1. GENERAL INFORMATION ON THE CORPORATE GOVERNANCE OF COMPANIES
1.1 Describe the corporate bodies of a company and the management powers granted to each of them. Which corporate bodies are mandatory and which can be appointed on a voluntary basis?

Under German corporate law, there are three predominant types of corporate entities with legal personality and liability which is in general limited to its registered capital. The stock corporation, typically in the form of a listed and therefore public company (Aktiengesellschaft, AG), the partnership limited by shares (Kommanditgesellschaft auf Aktien, KGaA) and the ‘German Ltd’ in the form of a private company (Gesellschaft mit beschränkter Haftung, GmbH). In addition, Council Regulation (EC) No 2157/2001 has implemented the European Company (SE) as a supranational stock corporation, also typically in the form of a public company in Germany.

For smaller enterprises, German corporate law offers the private limited partnership (Kommanditgesellschaft, KG) and the private general partnership (offene Handelsgesellschaft, OHG) without legal personality and personal liability of at least one partner.

The corporate bodies and powers granted to them vary among these types of corporate entities.

The legal framework is laid down in several legal acts regarding the respective legal forms, ie the German Stock Corporation Act (Aktiengesetz, AktG), the Private Limited Liability Company Act (GmbH-Gesetz, GmbHG) and the Code of Commerce (Handelsgesetzbuch, HGB). Besides these, listed companies are addressees of the rules regarding capital market and the German Corporate Governance Codex (Deutscher Corporate Governance Kodex, DCGK). The Codex is soft law and presents essential statutory regulations for the management and supervision of German listed companies. It contains internationally and nationally recognised standards for good and responsible governance. Listed companies must publicly explain if and why they do not comply with the rules of the Codex (section 161 AktG).

The Aktiengesellschaft has a mandatory ‘two-tier’ corporate governance system, with, however, three mandatory corporate bodies: the management board (Vorstand); the supervisory board (Aufsichtsrat); and the general meeting of shareholders (Hauptversammlung). The corporate body exclusively
In charge of the operational management is the management board. In the absence of a domination agreement, neither a major shareholder nor the shareholders meeting nor the supervisory board are entitled to instruct the management board regarding the direction and the operational management of the company. Only specific actions of the management board to be laid down in the articles of association require the consent of the supervisory board.

In contrast, the European Company can be established either consisting of the traditional two-tier corporate governance system with management board and supervisory board or, formerly unknown to German corporate law, of the one-tier system with an administrative board (Verwaltungsrat), which is in charge of directing the SE, and managing directors (geschäftsführende Direktoren) who are responsible for the day-to-day management. The administrative board is entitled to instruct the managing directors.

The GmbH consists of the shareholders meeting (Gesellschafterversammlung) and the managing director(s) (Geschäftsführer) as mandatory corporate bodies. A supervisory board can be established on a voluntary basis and is only mandatory if the GmbH has more than 500 employees. The shareholders meeting may give binding instructions to the managing directors. As shares in the GmbH cannot be publicly listed and are only transferable by way of notarial deed, the GmbH is more suitable for small and mid-size enterprises.

The KGaA is a partnership with at least one general partner, which may also be a company, and limited partners are shareholders. The KGaA is a combination of a stock corporation (ie, often in the form of a public company) and a limited partnership, the legal framework of both legal forms being applicable. The general partner is supervised by the mandatory supervisory board which also represents the shareholders’ interests. The shareholders exercise their rights in the general meeting. Compared to the management board of an Aktiengesellschaft, the general partner is more independent, eg it is appointed in the articles of association but not by the supervisory board. Thus, the KGaA is well-suited for family-controlled businesses.

In the following we focus on the publicly listed Aktiengesellschaft and its management board and/or supervisory board, unless otherwise stated.

1.2 What is the most common system of corporate governance? Are there any alternative systems?
German corporate law historically only provided the two-tier corporate governance system for public companies. However, since the implementation of the SE-regulation in late 2004 public companies may also elect the one-tier board system with an administrative board and managing directors. Although a significant number of listed blue chip Aktiengesellschaften (eg Allianz, BASF, MAN) have already been converted into European Companies, PUMA SE is the first and, so far, only company listed in the Dax and M-Dax that opted for the one-tier system.

1.3 Is it possible to appoint a legal entity as a director of the company?
Under German corporate law it is not possible to appoint a legal entity as
member of the management board of an Aktiengesellschaft. The same applies for managing directors or the administrative board of German based SEs, as well as for managing directors (Geschäftsführer) of a GmbH.

1.4 Does the concept of alternate or substitute directors exist in your jurisdiction?
The German Stock Corporation Act provides the possibility of deputy members of the management board. The rules relating to members of the management board in general also apply to their deputies. The deputy members are members with all rights and duties and do not only substitute regular members in case of their prevention.

2. APPOINTMENT, REVOCATION, RESIGNATION AND REPLACEMENT OF DIRECTORS
2.1 Describe the manner in which directors are appointed and the term of their office. Can directors be re-elected? Can foreign citizens be appointed as directors?
The members of the management board (Vorstand) are appointed by resolution of the supervisory board requiring a simple majority of the votes cast (section 84 AktG). The term of office must not exceed five years. The appointment may be renewed or the term of office extended for a maximum of five years, the renewed appointment or extension being possible not earlier than one year before the end of the previous term of office. Foreign citizens can also be appointed.

The members of the supervisory board are elected by the general meeting (section 101 AktG). If the company and its German subsidiaries have more than 500 but not more than 2,000 employees, one-third of the members must be employee representatives (section 4 One Third Participation Act). In case of more than 2,000 employees the co-determination is equal, meaning that half of the supervisory board members represent the employees (section 7 Co-Determination Act). The term of office is regularly five years at the most, with re-election being possible. The election process for employee representatives, which is set out in detail in the co-determination acts and governmental decrees, is complex and lengthy.

The Geschäftsführer of a GmbH (sole or several) is appointed by the shareholders.

2.2 Are there any specific requirements which a person must satisfy to be appointed as a director? What are the causes, if any, of non-eligibility, incompatibility or forfeiture of the directors’ office?
Only a natural person of full legal capacity may be a member of the management board. Further, ineligible to be a member of the management board is a natural person that is prohibited by court judgment from exercising a profession which coincides with the purpose of the company or that has been convicted of certain criminal offences, including insolvency-related and other economic crimes. The same applies to a Geschäftsführer of a GmbH. Members of the supervisory board cannot be appointed as members of the management board (section 105 AktG).
Corresponding to the personal requisites of members of the management board, only natural persons with full legal capacity may be elected as members of the supervisory board (section 100 AktG). In addition, members of the supervisory board may be member of not more than 10 other mandatory supervisory boards, or a legal representative of an enterprise controlled by the company, or a legal representative of another company whose supervisory board includes a member of the company’s management board. Furthermore, as a general rule, members of the supervisory board of a listed public company cannot have been members of the management of the same listed company during the previous two years (cooling off-period). Upon the proposal of shareholders holding at least 25 per cent of the voting rights the general meeting may, however, permit a direct move from the management board to the supervisory board.

2.3 In which cases can directors be revoked?
The supervisory board may revoke the appointment of a member of the management board only for good cause, in particular in case of a gross breach of fiduciary duties, inability to manage the company properly or a withdrawal of confidence by the general meeting (section 84 AktG). The revocation requires a resolution by the supervisory board. Even if the general meeting withdraws its confidence in the member of the management board, the supervisory board remains free to decide whether to revoke the member of the management board on this basis or not.

In contrast, a Geschäftsführer of a GmbH may be dismissed by the shareholders at will, except in the case of a GmbH that is subject to the Co-Determination Act and subject to its articles of association.

Members of the supervisory board can be dismissed by resolution of the general meeting without cause (section 103 AktG). The resolution requires a qualified majority of the votes cast (75 per cent), the articles of association often reducing the requirement to a simple majority. Upon application of the supervisory board a member of the supervisory board may also be dismissed by judicial decree.

Regarding employee representatives in companies with more than 500 people and more than 2,000 employees the co-determination rules provide special procedures for revocation.

2.4 What are the causes of termination of directors’ office? In which cases, if any, will the entire board of directors terminate as a consequence of the termination of some of the directors?
As described, a member of the management board may be revoked for good cause. Besides that, the office of the members of the management board terminates if the term of office for which the member has been appointed comes to an end. Further, the member of the management board may resign from office or the termination can be agreed upon amicably, the latter being the most common form of termination of office in practice. The termination of office of one member of the management board does not affect the term of office of other members.
Apart from the revocation without cause, the term of office of the members of the supervisory board terminates accordingly.

2.5 How are directors replaced after their revocation, resignation or termination of their office for other reasons?
If the office of a member of the management board ends, the supervisory board can appoint a new member of the management board. If the management board does not have the required number of members, in urgent cases an interim member can be appointed by court upon application until the vacancy is filled. Urgency is given if the company, the shareholders, the creditors or the employees face significant disadvantages without a full board.

At a GmbH, replacement of a Geschäftsführer follows the same rules as their initial appointment (see above).

If the office of a member of the supervisory board comes to an end, the general meeting will replace him or her. If the supervisory board does not have the number of members required to constitute a quorum (three is the minimum) or if the supervisory board consists of fewer members than the number stipulated by law or the articles of association for longer than three months, the competent court shall appoint the missing number of members upon application (section 104 AktG). In practice the court regularly follows the suggestion made by the applicant.

2.6 What are the publicity requirements concerning the appointment, revocation, resignation and replacement of directors?
The management board must apply for any change to it (or the power of representation of the members thereof) to be registered in the commercial register (section 81 AktG). In case a change of members of the management board could significantly influence the market price of shares of a listed company, the management board has also an ad hoc disclosure obligation regarding any upcoming resignation or dismissal (section 15 Securities Trading Act). This is the case if there is an unexpected change in key positions, eg the chairman of the management board or the chairman of the supervisory board.

At a GmbH, the Geschäftsführer needs to apply to the commercial register for the registration of the appointment of each new (and resignation of any former) managing director.

Also each change of the members of the supervisory board must be applied for registration with the commercial register by the management board and together with a full list of the members of the supervisory board providing the names, professions and places of residence (section 106 AktG).

3. RELATIONSHIP BETWEEN DIRECTORS AND THE COMPANY
3.1 What is the legal nature of the relationship between the company and its directors (mandate, employment or other)? Is the company liable for social security charges for its directors?
Members of the management board are appointed to their office by way of election by the supervisory board (section 84 AktG). They render their
services for the company on the basis of a service agreement which is legally distinct from the appointment of office. Because the members of the management board are not seen as employees but exercise functions of an employer and due to legal exemptions, in contrast to managing directors of a GmbH, members of the management board of a stock corporation/public company are not subject to the statutory social security system.

There is no service agreement between the company and the members of the supervisory board relating to their office. Special rules apply regarding advisory services provided to the company by supervising members upon the basis of separate agreements (section 114 AktG).

3.2 Are directors always entitled to a compensation for their office? How is such compensation determined? Are specific forms of compensation (such as participation in the profits, stock options, fringe benefits or others) common?

The members of the management board are entitled to compensation according to the service agreement which is negotiated between the member of the management board and the supervisory board. When determining the total remuneration for the members of the management board, the supervisory board must ensure that the remuneration is reasonable in relation to the duties and performance of the management board as well as in relation to the overall situation of the company and that it does not exceed the usual peer compensation without special reasons (section 87 AktG). The total remuneration typically consists of five components: a fixed cash component; a performance-based variable component in cash; stock or stock options; pension arrangements; and fringe benefits such as a company car. With regard to listed companies, the compensation is to be aligned with a sustainable corporate development (section 87 AktG). Therefore, variable compensation components should have a multi-year basis for assessment. In case the situation of the company deteriorates after determination of the remuneration so that the continued granting at the agreed level becomes unreasonable, the supervisory board shall reduce the remuneration to a reasonable level.

Generally, no such restrictions exist at a GmbH.

Also the members of the supervisory board receive a determined remuneration for their duties. Such remuneration may either be stipulated in the articles of association or approved by the general meeting (section 113 AktG). Corresponding to the remuneration for the management board, the remuneration for members of the supervisory board must be reasonable in relation to the duties of the supervisory board member and the situation of the company (section 113 AktG). In practice and in accordance with the German Corporate Governance Codex, special remuneration is granted for chairmanship of the supervisory board and membership or chairmanship of committees. Variable components of the remuneration, if any, must relate to the (reduced) company’s annual profits.
3.3 Describe the rules applying to the situations of conflict of interest between the company and its directors.

Conflicts of interest between the company and the members of the management board are governed by the German Corporate Governance Codex. According to the Codex, members of the management board are subject to comprehensive non-competition obligations during their employment. They also may not demand nor accept payments or other advantages from third parties. Members of the management board are strictly bound by the company’s best interest when acting on behalf of the company; no member may pursue personal interests in his decision or use business opportunities intended for the company for himself. Members of the management board shall further disclose conflicts of interest to the supervisory board without undue delay and shall inform the other members of the management board thereof. Transactions between the members of the management board and the company must comply with standards customary in the respective sector, important transactions requiring the supervisory board’s approval. The supervisory board’s approval is also required for sideline activities such as supervisory board mandates outside the company.

4. DIRECTORS’ OBLIGATIONS

4.1 What are the main obligations of directors of a company?

The management board manages the company jointly and under its own responsibility (sections 76 and 77 AktG). It is the legal representative of the company (section 78 AktG), its power not being limited by an ultra vires doctrine, which is unknown in German corporate law. Decisions cannot be made against the majority of its members (section 77 AktG). Managing the company is both the right and the obligation of the management board. It is responsible for corporate planning, coordination, control and the staffing of executive positions. Additionally, certain obligations of the management board are laid down in the German Stock Corporation Act: The management board is responsible for preparing and implementing of resolutions adopted by the general meeting, bookkeeping and implementing of a monitoring system. The management board is in charge of convening the general meeting and drawing up the financial statements. In the event of a loss amounting to half of the registered capital the management board must convene an extraordinary general meeting. It must file for insolvency procedure in case of over-indebtedness or illiquidity.

The management board has information obligations vis-à-vis the supervisory board and the general meeting, vis-à-vis the employees and the capital markets. It must prepare extensive reports prior to fundamental decisions to be made by the general meeting. Except for the specific stock corporation-related duties, the same applies to a Geschäftsführer of a GmbH.

4.2 What is the level of diligence required from directors? Does the ‘Business Judgment Rule’ apply to directors and to what extent?

When managing the company the members of the management board (and Geschäftsführer of a GmbH) shall apply the due care of a diligent and
conscientious manager (section 93 AktG). This includes the duty of care (Sorgfältspflicht) as well as the duty of loyalty (Treuepflicht). Besides the general duty of managing the company diligently, the duty of care consists of the duty to comply with applicable laws, the obligations as a member of the management board and those arising from the service agreement as well as the duty to preserve the internal order of responsibilities and to observe of the company's corporate purpose. The duty of loyalty is barely codified in German corporate law. With respect to public companies only a non-competition (section 88 AkG) and a non-disclosure obligation (section 93 AktG) are stipulated in the German Stock Corporation Act. In addition, case law and academic literature have acknowledged the fiduciary duty of loyalty in various cases; the German Corporate Governance Codex transferred some of them at least into soft law.

Finally, implementing the ‘Business Judgment Rule’ in German corporate law in 2005 and codifying the settled case law of the Federal Supreme Court, the German Stock Corporation Act stipulates that there is no breach of duty if the member of the management board, in the case of an entrepreneurial decision, could reasonably assume to be acting on the basis of adequate information and for the benefit of the company (section 93 AktG). The Business Judgment Rule only applies to entrepreneurial decisions but not for breaches of the duty of loyalty, information obligations and general breaches of law of the articles of association. The members of the management board, however, enjoy a rather broad level of discretion. Therefore, whether a measure is for the benefit of the company is to be determined from the manager’s perspective. However, he must not let himself be influenced by conflicts of interests or those of third parties but must act in good faith. Most important in practice is that the member of the management board decides on the basis of adequate information. This needs to be documented accurately.

4.3 Are directors subject to a non-competition obligation?
Members of the management board (and Geschäftsführer of a GmbH) are subject to a comprehensive non-competition obligation during their employment. In addition, non-competition clauses are usually stipulated in the service agreement.

5. RESOLUTIONS OF DIRECTORS AND BOARD OF DIRECTORS
5.1 Describe the matters that normally fall within the powers of directors and/or board of directors, as well as those matters that are reserved to the competence of the shareholders’ meeting.
The management board is in charge of the operative management of the company (section 76 AktG). In this respect neither the supervisory board nor the general meeting or any shareholder may instruct the management board. The management board’s ability to act is only restricted by on its own statutory provisions or provisions of the articles of association require the involvement of the supervisory board, or if the general meeting provides otherwise.
Thus, the articles of association or the supervisory board must stipulate that certain types of transactions may only be entered into with the prior consent of the supervisory board. Measures of management themselves must not be transferred to the supervisory board.

The German Stock Corporation Act as well as further legislation contain measures that can only be adopted by the general meeting upon request by the management board. These include the appointment of supervisory board members (subject to the co-determination provisions regarding employee representatives in companies with more than 500 employees); the appropriation of the balance sheet profit; the approval of the acts of the management board and the supervisory board; the appointment of the auditor for the annual financial statements; the appointment of a special auditor for specific matters relating to the formation or management of the company; measures to increase or reduce the registered share capital (including contingent and authorised capital increases as well as restrictions of subscription rights); amendments to the articles of association; approval of the sale of all or nearly all assets of the company; the approval of a domination and/or profit and loss pooling agreement; squeeze-out of minority shareholders against compensation in cash; merger, change of corporate form, hive-down, spin-off and corporate division; authorisation of frustrating action by the management board of a target company in response to a hostile takeover bid; as well as the dissolution of the company.

In contrast, while the actions requiring adoption by the general meeting of an AG also require resolutions of the shareholders of a GmbH, such shareholders – subject to the articles of association – are generally free to direct and resolve upon specific actions of the Geschäftsführer.

5.2 Describe the manner in which the board of directors is convened and how meetings can be held (eg written consent in lieu of a meeting or other, video or telephone conferences). Can a board of directors be held without a formal call?

There are no statutory provisions regarding resolutions and meetings of the management board (or Geschäftsführer of a GmbH). In practice the articles of association and the rules of procedure for the management board contain provisions of the internal decision-making process. Usually decisions are made by way of resolution at a meeting of the management board. Convening a meeting requires that all members are invited considering and depending on the provisions of the articles of association and the rules of procedure. With the consent of all members, the management board can waive the respective provisions. Depending on the provisions of the articles of association and the rules of procedure, resolutions may be adopted orally or by written consent, by way of telephone or video conference, e-mail or circular resolution.

5.3 What is the quorum necessary to pass a resolution?
The quorum necessary to pass a resolution by the management board (or among several Geschäftsführer of a GmbH) is usually laid down in the articles
of association or the rules of procedure for the management board. In practice resolutions require a simple majority. Only in exceptional cases are qualified majorities or unanimity necessary; eg resolutions regarding the adoption of rules of procedure for the management board (section 77 AktG). However, the articles of association and the rules of procedure cannot stipulate that one or several members of the management board may decide on differences in opinion among the members of the management board against the majority of its members (section 77 AktG). Therefore, the articles of association or the rules of procedure may determine a right of veto or provide that in case of the same number of votes, the vote of the chairman is decisive. In contrast, a double counting in other cases is not possible.

5.4 Is it possible to challenge directors’ resolutions? If so, by whom and when?
If the participation rights of a member of the management board are violated, the concerned member, but not the other members, can challenge the resolution of the management board. If, on the other hand, the content of a resolution contains a breach of applicable law, the articles of association or the rules of procedure, every member of the management board may challenge the resolution. The challenge has to be raised against the company by judicial action of declaration of nullity. Beside this possibility, members of the management board are obliged to demand correction of the resolution in question when filing the action. In contrast, neither the supervisory board nor the general meeting nor individual shareholders are entitled to contest management board resolutions. However, the supervisory board can determine that the resolution or its execution is subject to the supervisory board’s approval.

6. DELEGATION OF POWERS TO SINGLE DIRECTORS
6.1 Is it possible that the corporate bodies delegate certain powers to single (managing) directors or to a committee (executive committee) of the board? If so, describe in which circumstances and to what extent. Are there any matters that cannot be delegated?
The articles of association or the rules of procedure for the management board may provide that instead of all members, individual members of the management board solely or jointly with other members or proxy holders are in charge of the operative management. This delegation does not exclude the joint responsibility of the members of the management board. Matters that cannot be delegated are those that are assigned to the management board as a corporate body by law (see 4.1 above). In general, no such restrictions or limitations exist for the shareholders vis-à-vis the Geschäftsführer of a GmbH.

The supervisory board is entitled to delegate the preparation and implementation of its resolutions to committees and, furthermore, to pass on the resolving itself. Members of the committees must be members of the supervisory board. Whether to establish committees or not is in the sole discretion of the supervisory board. The only mandatory committee is the conciliation committee in case of employee co-determination. In
practice, personal, executive and audit committees are common as well as committees for financial and investment matters. Certain matters may only be delegated for preparation or implementation but not for the committee’s decision instead of the supervisory board. These include the election of the chairman of the supervisory board; enacting rules of procedure for the management board; appointment and dismissal of the members of the management board and its chairman; determination of the remuneration of the members of the management board; and the adoption of the financial statements and the approval of the consolidated financial statements.

6.2 What are the rights and the duties of the delegating corporate body in respect to the delegated director (eg information rights, duty of supervision, etc)?

See 6.4 below.

6.3 What is the level of diligence requested from the delegating corporate body compared to the diligence requested from the managing director?

See 6.4 below.

6.4 Does the circumstance that the powers were delegated to a managing director mitigate the potential liability of the delegating corporate body? If so, when and how?

As noted above (in 6.1), the delegation of responsibilities and powers to single members does not do away with the joint responsibility of the members of the management board. However, the delegation leads to a distinction among management activities between directly operative measures and supervising management functions within the management board. Every member of the management board is responsible for the duties delegated to him. Within his area of responsibility he must secure, by implementing appropriate measures, that all employees act in accordance with applicable law. The other members of the management board are obliged to supervise the transactions for which other members of the management board are responsible. This intra-body supervision is distinct from the inter-corporate body supervision by the supervisory board. The members of the management board are entitled to information from other managerial departments and are obliged to report about important transactions and incidences from their own.

The delegation of duties from the supervisory board to its committees does not release the other members of the supervisory board from their duties. However, these original duties change to supervision and control obligations with respect to those committees in the place of the entire supervisory board. In contrast, with regard to committees which are only in charge of preparatory measures, the full responsibility remains with all members of the supervisory board. Nonetheless, as long as there are no specific indications, the other members of the supervisory board may trust in the proper work of the preparing committee.
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6.5 Can directors delegate some of their powers to third parties?
Neither the power nor responsibility of the management board (or of the Geschäftsführer of a GmbH), nor those of the supervisory board may be delegated to third parties. Third parties may only support the members of the management board and the supervisory board without limiting the powers and responsibilities of the respective member.

7. CIVIL LIABILITY OF DIRECTORS
7.1 Describe the types of civil liability that directors may incur and the situations which may give rise to such a liability.
Members of the management board (or of the Geschäftsführer of a GmbH) can be held personally liable by and vis-à-vis the company (Innenhaftung) if they breach their fiduciary duties of loyalty and care (section 93 AktG). Court actions raised by German supervisory boards against members of the management board due to breaches of fiduciary duties became frequent following a landmark decision by the Federal Supreme Court in 1997 stating that the supervisory board is obliged to examine whether there are promising claims against members of the management board and that, if this is the case, the supervisory board is further obliged to recover the damages in question from the members of the management board; otherwise, the supervisory board members face liability for breach of their own duties (BGH II ZR 175/97 – ARAG/Garmenbeck). As regards entrepreneurial decisions, the members have a broad scope of discretion. The exonerating Business Judgment Rule applies (see 4.2). The member of the management board which is made liable bears the burden of proof that he did not breach his duties (section 93 AktG). If more than one member of the management board is liable, their liability is joint and several. In practice all companies have D&O insurance (with a mandatory deductible of 10 per cent of the damage to be borne by the board member itself–section 93 AktG) for members of the management board (and of the supervisory board).

Among the situations which give rise to such liability in practice can be speculative transactions, hazardous investment of free capital of the company, lack of collateral in case of advance payment/service of the company, lack of diligence in case of the acquisition of a company or shares therein, omission or delayed assertion of claims vis-à-vis third parties, waste of company property. Besides this, all kinds of breaches of duty of loyalty can trigger personal liability.

Third parties generally cannot claim damages for a breach of duty of members of the management board. Vis-à-vis shareholders and creditors (Außenhaftung), members of the management board face personal liability only on particular legal basis, e.g. based on tort if the member of the management board violates legal provisions that (also) protect individuals such as fraud, breach of trust or not withholding and paying social security payments for employees; liability for damages due to exertion of influence on the company; liability due to delay in filing for insolvency; liability due to incorrect information in an offering prospectus; or liability due to breach of duties with respect to the company’s tax obligations. The same applies...
if the member of the management board causes damage intentionally and immorally. If and to the extent the suffered damage consists only of the reduced value of the participation in the company, the claimant must demand compensation to the company.

Also the members of the supervisory board are liable *vis-à-vis* the company (*Innenhaftung*) if they breach their duties (sections 116 and 93 AktG). The Business Judgment Rule is also applicable to the supervisory board members. Personal liability may arise in particular if the members of the supervisory board do not supervise the acts of the management board sufficiently, determine an unreasonable remuneration for the members of the management board (section 116 sent. 3 AktG) or disclose any details concerning confidential information (section 116 AktG). Recent court decisions indicate an increase in the requirements of supervision by the supervisory board. Besides this, in limited cases, members of the supervisory board can be held liable directly by third parties if they infringe provisions protecting such third parties.

### 7.2 Which subjects can bring a liability action against directors?

If the member of the management board is liable *vis-à-vis* the company, the supervisory board shall bring the liability action as the supervisory board is the legal representative of the company *vis-à-vis* members of the management board (section 112 AktG). In a GmbH, shareholders may sue the Geschäftsführer for payment of damages or restitution to the GmbH. It can be observed that currently insolvency administrators often sue members of the management board as well as members of the supervisory board following the company’s insolvency. The general meeting can resolve that the claims must be raised (section 147 AktG). Shareholders and third parties are generally excluded from asserting the claim. Shareholders with an aggregate holding amounting to 1/100 of the registered share capital or a proportionate nominal amount of EUR 100,000 may apply for admission of action before a court if there are indications that the company has suffered damages due to gross violation of law or the articles of association by the board members (section 148 AktG). The company’s claim for damages may also be asserted by creditors of the company to the extent the creditors are unable to obtain fulfilment of their claims from the company (section 93 AktG).

Claims based on infringement of laws that protect individuals like shareholders, investors or creditors can be raised by these individual directly. Class actions are not possible.

Liability actions against supervisory board members based on breach of duties *vis-à-vis* the company are raised by the company represented by the management board; in case of insolvency by the insolvency administrator. With respect to third parties, the explanations relating to the liability of members of the management board apply.
7.3 What are the statutes of limitation and the procedure for each liability action?
Claims of a listed company against members of the management board or the supervisory board due to breach of duty elapse 10 years after both the claim and the damage have come into existence; if the company is not listed the time is five years (section 93 AktG). The statutes of limitation for claims by third parties depend on the various provisions regarding personal liability. The procedure to submit and enforce liability actions is the regular procedure as laid down in the German Code of Civil Procedure (Zivilprozessordnung, ZPO).

7.4 May a director be exonerated from his liability? If so, when?
Members of the management board and the supervisory board are not liable vis-à-vis the company for damages due to a breach of fiduciary duties if the action in question was taken on the basis of a lawful resolution of the general meeting (section 93 AktG). In contrast, the fact that the supervisory board approved an action of the management board does not exclude the liability of the members of the management board for damages (section 93 AktG). The company may only waive or compromise claims for damages three years after such claims arise and only with the general meeting's consent and no objection of a minority of shareholders with an aggregate holding of 1/10 of the registered share capital. The time limit does not apply if the liable member of the management board or supervisory board is illiquid or the company itself has filed for insolvency.

7.5 Can directors of a holding company be liable for damages caused to the controlled company?
If a company, which is able to exercise, directly or indirectly, a controlling influence over another legally separate company without having entered into a domination agreement, causes a legal transaction to the detriment of the controlled company and if the controlling company does not compensate such disadvantage by the end of the fiscal year of the controlled company, the controlling company is liable to the controlled company for damages suffered, but also to the controlled company’s shareholders for damages suffered other than those suffered as a result of the damages to the controlled company. There is no liability if a prudent and conscientious manager of an independent company would also have entered into the transaction (section 317 AktG). Besides the controlling company, the members of its management board who caused the controlled company to effect the transaction are jointly and severally liable.

If a domination agreement exists, the management board of the controlling company must apply the due care of a prudent and conscientious businessman when giving instructions to the controlled company (section 309 AktG). If the members of the management board fail to comply with such duty, they are jointly and severally liable to the controlled company for the resulting damage.
7.6 Specific analysis of liability in case of insolvency or bankruptcy.

Prior to insolvency the management board (or the Geschäftsführer of a GmbH) is obliged to permanently observe and audit the financial status of the company. An early warning and monitoring system needs to be implemented (section 91 AktG). A violation of these duties can result in personal civil and potentially criminal liability of the members of the management board. Furthermore, the management board must restructure the company if necessary, and in the event of a loss amounting to half of the registered share capital, immediately convene and inform the general meeting. A breach of the restructuring and convening obligation leads to civil liability, the violation of the obligation to convene a general meeting additionally being a criminal offence. The management board must not make any payments to shareholders to the extent such payments will lead to illiquidity of the company. Violating this prohibition may lead to personal liability vis-à-vis the company and its shareholders.

In the event of illiquidity or over-indebtedness the management board (or the Geschäftsführer of a GmbH) must file for insolvency without undue delay, in any event within three weeks (section 15a Insolvency Code). In case of the threat of insolvency the members of the management board may but do not have to file for insolvency (section 18 Insolvency Code). The company is considered illiquid if it is not able to fulfil its due liabilities; the company is over-indebted if the company’s assets no longer cover the existing liabilities, unless the economic survival of the company can be regarded as very likely in view of the circumstances (section 19 Insolvency Code). In case of violation the members of the management board are liable vis-à-vis the creditors of the company. The compensation includes the quota damage, ie the difference between the real and the fictive insolvency quota/distribution, for those creditors who had been creditors prior to insolvency, as well as full compensation for those creditors who became creditors of the company after the occurrence of illiquidity or over-indebtedness. In the case of a negligent or intentional violation the members of the management board can be punished by up to three years in jail.

Besides the liability for not filing for insolvency (in time), the members of the management board face a broad catalogue of liability for criminal insolvency offences in case of certain misbehaviour related to a decrease in the company’s property or its concealment in the case of the crisis of the company.

8. TAX LIABILITY OF DIRECTORS CRIMINAL LIABILITY OF DIRECTORS
8.1 What are the most common white collar crimes committed by directors in your jurisdiction?

In Germany the most common white collar crimes appear to be breach of trust, missing or delayed filing for insolvency as well as insider trading and market manipulation. The increased surveillance activity of the Federal Financial Supervisory Authority (BaFin) in the last few years has significantly increased the risk for members of the management board to be prosecuted based on infringements of capital market obligations.
Germany

8.2 Can a company, as a legal person, be held liable, together with its directors, for the crimes committed by them in the company’s interest?
A legal person or a company (public or private) cannot be held liable for criminal offences committed by its legal representatives in Germany. However, it can be liable for administrative offences (Ordnungswidrigkeiten) which lead to monetary fines.

8.3 Where a company can be held liable for the crimes committed by its directors, how can the risks of a potential ‘criminal’ liability of the company be mitigated?
Not applicable.

8.4 Where a company can be held liable for the crimes committed by its directors, describe the penalties to which such a company may be subject.
Not applicable.

9. OTHER PERSONS ACTING AS DIRECTORS
9.1 Are there any specific rules applying to persons who act as directors of the company without being formally appointed?
See 9.2 below.

9.2 Can the persons who act as directors without being formally appointed be held liable as directors?
There are no specific rules set out in the German Stock Corporation Act, the Private Limited Liability Company Act or other statutory rules. Nonetheless, the Federal Supreme Court has recognised the so-called factual members of the management board (faktisches Vorstandsmitglied) to a large extent. Therefore, if the appointment as member of the management board is ineffective or if a natural person acts as member of the management board without being formally appointed but with the consent of the supervisory board, the factual member faces the same civil and criminal liability as ordinary members of the management board.

10. INTERNAL AUDITORS
10.1 Do companies appoint internal auditors or boards of auditors? If so, is such appointment mandatory and in which cases?
Not applicable.
10.2 Describe the rules concerning the appointment, revocation, resignation and replacement of internal auditors and the relevant publicity requirements.
Not applicable.

10.3 Are there any specific requirements which a person must satisfy to be appointed as an internal auditor? What are the causes, if any, of non-eligibility, incompatibility or forfeiture of the auditors’ office?
Not applicable.

10.4 Are internal auditors always entitled to a consideration? How is such consideration determined?
Not applicable.

10.5 What are the powers and duties of internal auditors or boards of auditors within the company?
Not applicable.

10.6 Where a board of internal auditors is appointed, describe its decision making process.
Not applicable.

10.7 Describe the rules governing the liability of internal auditors.
Not applicable.