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Corporate Governance 2023

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Germany: Law & Practice and Trends & Developments

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GERMANY

Law and Practice

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Contents

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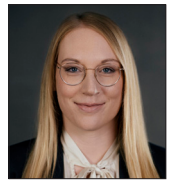

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1. Introductory

1.1 Forms of Corporate/Business Organisations

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

Capital Companies

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

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

Partnerships

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

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

1.2 Sources of Corporate Governance Requirements

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

- the German Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* or GmbHG);
- the German Stock Corporation Act (*Aktiengesetz* or AktG);
- the European and German acts on SEs (in particular the European SEVO and the German SEAG);

- the German Commercial Code (*Handelsgesetzbuch* or HGB);
- the Reorganisation of Companies Act (*Umwandlungsgesetz* or UmwG);
- the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz* or WpÜG);
- the Market Abuse Regulation (*Marktmissbrauchsverordnung* or MAR); and
- the Securities Trade Act (*Wertpapierhandelsgesetz* or WpHG).

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

In 2022, the DCGK was amended, substantiating some ESG aspects as well as the guidelines on internal controlling in response to new legislation on financial integrity.

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

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

1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares

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

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

The declaration of compliance is to be included in the declaration on corporate governance, which itself is part of the management report. The issuance of the declaration of compliance is obligatory. Deviations from suggestions are allowed without disclosure. In practice, listed companies seek to comply with the standards

set out in the DCGK, in particular the recommendations.

2. Corporate Governance Context

2.1 Hot Topics in Corporate Governance

Sustainability, ESG and Supply Chain:

The topic of sustainability as well as social and environmental responsibility has become increasingly significant, resulting in more specific and extensive expectations and legislation on this matter, both at national and EU level. In particular, the EU Corporate Sustainability Reporting Directive (CSRD) as well as the German Supply Chain Act came into force in January 2023 (see **2.2 Environmental, Social and Governance (ESG) Considerations**). Also, the revised version of the DCGK which became effective in June 2022 extends the corporate duties in connection with environmental and social sustainability-related issues.

Virtual Shareholders' Meetings

Following the expiry of the COVID-19 law and its provisions on virtual general meetings of AGs and SEs as well as reliefs on passing shareholders' resolutions in writing in GmbHs, new legislation has been passed and entered into force on 20 July 2022. It states the general possibility of holding virtual general meetings for AGs or SEs on the basis of a corresponding provision in their articles of association, or virtual meetings for GmbHs on the basis of shareholder consent (see **5.3 Shareholder Meetings**).

Digitalisation

The laws implementing Directive (EU) 2019/1151 regarding the use of digital tools and processes in company law became applicable in August 2022. The provisions thereof offer the possibility, for example, to found GmbHs online via virtual notarial certification and to make trade register excerpts free of charge.

Corporate Codetermination

As envisaged by the German governing parties in their coalition agreement in 2021, a reform to tighten corporate codetermination rules (see **3.1 Bodies or Functions Involved in Governance and Management** and **4.1 Board Structure**) is expected to be on the agenda in the course of the current legislative term. However, it is still unclear when concrete draft legislation will be presented.

Dual Class Shares

In contrast to the current legal situation in Germany, there are plans to permit dual class shares under certain circumstances and some further reliefs to enter the capital markets as well as to seek capital for start-ups and growing companies in the future. However, it remains to be seen how and to what extent this will be implemented.

2.2 Environmental, Social and Governance (ESG) Considerations

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

The new Corporate Sustainability Reporting Directive (CSRD) came into force on 5 January 2023 and must be implemented into national law until 6 July 2024. Aiming to create a culture of transparency about companies' impact

on people and the environment, the new CSRD modernises and strengthens the rules on ESG reporting. The goal is to bring corporate sustainability reporting in line with the EU's ambition to become the first climate-neutral continent by 2050.

The scope of the CSRD is significantly wider compared to the previous scope of the non-financial declaration. In future, all companies listed on a regulated EU market and non-capital-market-oriented companies that exceed two of the following three criteria will be affected:

- EUR40 million annual turnover;
- EUR20 million balance sheet total; and
- an average of at least 250 employees.

The CSRD expands the reporting requirements to include further information on environmental, social and governance matters in addition to the already-known aspects concerning environmental, labour and social matters, respect of human rights and the fight against corruption and bribery.

ESG criteria are becoming increasingly more important, and not only in the voting guidelines of voting advisors. In June 2021, the federal government passed the so-called Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz)*, intended to implement the UN Guiding Principles on Business and Human Rights and aiming to prevent the violation of human rights by companies. Therefore, it obliges companies to respect human rights as well as the environment throughout the global supply chain, and to remedy violations.

For this purpose, companies must establish an appropriate risk-management system and conduct a risk analysis for themselves and suppliers. The first is ensured by the appointment of an internal officer for monitoring the system. Additionally, companies must establish a procedure for filing complaints concerning human rights violations. Finally, companies must publish an annual report on their compliance containing fulfilment of their obligations under the Supply Chain Act. The law came into force on 1 January 2023 for companies in Germany with at least 3,000 employees, and will come into force on 1 January 2024 for companies with at least 1,000 employees.

3. Management of the Company

3.1 Bodies or Functions Involved in Governance and Management

Management Board

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

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

Administrative Board

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

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

General Partner

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

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

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

Managing Directors

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

However, the shareholders' meeting is – in contrast to the situation in an AG – the supreme decision-making body of the GmbH, and has the authority to issue internally binding instructions to the managing directors. In a GmbH, a voluntary supervisory or advisory board may be implemented. Apart from this, a supervisory board is to be installed only in the case of codetermination (see **4.1 Board Structure**).

3.2 Decisions Made by Particular Bodies

Management Board

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

Besides the supervision of the management board, the supervisory board is responsible for:

- the appointment and dismissal of the members of the management board;
- their service contracts; and
- the review and determination of the financial statements.

Administrative Board

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

General Meeting

Only selected decisions are reserved by law for the general meeting of an AG and an SE. With respect to the annual ordinary general meeting, such decisions include the appropriation of profits, the appointment of the auditor, the formal approval of action for members of both the management board and supervisory board, and the vote on the annual remuneration report; Fundamental, extraordinary decisions include:

- the election and removal of the supervisory board members;
- amendments to the articles of association; and
- resolutions on restructuring measures and the sale of substantially all of the corporation's assets, as well as on corporate agreements (profit and loss pooling agreements).

Managing Directors

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

3.3 Decision-Making Processes

Management Board

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

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

The same decision-making process applies (more or less) to managing directors of a one-tier system SE and a GmbH.

Supervisory Board

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

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

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

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

4. Directors and Officers

4.1 Board Structure

Management Board

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

Supervisory Board

The supervisory board of an AG, KGaA and a two-tier system SE, and the administrative board of a one-tier system SE, has to consist of at least three members, or a higher number up to nine, 15 or 21 members, depending on the registered share capital of the corporation, to be set in the articles of association.

If an AG, KGaA or GmbH exceeds the threshold of, generally, 500 German employees, one third of the supervisory board members of the company must be employee representatives – ie, the one-third participation (*Drittelbeteiligungsgesetz* or DrittelbG). In this case, the number of supervisory board members must be divisible by three. If an AG, KGaA or GmbH and its controlled companies exceed, generally, 2,000 German employees in total, the supervisory board must consist of 50% employee representatives – ie, the parity codetermination (*Mitbestimmungsgesetz* or MitbestG). In this case, the minimum number of supervisory board members is 12, and beyond this depends on the total number of German employees.

German codetermination rules do not apply to the SE. Instead, when incorporating an SE, an agreement on the participation of employees

in the SE (the so-called employee participation agreement) has to be negotiated with the special negotiating body, which is established particularly for such negotiation, representing employees from the German company, its subsidiaries and branches that are in EU and EEA member states other than Germany. The rules on codetermination are part of the agreement, with the general principle that the level of codetermination of the German company used to incorporate the SE shall be maintained (freezing of codetermination prior to and after principle) – eg, if no codetermination exists and needed to exist prior to the incorporation of the SE, then no codetermination would need to be agreed upon in the employee participation agreement for the SE, etc.

4.2 Roles of Board Members

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

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

4.3 Board Composition Requirements/ Recommendations

Management Board/Managing Directors

Beyond the requirements set out in **4.1 Board Structure** and **4.2 Roles of Board Members**, there are no other statutory rules governing the composition of the management board of an AG or a two-tier system SE, nor of the managing directors of a one-tier system SE or GmbH. However, if such a company is listed on a stock exchange as well as parity codetermined and consists of more than three members as of 1 August 2022, at least one new member must be female and one must be male.

With respect to the management board of an AG, and a two-tier system SE or an administrative board of a one-tier system SE, that is listed on a stock exchange or codetermined, the supervisory board must determine a target percentage for women on the management board and the management board for the second/third line management as well as deadlines by when such percentage is to be reached. In the case of a set target of zero, the management board must justify this in a clear and comprehensive manner. If at the time of the determination the percentage of women on the management board is below 30%, the target percentage may not be lower than the present percentage.

These corporations must include a declaration on corporate governance in their management reports. The DCGK recommends taking diversity into account when composing the management.

Composition of Supervisory Boards

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

With respect to the supervisory board of an AG, and a two-tier system SE or an administrative board of a one-tier system SE, that is listed on a stock exchange or codetermined, the supervisory board must also set a target for women on the supervisory board as well as deadlines by when such a target is to be achieved. With regard to a target of zero or below 30%, the same applies to the supervisory board as to the management board as described above.

At least one member of the supervisory board must have expertise in the field of accounting and at least one other member of the supervisory board must have expertise in the field of auditing. Sufficient expertise can, for example, be assumed for:

- financial directors;
- expert employees from the fields of accounting and controlling analysts; and
- long-standing members of audit committees or works council members who have acquired this ability in the course of their work through further training.

The DCGK recommends, among other matters, that the supervisory board determines concrete objectives regarding its composition and prepares a profile of skill and expertise for the entire board while taking diversity into account. The profile of skill and expertise shall also comprise expertise regarding sustainability issues.

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

4.4 Appointment and Removal of Directors/Officers

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

The members of the supervisory and administrative board are appointed by the general meeting, for a maximum term of office of approximately five years in an AG and six years in an SE. Reappointment is permitted. Dismissal could happen by resolution of the general meeting with a majority of at least three quarters of the votes cast, unless the articles of association provide otherwise. Employee representatives on the

supervisory board in the case of codetermination are generally appointed by employee elections.

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

4.5 Rules/Requirements Concerning Independence of Directors

Management Board

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

Supervisory Board

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

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

4.6 Legal Duties of Directors/Officers

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

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

4.7 Responsibility/Accountability of Directors

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

German "stakeholder model" in contrast to the Anglo-Saxon "shareholder model").

4.8 Consequences and Enforcement of Breach of Directors' Duties

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

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

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

Where members of the supervisory board culpably breach their duties, the management board is responsible for pursuing possible damage claims against the supervisory board members jointly and severally.

Claims Against Members of Corporate Governance

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

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

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

4.9 Other Bases for Claims/Enforcement Against Directors/Officers

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

However, the courts have traditionally been cautious in recognising such claims.

Liability

The liability of a member of a management and supervising body in an AG, SE and KGaA cannot be limited, as this would in particular qualify as an impermissible waiver by the company upfront – ie, prior to the expiry of the three-year period (see **4.8 Consequences and Enforcement of Breach of Directors' Duties**). However, D&O insurance for the members of the management and supervising body is permissible and common in practice in order to protect them against risks arising from their professional activities for the company. Premiums are generally paid by the company, although members of the management board of an AG, SE and KGaA are obliged to bear a deduction of at least 10% of the damage to one-and-a-half times their annual fixed salary at maximum.

4.10 Approvals and Restrictions Concerning Payments to Directors/ Officers

Remuneration of the Management Board

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

In listed companies, the supervisory board has to determine the principles of the remuneration of the members of the management board in a remuneration system, which is subject to approval by the general meeting upon its introduction and any material changes thereto, at least every four years. However, the resolution on the approval is non-binding and thus has no effect on the legitimacy of the remuneration. Nevertheless, if the general meeting does not approve the remuneration system, a reviewed remuneration system has to be presented at the next annual general meeting for approval.

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With respect to the contents of the remuneration system, the AktG only requires a few elements to be included in every remuneration system (eg, a maximum total remuneration of the management board) but provides for further rules with respect to its contents relating to different aspects of the remuneration of the management board if those aspects are foreseen in the remuneration system. However, the DCGK makes several recommendations with respect to criteria to be described in the remuneration system – eg, the ratio between the fixed remuneration and the variable remuneration based on short- and long-term incentives, as well as the performance and non-performance indicators for determining payment of variable remuneration.

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

Restrictions

As regards restrictions on the remuneration of the members of the management board, the AktG requires that the overall remuneration of individual members of the management board is appropriate in relation to their tasks and performance as well as the economic situation of the company. In addition, the supervisory board

must ensure the customary remuneration is not exceeded. Further, the remuneration in listed companies has to be aimed at a sustainable and long-term-oriented development of the company, and variable remuneration should be granted based on long-term incentives accordingly.

If the supervisory board culpably disregards the statutory requirements when determining the remuneration for the management board, it may be held liable for damages.

Characteristics

The DCGK makes further recommendations with respect to the characteristics of the remuneration. For example, it recommends that the variable remuneration based on long-term incentives exceeds the one based on short-term incentives. Variable remuneration shall be predominantly invested in shares of the company or granted as share-based remuneration.

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

Supervisory Board

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

Managing Directors and General Partners

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

In a KGaA, the general partners generally receive no remuneration for their activities, but are entitled to receive a fee for taking over the liability of the KGaA vis-à-vis third parties. In the case of a capital company as general partner, the remuneration of its management members is to be set according to the rules applying to the respective legal form of such a capital company.

4.11 Disclosure of Payments to Directors/Officers

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

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

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

The AktG also requires ad hoc and annual disclosure of related party transactions, including transactions of the company with its various members of corporate bodies.

5. Shareholders

5.1 Relationship Between Companies and Shareholders

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

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

5.2 Role of Shareholders in Company Management

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

AGs, SEs and KGaAs

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

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

Listed Companies

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

Non-listed Companies

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

GmbH

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

5.3 Shareholder Meetings

Annual General Meetings

An annual general meeting is mandatory in an AG and KGaA within the first eight months of a financial year, and in an SE within the first six months of a financial year. The annual meeting has to resolve upon the ordinary topics (see **3.2 Decisions Made by Particular Bodies**) and upon the remuneration system, the latter resolution being non-binding (see **4.10 Approvals and Restrictions Concerning Payments to Directors/Officers**). Further extraordinary topics on fundamental decisions can also be put on the agenda of the annual general meeting, or can be passed in an extraordinary general meeting.

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

However, shareholders whose share is equivalent to at least 5% of the registered share capital may also demand the convening of a general meeting. Shareholders whose share in the share capital is that high or corresponds to a nominal stake of EUR500,000 may demand that certain additional items are put on the agenda. The demand has to be received by the company 24 days prior to the general meeting at the latest, or no later than 30 days prior to the general meeting for listed companies.

Virtual General Meetings

In reaction to the COVID-19 pandemic, the German legislature has temporarily allowed AGs, SEs and KGaAs to hold virtual general meetings – ie, by way of audio and video streaming and carrying out submissions of votes either electronically or in written form, even where the articles of association do not provide for such meetings. Upon expiry of this temporary COVID-19 law in August 2022, the German Parliament passed a new law introducing virtual general meetings – ie, meetings without the physical presence of the shareholders or their proxies at the location of the general meeting, as a permanent option and alternative to the physical general meeting. However, pursuant to the new provisions, virtual general meetings require a corresponding provision or authorisation in the articles of association as of 31 August 2023. Such provision or authorisation may only be set for a maximum term of five years.

Annual General Meeting Invitation

The invitation has to fulfil a lot of formalities, such as setting out the business name and seat of the company, the time and place of the general meeting, and the agenda. For listed compa-

nies, the invitation has to provide further information – eg, about the rights of the shareholders in respect of the general meeting.

Votes and Resolutions

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

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

GmbHs

In a GmbH, the regulations in respect of the shareholders' meeting are not as strict as in the AktG for AGs, SEs and KGaAs. Resolutions generally have to be passed in a meeting of the shareholders, but can also be made in writing based on a corresponding provision in the articles of association or provided that all shareholders agree in text form. The shareholders' meeting generally has to be convened by the managing directors by registered letter.

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

There are no special requirements for the holding and conducting of shareholders' meetings. Shareholders may submit their vote in writing or may grant proxy. It is also permissible to hold virtual meetings via electronic communication based on a corresponding provision in the articles of association or provided that all shareholders agree in text form.

5.4 Shareholder Claims

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

Appealing Resolutions

Any shareholder who holds only "one" share may appeal resolutions (*Anfechtungs- und Nichtigkeitsklage)* of the general or shareholders' meeting for breach of law or the company's articles of association. Another objection shareholders can try to bring forward in such lawsuits is the violation of the (majority) shareholder's duty of good faith. As these duties are not statutorily defined, the chances of success are based on case law. The defendant is the company, not the other shareholder/shareholders who has/have voted in favour.

By filing such objection and voidance claims in court, minority shareholders can block the completion (ie, entry into the commercial register) of, for example, corporate and integration measures. Registration will take place when the minority shareholders' court challenges are overcome by a so-called release proceeding, which

the company must file (*Freigabeverfahren)*. The company will particularly prevail in the release proceeding and thereby achieve registration in the commercial register if minority shareholders cannot prove that they hold more than a nominal value of EUR1,000 of the registered share capital of the company since the announcement of the convocation of the general meeting.

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

Appointing a Special Auditor

Shareholders can request (by demanding either an invitation of an extraordinary general meeting or the adding of a topic on the agenda, see **5.2 Role of Shareholders in Company Management**) that the general meeting shall – with a simple majority of the votes cast – appoint a special auditor (*Sonderprüfer)* to analyse statutorily specified decisions of the executive and supervisory board. If the general meeting rejects the motion to appoint a special auditor, and if facts and circumstances justify severe breaches of tasks and duties by the management, minority shareholders who together hold 1% of the registered share capital or a nominal value of at least EUR100,000 can file for the appointment of the special auditor in court.

Damage Claims

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

5.5 Disclosure by Shareholders in Publicly Traded Companies

Shareholders of listed companies have to notify the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* or BaFin) and the issuer if their direct and/or indirect holdings exceed or fall below certain thresholds (3%, 5%, 10%, 15%, 20%, 25%, 30%, 50%, 75%) and if their positions in financial instruments relating to shares exceed or fall below the aforementioned thresholds (except for the 3% threshold). The notification is to be published by the issuer and can be viewed on its website at any time. Shareholders of listed companies who directly or indirectly hold at least 10% must notify the issuer of the objectives pursued with the acquisition and the origin of the funds used within 20 trading days of reaching or exceeding this threshold.

According to the Money Laundering Act (*Geldwäschegesetz* GWG), which implements the EU Anti-Money Laundering Directive, companies need to disclose their beneficial owner(s) in the transparency register, irrespective of whether their shares are publicly traded or not.

6. Corporate Reporting and Other Disclosures

6.1 Financial Reporting

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

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

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

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

6.2 Disclosure of Corporate Governance Arrangements

The declaration on corporate governance includes information on how the management board and the supervisory board conducted their duties, and also has to address other issues, such as whether quotas for female members of the management and supervisory board have been met, and whether or not the company has a diversity concept (see **4.3 Board Composition Requirements/Recommendations**). Furthermore, listed companies have to publicly declare each year whether they comply with the DCGK (see **1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares**). The declaration is part of the declaration on corporate governance and must be published on the website.

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

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

6.3 Companies Registry Filings

A company must in particular file the following with the commercial register (*Handelsregister)*:

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

- in a GmbH, a list of shareholders; and
- subsequent amendments to the above-mentioned points.

Those filings are publicly available at www.handelsregister.de, which contains all entries in the commercial register filed since 2007.

The entry in the commercial register is constitutive in certain cases (eg, foundation, mergers or changes of legal form of the company), which means the measure will only become effective upon its entry in the commercial register. In other cases, failures to make filings may result in a fine from the registry court.

7. Audit, Risk and Internal Controls

7.1 Appointment of External Auditors

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

7.2 Requirements for Directors Concerning Management Risk and Internal Controls

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

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

Trends and Developments

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POELLATH is an internationally operating German law firm of more than 180 lawyers and tax advisers in Berlin, Frankfurt and Munich, providing high-end legal and tax advice. The firm advises on all transaction-related areas, including corporate, M&A, private equity, funds, real estate, private clients, succession planning and tax-related matters. POELLATH's corporate advice includes corporate law and group company law, reorganisations, capital market rules, corporate litigation and compliance. POELLATH advises publicly listed and private companies on preparing and conducting their general and shareholder meetings on all matters, including mergers, spin-offs and hive-downs, conversions of legal form, and on all corporate advisory matters related to corporate governance. A further core area is public takeovers with subsequent corporate integration. Key clients include Deutsche Telekom AG, shareholders of Porsche Automobil Holding SE, PUMA SE, Wacker Neuson SE, Eckert & Ziegler Medizintechnik, Nemetschek SE, GERRY WEBER, Münchener Hypothekenbank, BayWa, Giesecke+Devrient, Fiege Group, KME Group and Groz-Beckert.

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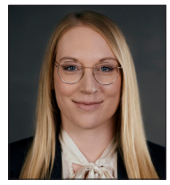

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Introduction

Digitalisation and environmental, social and governance (ESG) remain the dominant topics in recent legislation on corporate governance. The experiences from the COVID-19 pandemic and the accompanying digitalisation have had a significant influence on new legislative developments. In particular, the German legislature has adopted an act introducing virtual general meetings as a permanent option. The growing importance of ESG matters in the context of corporate governance has reached its peak to date. The EU Corporate Sustainability Reporting Directive (CSRD) and the German Supply Chain Act (*Lieferkettensorgfaltspflichtengesetz)* reflect their growing influence. In addition, the EU Whistle-blowing Directive has recently been implemented in Germany, and reform efforts on German codetermination law are under discussion. This article will shed light on these recent trends and developments.

Virtual General Meetings

General meetings of the shareholders (*Hauptversammlung)* of a stock corporation (*Aktiengesellschaft* or AG) and a European stock corporation (*Societas Europae* a or SE) were required to be held physically prior to the COVID-19 pandemic. Due to and during the pandemic, the federal government statutorily permitted these companies to hold their general meetings entirely virtually. These temporary COVID-19 rules expired at the end of August 2022.

Since the format of the virtual general meeting has met with a positive response in practice, and digitalisation is advancing in all areas of law, the possibility of virtual general meetings has been introduced as a permanent alternative to physical general meetings under a new law which became effective in July 2022.

Requirements

In contrast to the temporary COVID-19 rules, the legislature has adjusted the rules for virtual meetings towards those for physical general meetings, aiming to secure an equivalent level of shareholder rights as is foreseen for physical general meetings. Therefore, virtual general meetings are only permissible if essential shareholder rights are granted, in particular the right to speak and to ask questions under certain conditions.

Further, virtual general meetings require a corresponding provision or authorisation in the articles of association, which needs to be resolved by the shareholder meeting with a 75% majority. Such provision or authorisation may only be set for a maximum term of five years. Without such basis in the articles of association, virtual gen-

eral meetings will no longer be possible as of 1 September 2023.

In consummating a virtual general meeting, the management board has flexibility, in particular on how to allow shareholders to address questions. The management board may either decide that shareholders may ask questions during the general meeting as is foreseen for physical meetings, or that shareholders must send their questions up to three days prior to the general meeting. In the latter case, the company has to answer these questions up to one day prior to the general meeting at the latest, and shareholders may then ask follow-up questions on the company's answers or questions on new matters during the general meeting.

Acceptance in practice

During the legislative process, the framework conditions for virtual general meetings had already been the subject of intense debate, accompanied by numerous critical statements from among representatives of both shareholders and companies. While shareholder representatives feared inappropriate restrictions on the right to speak and to ask questions (and thus the lack of a general debate and sufficient interaction), company representatives, on the other hand, expressed concerns regarding the potentially excessive use of the shareholders' rights to speak and to ask questions (leading to very long general meetings and extensive organisational effort).

In the course of the current general meeting season, the resolution on authorisations for conducting virtual general meetings via amendment of the articles of association is on the agenda of the vast majority of AGs and SEs, particularly listed ones. However, various influential proxy advisers declared in their voting guidelines the acceptance of authorisations for conducting virtual general meetings only under certain conditions. In response, many listed companies refrained from using the maximum term of five years permitted by law, and instead limited the authorisation to two years initially, with commitment by the management to carefully decide in each case whether to make use of the authorisation, particularly taking into account the protection of shareholders' rights and aspects of health protection, efforts and costs, and sustainability considerations.

In practice, it remains to be seen whether the criticism regarding shareholders' rights is justified, and how companies will deal with virtual general meetings in the coming years.

Corporate Sustainability Reporting Directive (CSRD)

The EU aims to become the first climate-neutral continent by 2050. Against this background, it adopted a new Corporate Sustainability Reporting Directive (CSRD) which came into force on 5 January 2023 and that must be implemented into national law by 6 July 2024.

Scope

Currently, large listed companies have to issue a non-financial declaration addressing aspects related to environmental, labour and social issues, respect for human rights and the fight against corruption and bribery. The scope of the CSRD is considerably wider. In future, all companies listed on a regulated EU market will be affected, as will non-capital-market-oriented companies that exceed at least two of the following three criteria:

- EUR40 million annual turnover;
- EUR20 million balance sheet total; and
- an average of 250 employees.

From 2026, capital market-oriented small and medium-sized companies will also be required to issue a sustainability report.

Sustainability reporting

The CSRD aims to expand the reporting requirements to include additional information on ESG issues. This is intended to increase the influence of the reporting company on sustainability aspects as well as, vice versa, the impact of sustainability aspects on the development and performance of the reporting company. The reporting obligation is mandatory. The European Commission is currently developing reporting standards for sustainability reporting (ESRS) which are expected to be adopted in June 2023. With these standards, the EU intends to specify the requirements for future reporting.

Supply Chain Act

Implementing the UN Guiding Principles on Business and Human Rights, the German legislature passed the so-called Supply Chain Act in June 2021. According to this law, companies must observe compliance with human rights and environmental standards throughout the global supply chain, and must remedy any breaches. The law came into force on 1 January 2023 for companies with at least 3,000 employees, and will come into force on 1 January 2024 for companies with at least 1,000 employees.

Compliance with human rights and environmental standards

Companies must ensure compliance with human rights in their own business operations as well as vis-à-vis their direct suppliers. This obligation only applies to indirect suppliers if the company has substantiated knowledge of human rights violations. In order to comply, companies must:

- set up an appropriate risk management system;
- conduct a risk analysis for themselves and their suppliers;
- appoint an internal representative to monitor the risk management system;
- set up complaint possibilities regarding alleged human rights violations;
- carry out a risk analysis on an ad hoc basis, but at least once a year; and
- publish an annual report on compliance with their due diligence obligations under the Supply Chain Act.

Breaches

If breaches are identified – eg, in the case of child labour or forced labour – companies must take remedial action. This may also require termination of the business relationship with a particular supplier. The Federal Office of Economics and Export Control (BAFA) will monitor compliance with the obligations under the Supply Chain Act. Breaches will be punished by means of a fine. The fine can be up to EUR8 million or 2% of the annual turnover for companies with more than EUR400 million. Public authorities must take compliance with these obligations into account when awarding contracts.

Additional work and expenses for companies

As a result of these newly created obligations and the corresponding increase in responsibility, the Supply Chain Act will lead to additional work and expenses for companies. As a preventative measure, companies affected in the future should include appropriate clauses in the supply chain contracts with their suppliers regarding the obligation to respect human rights. In addition, companies should agree on certain codes of conduct with their suppliers.

Outlook

In practice, it remains to be seen whether the Supply Chain Act will actually have the desired effect in terms of improving human rights and environmental aspects along supply chains. In February 2022, the EU Commission presented a draft EU Corporate Sustainability Due Diligence Directive (CSDDD) with even stricter regulations than under German law, and with, inter alia, a broader scope and claims for damages deriving from violation of sustainability obligations. The CSDDD is currently in the middle of the EU legislative process and its scope and punitive approach is heavily discussed. In any case, a further expansion of the regulations concerning compliance with human rights and environmental due diligence obligations is to be expected in the future.

Further ESG-Related Recommendations Under the DCGK

With the last reform of the German Corporate Governance Code (DCGK) in 2022, new recommendations for listed companies were introduced, taking into account the growing importance of environmental and social sustainability. However, since the DCGK is not statutory law but rather "soft law", this recommendation is not binding but can be deviated from (principle of "comply or explain").

According to the revised DCGK, the internal control and risk management system shall be geared towards sustainability-related concerns. Further, the company strategy shall provide information on how the economic, ecological and social objectives are to be implemented in a balanced manner, while corporate planning shall include sustainability-related objectives in addition to financial objectives. The management board shall, among other things, systematically identify and assess the risks and opportunities for the company associated with social and environmental factors, as well as the social and environmental impacts of the company's activities.

Additionally, the supervisory board shall monitor certain sustainability aspects, while its competence profile shall include expertise on sustainability issues of importance to the company. In addition, the professional qualifications of the members of the audit committee of the supervisory board shall be expanded to include knowledge and experience in sustainability reporting, and be provided in the corporate governance statement.

Legal Protection for Whistle-blowers

While the role of whistle-blowing in a functioning compliance management system and the importance of legal protection for whistle-blowers have been recognised in other jurisdictions (in particular the USA) for decades, it remains a highly controversial legal policy issue in Germany.

Apart from sector-specific rules for certain companies, in particular in the area of financial services, there has been only little precise legislation on the integration of whistle-blowing systems into corporate governance so far. For listed companies, the DCGK recommends in a general sense that employees be given the opportunity to report, in a protected manner, suspected breaches of law within the enterprise.

EU Whistle-blowing Directive

In October 2019, the EU adopted a directive on the protection of persons reporting on breaches of EU law (Directive (EU) 2019/1937), aiming to establish a comprehensive legal framework for whistle-blower protection and for safeguarding the public interest at the EU level. Member states are required to provide whistle-blowers working

in the public and private sectors with effective channels to confidentially report breaches of EU law in the areas of, inter alia:

- environmental protection;
- public procurement;
- financial services;
- product and food safety;
- data privacy; and
- consumer protection.

Thereby, the directive further aims to create a robust system of protection against retaliation for whistle-blowers.

Implementation into German law

Even though the implementation of the EU Whistle-blowing Directive into national law was due in December 2021, the German legislature only recently adopted the Act on Whistle-blower Protection (*Hinweisgeberschutzgesetz)*, presumably becoming effective in June 2023. The German Act on Whistle-blower Protection introduces a comprehensive duty to establish internal whistle-blowing systems for all companies with 50 or more employees, and goes beyond the material scope of the underlying EU Directive, which is limited to breaches of specific EU law. It aims to promote the legal protection of whistle-blowers against retaliation (eg, discrimination, dismissal, warning notice, denial of promotions), including potential civil damage claims with a reversal of proof and public sanctions.

This was preceded by an intense public and parliamentary debate on the details of the implementation. The draft bill faced criticism, in particular regarding the potential bureaucratic and financial burden for small and medium-sized companies and the initially intended duty to establish anonymous reporting channels, which is no longer foreseen in the final bill.

Corporate Codetermination

Corporate codetermination – ie, the representation of employees on supervisory and administrative boards – is among the most frequently discussed corporate governance topics in recent times.

Employee involvement procedure in cross-border reorganisations

With implementation of the EU Directive on cross-border conversions, mergers and divisions ((EU) 2019/2121), the German Parliament enacted new rules strengthening the rights of employees in the course of cross-border reorganisations. According to the new law, which became effective on 31 January 2023, capital companies are also obliged to conduct employee involvement procedures in the case of cross-border conversions and divisions into Germany ("inbound"). This was previously only the case for foundations of a European Stock Corporation (Societas Europaea, SE) or for cross-border mergers.

The employee involvement procedure requires the election of a (international) special negotiating body by the employees of all involved companies and their subsidiaries, followed by negotiations between the management and the special negotiating body on the participation of the employees in the future company. The duty to conduct such employee involvement procedure applies where:

- the cross-border reorganisation would cause the reduction of existing codetermination rights;
- the cross-border reorganisation would lead to disadvantageous treatment of foreign employees; or
- the company involved in Germany employs a number of employees corresponding to at

least four fifths of the threshold for codetermination in the exit state (the "four-fifths rule").

Within four years after effecting a cross-border reorganisation, existing participation rights of employees of the company that evolved from the cross-border reorganisation are protected by the duty to conduct employee involvement procedures, again in cases of subsequent domestic reorganisation measures.

In practice, compliance with these new rules will require significant efforts from companies in terms of timing and planning of cross-border reorganisation measures.

Potential reform to tighten German codetermination law

Under German law, there are two different kinds of employee representation in supervisory boards of capital companies – the so-called codetermination (*unternehmerische Mitbestimmung)*. If a capital company exceeds the threshold of 500 German employees, one third of the supervisory board members must be employee representatives (ie, one-third participation). If a capital company and its controlled companies exceed 2,000 German employees, the supervisory board must consist of 50% employee representatives (ie, parity codetermination).

In their coalition agreement dated 7 December 2021, the current governing parties envisaged tightening German codetermination law with the goal of preventing abusive avoidance of codetermination rights. Currently, the coalition agreement focuses on the following two aspects.

- It is intended to close the current legal "loophole" regarding the attribution of employees within the group in terms of one-third codetermination rules. Whereas under the status quo employees of an affiliated company are only attributed to the controlling company, in the case of either an existing domination agreement or the legal integration of the dependent company into the controlling company, the attribution of employees to the controlling company shall be extended to cases of de facto control, irrespective of an underlying company agreement or integration (as is already the case in terms of parity codetermination rules).
- The federal government intends to address the so-called freezing effect in the context of foundations of SEs, which currently allows the perpetuation of the existing codetermination level (or the lack thereof) at the time of the foundation of the SE, even if the number of employees within the SE or the group later exceeds the relevant thresholds ("before and after principle"). However, it remains unclear how this shall be implemented, in particular since profound legal changes would only be possible at the EU level and would require the broad consensus of the EU member states, which is not currently foreseeable.

Furthermore, there have been legislative initiatives and statements in the election programmes of individual parties proposing, for example:

- extension to companies with a foreign legal form but seat in Germany;
- the reduction of the relevant thresholds (ie, number of employees); and
- the inclusion of foundations with operative business within the scope of codetermination.

Even though the statements contained in the coalition agreement remain rather vague and there is no legislative draft yet, it is to be expected that the reform will be put on the agenda in the course of the current legislative term. The

envisaged intensification of the codetermination law would potentially affect many medium-sized, owner-led companies in Germany and might trigger the need for anticipatory action from a company's perspective.

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