, but it establishes extensive transparency obligations in the integration of sustainability risks, the consideration of adverse sustainability impacts in their processes (eg, investing and advising) and the provision of sustainability-related information with respect to financial products.

With regard to other companies, listed and non-listed, there is little clear legislation in connection with environmental, social and governance. Nevertheless, the management and supervisory board should already take environmental, social and governance criteria into account, as they are becoming more and more important.

CEO pay ratio disclosure

42 Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

There is no general requirement to disclose this pay ratio. Nevertheless, companies must add a note to their profit and loss statement stating the total remuneration granted to each of the following bodies: a management board, a supervisory board, an advisory board or similar bodies.

For listed companies, it is mandatory for pay ratios of full-time employees to be included in remuneration reports.

The DCGK recommends that the supervisory board considers these pay ratios in the context of the company's remuneration policy. If the recommendation is followed, and as the remuneration policy is available on the company's website, it provides a further degree of disclosure with respect to pay ratios.

Gender pay gap disclosure

43 Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

There is no requirement to disclose information concerning gender pay gaps. However, companies with generally more than 200 employees are obliged, upon an employee's request, to supply information on the average payment for comparable work, and if comparable work is predominantly done by female or male staff. Furthermore, companies with more than 500 employees that are under a duty to publish a management report are, according to the Payment Transparency Act, obliged to publish a report that states their measures concerning the promotion of gender equality and equal pay.

UPDATE AND TRENDS

Recent developments

44 Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

The following were notable developments in 2020 regarding corporate governance within Germany.

The Covid-19 Law permitting stock corporations (AGs) and European stock corporations (SEs) to hold virtual general meetings and with its most recent amendments strengthening shareholders' discussion and filing rights, and implementing relief for GmbHs to pass shareholders' resolutions in writing during general meetings was passed.

The draft of the Second Leadership Positions Act was developed, which aims to further develop the statutory provisions regarding the equal participation of women in leadership positions (commonly known as the 'women's quota') established in 2015 with the First Leadership Positions Act. The realisation of the draft is still pending and is subject to political discussions.

The European Union increased regulations in respect to environmental issues and sustainability.

Discussions continued regarding the 'Wirecard Act', a legislative proposal which was formed in the wake of the Wirecard scandal and which addresses, among other things, the appointment and obligation of auditors and certain corporate governance aspects. In particular, the draft proposes that supervisory boards of public interest entities need to implement an audit committee and that supervisory boards of such companies need to comprise at least one expert in audit and one expert in financial reporting.

Coronavirus

45 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

On 28 February 2021, an amendment to section 1 of the Covid-19 Law came into force. It aims to extend the rights of shareholders in AGs, SEs and KGaAs during virtual general meetings (ie, general meetings held through attendees being present using electronic communication technology) and will initially apply until the end of 2021. In detail:

- Shareholders no longer only have the opportunity to ask questions, but also the right to ask questions by means of electronic communication.

- Management boards no longer have the discretion as to whether they answer questions, but only on how they answer questions. Thereby, a management board must answer all questions, just as it does during general meetings held in person unless it exercises its right to refuse to give information.
- Questions of shareholders may be submitted by electronic communication up to one day before the general meeting, previously this was two days.
- Motions or election proposals that are to be made accessible are deemed to have been made at the general meeting if the shareholder is duly authorised and registered for the general meeting. This enables the shareholders to exercise the right to propose motions and nominations irrespective of whether a general meeting is held in person or virtually.
- Virtual shareholders' meetings of a GmbH require a provision in the articles of association.

During the covid-19 pandemic, shareholders meetings were also held virtually. The Covid-19 Law does not contain any requirements in this regard, because a physical meeting is not mandatory for limited liability companies. Therefore, the Covid-19 Law regulates the implementation of a facilitated circulation procedure by a simple majority instead of a unanimous vote. For limited liability companies, only physical meetings or a written circulation procedure can be used. Due to the pandemic conditions, physical meetings are hardly possible, while written circulation procedures do not allow discourse between the shareholders. A possible solution are virtual shareholder meetings held in combination with physical representatives. However, this requires corresponding provisions in the company's articles of association; a requirement that has not been changed by the Covid-19 Law.

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