SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZAHAVA ROSENFELD, derivatively as a shareholder of Deutsche Bank AG and on behalf of DEUTSCHE BANK AG, Plaintiff, vs. PAUL ACHLEITNER *et al*., Defendants, - and - DEUTSCHE BANK AG, Nominal Defendant.	Index No. 651578/2020

Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Verified Amended Shareholder Derivative Complaint

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Plaintiff Zahava Rosenfeld, a citizen of N.Y. and shareholder of nominal defendant Deutsche Bank AG ("DB"), respectfully submits this opposition to Defendants' motion to dismiss her Verified Amended Shareholder Derivative Complaint ("FAC").

INTRODUCTION AND OVERVIEW

Defendants' brief is filled with hyper-technical, erroneous and misleading claims and personal attacks that strain — and ultimately break — the bounds of proper advocacy. Their brief also ignores the key allegations in the ***verified*** 164-page FAC detailing a decade of grotesque fiduciary failures by DB's Supervisors/Managers, most of which took place at its U.S. headquarters on Wall Street, injured N.Y. residents/investors and DB shareholders and were punished by N.Y. regulators, costing DB over $18 billion in penalties, financially crippling DB, and putting its survival in doubt.

A grandmother and teacher of special-needs children,[1] Ms. Rosenfeld resides in N.Y. She has owned DB stock since 2000, which has lost most of its value. She sued derivatively for DB, alleging that Defendants breached their duties under the German Stock Corporation Act ("GSCA").[2] Her action should be litigated in N.Y. pursuant to Business Corporation Law ("BCL") §§ 626, 1319, Banking Law ("NYBL") §§ 200, 6025, 7017 and/or common law. *See* FAC ¶¶ 106–108, 211–214.

DB, organized under the GSCA, is a publicly-owned bank holding company[3] operating in the U.S. through its "New York Branch" and wholly-owned subsidiaries,

[1] Declaration of Zahava Rosenfeld dated September 20, 2020 (cited as "Rosenfeld Decl.").

[2] A copy of the full English translation of the GSCA is attached as Exhibit A to the October 22, 2020 Affirmation of James D. Baskin (cited as "Baskin Aff."). *See* Baskin Aff. ¶ 2.

[3] DB's filings with the U.S. Federal Reserve and the SEC describe it as "a bank holding company." DB's U.S. Resolution Plan (https://www.fdic.gov/regulations/reform/resplans/plans/deutschebank-165-1807.pdf) at 70; DB's Form 20-F (https://www.sec.gov/Archives/edgar/data/1159508/000115950820000012/db2020032020f.htm) at 26, 73; *see also* FAC ¶ 45. These filings are judicially noticeable.

including DB USA. In 1998 DB acquired the scandal-ridden Bankers Trust, establishing DB's U.S. headquarters at 60 Wall Street, where the bulk of the later wrongdoing occurred. DB's stock and other securities are listed on the NYSE and thousands of its shareholders reside in the U.S./N.Y. FAC ¶¶ 45, 123, 133, 282.

This type of derivative suit, on behalf of a "foreign" (incorporated outside the U.S.) corporation with a N.Y. business presence/"nexus" to the wrongdoing, is well within existing precedents: *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018) ("*HSBC*") (English corporation), *Davis v. Scottish Re Group Ltd.*, 30 N.Y.3d 247 (2017) (Cayman Islands corporation) and *In re Renren Inc. Derivative Litig*., 2020 N.Y. Misc. LEXIS 2132 (Sup. Ct. N.Y. Cnty. May 20, 2020) (Cayman Islands corporation). Defendants cite *HSBC* but fail to inform the Court that it involved a derivative suit on behalf of an English-incorporated ***bank holding company***, ***filed in N.Y. by a stockholder residing in England*** arising from illegal conduct in N.Y. that resulted in $1.5 billion in penalties on HSBC Holdings plc. **HSBC *reversed the trial court's dismissal of that suit — a dismissal based on the same arguments Defendants serve up here***.[4]

HSBC held that New York's ***post-suit demand futility*** "***gatekeeping***" ***procedure*** (***BCL §§ 626/1319***) ***controlled***, not the English ***pre-suit petition procedure***. 116 A.D.3d at 757.[5] *HSBC* so held, even though the UK Companies Act of 2006 is not a procedural code and requires that the stockholder petition for permission to sue, produce ***proof*** of wrongdoing without discovery and, if turned down, pay fees and expenses. This English ***pre-suit procedure is no different from the German pre-suit*** "***Court Procedure for***

[4] Though rendered by the Second Department, *HSBC* is binding. *Mountain View Coach Lines, Inc., v. Storms*, 102 A.D.2d 663, 664 (2d Dep't 1984) ("the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department").

[5] Unless otherwise noted, all emphases are added, and all internal citations are omitted.

Petition to sue." ***Under* HSBC**, ***foreign procedural rules — whether in corporation codes or civil procedure codes — do not apply***. ***N.Y.'s procedural rules apply in N.Y. courts***.

HSBC also destroys Defendants' other arguments: (1) as to demand futility, because of the "illegal purpose, magnitude and duration of the alleged wrongdoing," demand on the Board to sue itself was futile; and (2) as to *forum non conveniens* ("FNC"), "given that the allegations of wrongdoing occurred in [N.Y.]" at HSBC's N.Y. headquarters, "the nominal defendants were not entitled to dismissal." *HSBC*, 166 A.D.3d at 759. Defendants' disregard of *HSBC* is only the first example of their strained advocacy.

HSBC/*Scottish Re* dictate not only the outcome, but also the approach to be taken:

- Based on the "***plain language***" of the foreign pre-suit provisions at issue, both courts determined them to be procedural, rather than substantive, and thus inapplicable in N.Y.
- Specifically, in *HSBC* the "procedural provision" was contained in the English Companies Act — the same as the GSCA — where both these corporation codes contain both procedural and substantive provisions.
- In the same vein, BCL §§ 626/627 — the N.Y. procedural rules for corporate derivative suits — are contained in the ***BCL***, not the CPLR. Where the statutory provision appears in a legal code does not determine whether the provision is substantive or procedural.
- Finally, neither of the *Scottish Re* nor *HSBC* appellate opinions mentioned or relied upon expert testimony to "interpret" the foreign law at issue.

ARGUMENT

I. Plaintiff Has a Right to Bring Derivative Claims for DB in N.Y. Because, Under Binding Precedents — *Scottish Re* and *HSBC*, § 148 of the GSCA Is Procedural and Inapplicable

A. As Reflected in Its Title and Text and Analyzed Under N.Y. Precedents, § 148 Is an "Admission Procedure" Serving as a "Gatekeeper" for Derivative Claims Brought in German Courts

Defendants claim Ms. Rosenfeld seeks to "evade" German law. That's false. She pleads, and indeed seeks, the application of German substantive law, *e.g.*, the GSCA, which ***imposes stringent duties*** on ***both Supervisors and Managers***: "the care of ***diligent and***

conscientious managers," who "***in particular*** [***shall take***] ***surveillance measures to ensure that developments threatening the continuation of the company are detected early***." FAC ¶¶ 106–108, GSCA §§ 91, 93, 111, 116, 117.

While Ms. Rosenfeld welcomes the application of German substantive law (FAC ¶¶ 106–108), she seeks to prosecute her claims under N.Y. procedural rules (¶¶ 211–214). "Under [N.Y.] common law principles, procedural rules are governed by the law of the forum" — here, the law of N.Y.[6] *Scottish Re*, 30 N.Y.3d at 257 ("we employ our own procedural rules … to actions in our courts").

Despite GSCA § 148's title: "***Court Procedure for Petition for Leave to File an Action for Damages***," Defendants claim it is a ***substantive*** provision applicable to actions brought in N.Y. They are wrong. "'[T]he law of the forum normally determines for itself whether a given question is one of substance or procedure'" and "'a foreign jurisdiction's designation of the rules as procedural or substantive [is] instructive.'" *HSBC*, 166 A.D.3d at 756 (quoting *Scottish Re*, 30 N.Y.3d at 252). Here, ***German law designates § 148 as procedural***. Section 148's title leaves no room for debate; it is a "Court Procedure" no different than Grand Cayman Court Rule 12A found to be procedural and inapplicable in *Scottish Re*. ***Defendants' failure to disclose this title of the key statutory provision is a second example of strained advocacy***.

A § 148 pre-suit ***petition*** to sue is filed in the "regional court" in Germany at the "company's registered seat, which court shall decide on the petition." Section 148 has no

[6] Under N.Y. statutes and decisions, subject matter jurisdiction exists over derivative suits on behalf of "foreign" corporations, ***including foreign bank holding companies*** in N.Y. courts. BCL §§ 626/1319; NYBL §§ 200(b)(1), 6025/7017. *HSBC*, 166 A.D.3d at 754; *Scottish Re*, 30 N.Y.3d at 249; *Renren*, 2020 N.Y. Misc. LEXIS 2132, at **38, 53; *David Shaev Profit Sharing Plan v. Bank of Am. Corp.*, 2014 N.Y. Misc. LEXIS 6470, at **5–6 (Sup. Ct. N.Y. Cnty. Dec. 29, 2014) ("*Bank of America*").

extraterritorial reach; it is by its terms limited to derivative cases filed in Germany; it does not apply to derivative cases on behalf of German companies filed outside of Germany. Similarly, *Scottish Re* held that the "[p]lain language of Rule 12A … pertains to all derivative actions begun by ***writ*** [by] applying to the Grand Court in Grand Cayman [a] ***procedure specific to Cayman Islands litigation*** … [***which has***] ***no provision that would suggest that it applies*** … ***in derivative actions*** … ***commenced outside the Cayman Islands***." 30 N.Y.3d at 253–54; *see also HSBC*, 166 A.D.3d at 756 ("by its own terms, UK Companies Act § 261(1) applies only to derivative claims brought in [the UK], and does not suggest that it applies in any other jurisdiction such as [N.Y.]"). "The term 'writ' [in Germany, "petition"] is clearly inapplicable to jurisdictions, such as [N.Y., where] such actions are not commenced by writ," but rather by a ***verified complaint and tested by the post-filing demand futility test***. *Scottish Re*, 30 N.Y.3d at 253. "Under this analysis, Rule 12A is a procedural rule that does not apply in [N.Y.] courts" (*id.* at 254); so too GSCA § 148 is a German-specific "admission procedure" for German courts to utilize in derivative suits in German courts, not elsewhere.

HSBC and *Scottish Re* both hold that BCL §§ 626/1319 apply to derivative suits "***brought in the right of a domestic or foreign corporation***." N.Y. adopts the ***post-suit demand-futility rule*** as the "gatekeeper" device to be applied ***after the verified complaint is filed***, ***unlike the punitive foreign pre-suit petition procedures they rejected***.[7]

[7] Section 148 requires a stockholder to ***petition*** the German Regional Court located where the corporation is headquartered for permission to sue. It imposes a wealth test (€100,000 worth of stock), requires the stockholder to show "***gross misconduct***" without discovery, and pay the opposition's fees when the petition is denied. And if per chance the stockholder prevails, the potential defendants can appeal — delaying the case indefinitely, likely for years. Due to the punitive nature of § 148, there have been virtually no derivative suits involving big public German corporations. FAC ¶ 213. German corporate governance is widely considered inadequate and ineffective, no doubt the reason so many Germany companies have been embroiled in repeated scandals in recent years. *See* Baskin Aff. Ex. B; *see also* Mankowski Aff. ¶ 48.

Defendants not only ignore *HSBC*, they misconstrued *Scottish Re*. There, this Court dismissed a derivative complaint on behalf of a Grand Cayman corporation. Applying the "restrictive English Common law rule" of *Foss v. Harbottle* this Court accepted defendants' argument that even though Cayman Islands Grand Court Rule 12 was ***procedural*** under Cayman law, it was substantive under N.Y. law because Rule 12A "envelopes both the right and the remedy"; therefore failure to comply with Rule 12A extinguished the remedy. *Scottish Re*, 30 N.Y.3d at 256. The Court of Appeals reversed, holding Rule 12A to be procedural ***by its own terms and thus inapplicable in a N.Y. derivative case on behalf of a foreign corporation***. *Id*. at 254. That holding governs here; GSCA § 148 is procedural.

B. Section 148 Does Not Provide for "Exclusive Jurisdiction" and Has No Extra-Jurisdictional Reach

Apparently recognizing the futility of their frontal attack, the Defendants try another stratagem: they try to analogize to Canadian law by claiming § 148 provides for "exclusive jurisdiction" when it plainly doesn't.[8] Defendants deploy a German law "expert" (Prof. Dr. Goette) to attempt to conjure "exclusive jurisdiction" from thin air.

The plain language of § 148 belies the argument. The term "exclusive jurisdiction" does *not* appear in § 148 — but it is *explicitly* provided for in four different provisions of the GSCA, each involving other kinds of shareholder disputes: § 98 (concerning the composition of the Supervisory Board); § 132 (shareholder right to information); § 246 (action to invalidate a resolution of a shareholder meeting); and § 396 (judicial dissolution).

[8] *Scottish Re* and *HSBC* both contrasted Canadian law — which restricts to Canadian courts both the admission procedure and the main damages claims in derivative cases — to the Cayman and UK laws involved respectively in those cases, and suggested in *dictum* that the outcomes might have been different had the cases involved the Canadian statutory scheme. Defendants here, seeking a way out of the *Scottish Re/HSBC* noose, try mightily but unsuccessfully to recast § 148 as more like Canadian law.

The fact that the German legislature did not provide for exclusive jurisdiction ("ausschließlich") in § 148 — while expressly providing for it, in those terms, in several other sections of the same statutory scheme — is powerful evidence of legislative intent.

The Court need not plow through stacks of "expert" declarations to determine which provisions of the GSCA are substantive or procedural, or whether jurisdiction is exclusive or not. ***The text of GSCA § 148*** — "***Court Procedures for Petitions seeking leave to file an action for damages***" — ***is plain***. Procedure means procedure. Section 148 simply does not contain the word "exclusive." ***The plain language of GSCA § 148 dictates the outcome***. One doesn't need a weatherman to know which way the wind is blowing.

At issue here is the legal import of language contained in N.Y. law, as well as in the GSCA, as to which there is no translation dispute. N.Y. courts, which regularly hear cases involving foreign laws, are perfectly capable of applying those words, statutes and precedents. In *Bodum USA, Inc. v. LaCafetiere*, 621 F.3d 624 (7th Cir. 2010), a dispute involving French law, a panel of distinguished jurists of the Seventh Circuit Court of Appeals (Judges Easterbrook, Posner and Wood) gave short shrift to the need for experts (*id*. at 628–29, 631):

> It is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana, which had its origins in the French civil code ….
>
> ***
>
> Trying to establish foreign law through experts' declarations not only is expensive (experts must be located and paid) but also adds an adversary's spin, which the court then must discount. … Because objective, English-language descriptions of French law are readily available, we prefer them to the parties' declarations.
>
> ***
>
> When the facts are undisputed, interpretation of contractual language is a question of law for the judge ….

This Court needs no "expert" assistance to interpret and apply the applicable law.

Here, GSCA § 148's text is straightforward and undisputed. Its title is clear. Its lack of any exclusivity language — and any resemblance to Canadian law — is apparent.

But, if Defendants want a battle of experts, then Ms. Rosenfeld submits the Affirmation of Prof. Dr. Peter Mankowski — a real expert who is a professor holding the chair for private law, private international law and comparative law at the University of Hamburg for 20 years. Prof. Dr. Mankowski's report unmasks the flawed analyses and wrong conclusions put forward by Defendants' expert.

Defendants' expert Goette asserts that § 148 is substantive because, he says, it *requires* that both the "admission procedure" and the main action (*i.e.*, the claim for damages) be pursued *only* in German courts, *i.e.*, that the regional court in Germany has "exclusive jurisdiction" over both the admission procedure and the main action. This argument is incorrect; there is no exclusive jurisdiction.[9]

The Mankowski Affirmation details the correct analysis. *First*, EU law — which has primacy over the laws of Germany and other member states — ***prohibits*** exclusive jurisdiction in damages cases such as this one. Mankowski Aff. ¶¶ 19–23. The Brussels Regulation and authorities construing it make this non-exclusivity quite clear. *Id.* *Second*, the language, structure and legislative history of § 148 show that the German legislature neither intended nor provided for exclusive jurisdiction.[10] *Id*. ¶¶ 24–30. Thus,

[9] Goette refers to multiple exhibits, seemingly to emphasize the asserted complexity of the task, but his analysis is thin. One of his exhibits (Goette Ex. 25) actually confirms that there is no exclusive jurisdiction in the sense that derivative actions can only be brought in Germany. Moreover, the flaws in Goette's exclusive jurisdiction argument doom his suggestion that German courts would not enforce a judgment here.

[10] As noted, § 148 does ***not*** specify "exclusive jurisdiction" — it does *not* contain the term "ausschließlich," meaning "exclusive" — but four *other* sections of the GSCA do just that (including § 246, which was amended in the same piece of legislation that created § 148). Mankowski Aff. ¶¶ 33–35. The German legislators knew exactly how to provide for exclusive jurisdiction, but did ***not*** do so in § 148, in part because they were constrained by governing EU law. *Id*. ¶¶ 19–23. The Mankowski Affirmation also analyzes the structural and legislative history bases for non-exclusivity. *Id.*

derivative actions for damages on behalf of German corporations are not restricted to German courts and may be brought elsewhere. *Id*. ¶¶ 31–45.

Subsections (2) and (4) of § 148, taken together, show that the German legislature did *not* intend for § 148's "admission procedure" to have "extra-jurisdictional authority." Mankowski Aff. ¶¶ 27–28. That is because, while it is possible to file derivative litigation outside of Germany, it is not possible to first employ the admission procedure in a German court, ***then pursue the main action in a court outside of Germany***. *Id*. Accordingly, the German scheme is like the UK legislation analyzed in *HSBC* — legislation enacted, like Germany's, in the shadow of EU law — similarly lacking the extra-jurisdictional reach, and similarly characterized as procedural in nature, not like the Canadian model.

Prof. Dr. Mankowski's Affirmation is detailed and well-supported, but it is also straightforward and sensical. The applicable law itself is straightforward, not at all impenetrable as Defendants suggest in an effort to warn the Court away. At worst, the expert affirmations offset each other — exactly the point made by *Bodum*. But here, based on the plain meaning of the words of the German and N.Y. statutes involved, logic and the strength and depth of expert analysis and credibility, Plaintiff wins the battle of experts.[11]

To summarize: § 148 is procedural; it has no extra-jurisdictional reach; it does not prohibit jurisdiction outside of Germany; it does not control in this case in N.Y. state court.

[11] To the extent the Court wishes to consider the expert declarations, it should weigh the credibility of the experts. In another example of Defendants' strained advocacy, they failed to disclose the following facts about Goette, who advises the Court he is a "professor" — but omits the following (Baskin Aff. ¶ 4):

- Goette's primary occupation is as an attorney in private practice, "of counsel" to the large German firm Gleiss Lutz (*id*. Ex. C-1);
- DB has retained Gleiss Lutz as counsel to handle some of its largest litigations (*id*. Ex. C-2);
- Gleiss Lutz maintains a close relationship with Ropes & Gray (*id*. Ex. C-3); and
- Goette is not even listed on the University of Heidelberg website as a faculty member (*id*. Ex. C-4).

C. N.Y. Courts Have Jurisdiction over DB (and Its Massive U.S./N.Y. Operation), and the Gatekeeping Provisions of the BCL and the NYBL Apply to DB

Despite a massive N.Y. presence, DB tries to escape N.Y. "***jurisdiction***." It says BCL §§ 626/1319 do not apply to it — but then neither do NYBL §§ 200/6025. Thus, DB magically escapes "jurisdiction" in a N.Y. derivative suit brought by a N.Y. resident stockholder for wrongdoing that occurred at DB's U.S. headquarters in N.Y. and resulted in penalties in N.Y. This is beyond strained advocacy; it's deception.

If Defendants were correct, the *HSBC* precedent (involving an English bank holding company) would not exist. Nor could a N.Y. shareholder/resident bring a derivative suit on behalf of N.Y.-headquartered Citigroup, Inc., a "foreign" Delaware corporation — as are all the big N.Y. banks, incorporated elsewhere but subject to N.Y.'s regulatory scheme (*i.e.*, BCL/NYBL). If Defendants' word dance were correct, ***all "foreign" banks headquartered or with large operations here could escape N.Y. jurisdiction — and "foreign" includes Delaware as much as it does Germany***.

DB, the publicly-traded bank holding company, is a "foreign" corporation with a major N.Y. presence, just like Bank of America and Citigroup, which are "foreign corporations" incorporated outside N.Y. *Bank of Am.*, 2014 N.Y. Misc. LEXIS 6470, at **5–6 (BCL §§ 626/1319 apply); *Shaev v. Pandit*, 2014 N.Y. Misc. LEXIS 1418, at *8 (Sup. Ct. N.Y. Cnty. Jan. 24, 2014) ("*Citigroup*") (NYBL §§ 6025/7017 apply). DB is subject to the provisions of the BCL and/or NYBL — one or the other — which contain identical N.Y. demand futility procedures. At bottom, N.Y.'s procedural rules — BCL §§ 626/1319 and NYBL §§ 6025/7017 — apply to DB.

There simply is no "doughnut hole" in this State's regulatory scheme, as

Defendants posit. Derivative standing exists under ***either*** the BCL ***or*** the NYBL.

Defendants' NYBL argument ignores the word "***all***" as used in § 1001(1): "'Corporation' means and includes ***all*** banks." A "foreign corporation," as defined in § 1001(3), is still a "corporation." Foreign corporations include banks formed under the laws of other U.S. states (*e.g.*, Delaware) or headquartered outside N.Y., as well as banks formed under the laws of another country, and are thus subject to derivative suits here.

If DB falls outside of the NYBL, it is because it is a "bank holding company" governed by the BCL. *See* n.3, *supra*. In *Bank of America,* Justice Schweitzer held that Bank of America, as a "bank holding company," was a foreign corporation subject to §§ 626 and 1319 of the BCL, rather than a "bank" under the NYBL. *See* 2014 N.Y. Misc. LEXIS 6470, at **5–7. In any event, no court has ever held that this State's regulatory scheme contains the blank space that Defendants imagine they see.

There is no reason that the Commercial Division — as sophisticated a court as any, and located in the center of world commerce and financial markets, where giant foreign enterprises have their U.S. headquarters with thousands of employees and shareholders, sell their goods, services and securities ***and occasionally engage in illegal misconduct harming N.Y. customers and their own shareholders*** — should shy away from hearing such suits. Corporations today are as large as countries, operate worldwide and can attempt to avoid accountability by incorporating in "foreign" jurisdictions. Consistent with modernity and globalization, N.Y.'s appellate courts have opened the courthouse doors to accommodate these suits. N.Y. courts have an obligation to exercise their jurisdiction to provide remedies to N.Y. residents for corporate misconduct with an N.Y. "nexus."

Lacking worthwhile legal arguments, Defendants resort to attacking Ms. Rosenfeld

and her lawyers personally. They say that she just "***purports***" to live in N.Y. and fails to plead *how many* shares of DB's stock she owns,[12] suggesting she and her counsel are lying. They accuse her of asserting "***novel***" claims without having "***knowledge***" or making any ***"investigation***," assisting her lawyers' "misguided attempt to create a cottage industry of derivative suits." This petty, mean-spirited advocacy, coming from the symbol of the modern corporate kleptocracy, deserves no heed.

This calls to mind *Surowitz v. Hilton Hotels Corp*., 383 U.S. 363 (1966), where an immigrant N.Y. stockholder sued derivatively. Defendants belittled her as "***wholly ignorant***" and making "***false"*** claims, despite her complaint ***being verified***, and secured its dismissal.[13] The U.S. Supreme Court unanimously reversed (*id.* at 371–73):

> Rule 23(b) was not written in order to bar derivative suits [which] have a rather important role in protecting shareholders of corporations from ***the designing schemes and wiles of insiders who are willing to betray their company's interests in order to enrich themselves***. And it is not easy to conceive of anyone more in need of protection against such schemes than little investors like Mrs. Surowitz.
>
> When the record of this case is reviewed in the light of the purpose of Rule 23(b)'s ***verification requirement***, there emerges the plain, inescapable fact that this is not a strike suit, or anything akin to it. Mrs. Surowitz was not interested in anything but her own investment made with her own money.
>
> We cannot construe Rule 23 … as compelling courts to summarily dismiss cases like this ***where grave charges of fraud are shown by the record to be based on reasonable beliefs growing out of careful investigation***. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possibly guarantee, that *bona fide* complaints be carried to an adjudication on the merits.

[12] Contrary to Defendants' argument, a shareholder plaintiff is required only to plead ownership of shares, not the number of shares. *See Lewis v. S. L. & E., Inc*., 629 F.2d 764, 768 n.10 (2d Cir. 1980) (a shareholder "would be a proper party to assert claims on behalf of the corporation in a derivative action, regardless of the number of shares he owns").

[13] Ms. Surowitz relied on her lawyer (Mr. Rockler) and famously-named financially sophisticated son in law (Irving Brilliant) to investigate the facts and draft her complaint. Ms. Rosenfeld relied on her lawyers for her pre-suit investigation and stockbroker husband as well. *See* FAC at 169 (Verification ¶ 3).

D. N.Y.'s BCL §§ 626/627's "Gatekeeper" Procedures Following the Filing of a Verified Derivative Complaint Control, Not Germany's Pre-suit Petition for Permission to Sue Procedure to Be Decided by a German Regional Court at the Corporate Headquarters

BCL § 1319 provides that N.Y. law — *i.e.*, the provisions of BCL § 626, which include the standing requirements and procedures for shareholder derivative suits — applies to "foreign corporation[s] doing business in [N.Y.], [and their] directors and officers." NYBL § 200(b) creates jurisdiction over suits by N.Y. residents against foreign banks and includes its own derivative suit procedure, § 6025 (identical to BCL § 626).[14] *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422 (1st Dep't 2014).

In a procedural summersault to escape N.Y. jurisdiction, Defendants claim neither BCL §§ 626/1319 nor NYBL §§ 6025/200 apply to DB. Thus, DB escapes a derivative suit by a N.Y. resident DB stockholder for wrongdoing that largely occurred at DB's U.S. headquarters. But, one of them must apply and since both NYBL § 6025 ***and*** BCL § 626 adopt the same demand-futility pleading test, which one applies makes no difference.

Defendants' statutory dance is wrong. *HSBC* involved a publicly-owned ***foreign bank holding company*** — ***the same as DB*** — and thus was subject to BCL §§ 626/1319. *Bank of America* involved a derivative action for a "foreign (Delaware) corporation":

> The nominal defendant in this action, Bank of America is not a "corporation" as defined under [NYBL § 1001], but rather it is a bank holding company and a separate corporate entity from its bank subsidiaries. As such, the applicable provisions of [NYBL § 6025] do not apply here.

[14] By making BCL § 626 applicable in derivative suits brought on behalf of foreign corporations doing business in N.Y., the N.Y. legislature has expressed a specific interest in applying its own law to determine "the right[s] of stockholders to participate in the management of a corporation through the intervention of the [New York] courts." *Seybold v. Groenink*, 2007 U.S. Dist. LEXIS 16994, at *15 (S.D.N.Y. Mar. 12, 2007); *Stephens v. Nat'l Distillers & Chem. Corp*., 1996 U.S. Dist. LEXIS 6915, at *15 (S.D.N.Y. May 21, 1996) ("The public policy concerns of New York State as embodied in [BCL § 1319] mandate a departure from the 'internal affairs' doctrine.").

> … [BCL § 626] provides shareholders of corporations with the ability to initiate derivative actions in New York, and Section 1319 makes Section 626 applicable to foreign corporations doing business in New York ….
>
> Bank of America is considered a foreign corporation under the [BCL] and, thus, certain provisions of the [BCL] apply here. … Section 1319 … provides a procedural basis that enables the courts in New York to assume jurisdiction of derivative actions involving foreign corporations and to apply the applicable substantive law.

Bank of Am., 2014 N.Y. Misc. LEXIS 6470, at **4–6; *see also Citigroup*, 2014 N.Y. Misc. LEXIS 1418, at *8 (derivative action on behalf of "foreign" Delaware Corporation and bank holding company Citigroup, Inc.; NYBL §§ 6025/7017 "governs such actions"; demand futility required). Whether BCL § 626 or NYBL § 6025/7017 applies does not make a difference — ***one or the other clearly does, and the result is the same***.[15]

Defendants assert that Ms. Rosenfeld lacks standing as a matter of German law based on two requirements they extract from § 148: (1) that a plaintiff be a "registered" shareholder (*i.e.*, be listed in DB's share register) and (2) that a plaintiff own stock valued at €100,000 or more. These, however, are procedural matters within a procedural statute, not substantive, and are not applicable here. Defendants' argument is premised on "the internal affairs doctrine, which provides that ***relationships between a company and its directors and shareholders*** are generally governed by the substantive law of the jurisdiction of incorporation." *Scottish Re*, 30 N.Y.3d at 253.

[15] But even if by some legislative oversight any uncertainty exists, N.Y. common law would fill any statutory gap. "Common law continues even after later codification." *See, e.g.*, *Crane Co. v. Anaconda Co.*, 39 N.Y.2d 14, 19 (1976) (holding that a shareholder's statutory right to inspect the company's books and records is "not exclusive but supplement[s] the common law."). Before the BCL/NYBL were enacted, derivative suits existed at common law. *Greaves v. Gouge*, 69 N.Y. 154 (1877); *Isaac v. Marcus*, 258 N.Y. 257, 265 (1932) (pre-BCL shareholder derivative suit on behalf of a bank applying futility of demand test). The N.Y. common law post-suit futility-of-demand procedures were the same as those adopted by the legislature in enacting the BCL and the NYBL. *Barr v. Wackman*, 36 N.Y.2d 371 (1975) (discussing pre-BCL N.Y. demand futility procedure as "an early rule of equity in shareholder derivative actions" requiring particularized allegations as to why demand would be futile).

Registration involves notifying DB and providing shareholding *and personal* information including, *inter alia*, name, home address and date of birth. This notification, however, does nothing to alter the *relationships* described in *Scottish Re*. German and American shareholders own the same shares with the same rights. *See* https://www.db.com/ir/en/share-information.htm. At issue is only the means of *proof* of ownership, which clearly is a matter of procedure.[16]

Nor is the minimum holding requirement substantive. It does not affect the "relationships between [DB] and its directors and shareholders" — the duties at issue here were not affected by the size of a shareholder's portfolio. The minimum holding requirement, as shown by Goette Exhibit 13, was aimed at preventing abusive litigation. Section 627 of the BCL was aimed at precisely the same thing, *i.e.*, weeding out so-called "strike suits." That the bond procedure in § 627 embodies procedural "gatekeeping" law is beyond dispute. So too is its German counterpart — the minimum holding requirement is indisputably part of GSCA § 148's gatekeeping regime.

Defendants' attempt to import GSCA § 148's €100,000 stock ownership provision as a "substantive" gatekeeper provision lurking in § 148's "Court Procedure" ignores that BCL § 626's companion § 627 contains N.Y.'s equivalent ownership gatekeeper provision. BCL § 627 allows Defendants to request a bond for costs if plaintiff's shares are worth less than $50,000. ***BCL §§ 626/627 are integrated gatekeeping provisions to guard against***

[16] In addition to Ms. Rosenfeld's natural reluctance to provide personal information to DB, there is a pro-German bias in the way DB handles the "registration" issue; a German who acquires DB shares is *automatically* registered with the Deutsche Bank Share Register unless she opts out, while "some shareholders that hold the securities via banks/brokers outside of Germany are not directly registered." *See* https://www.db.com/ir/en/faq.htm. Nevertheless, Ms. Rosenfeld submitted her declaration detailing her share ownership and has taken steps to have her shareholdings included in DB's share register. *See* Baskin Aff. ¶ 10, Ex. H. Thus, the Court need not decide whether this "registered share" requirement is substantive or procedural. Whatever it is, its technical requirements have been fulfilled.

frivolous derivative suits in N.Y. Defendants don't get to cherry-pick one isolated provision in GSCA § 148 to preempt N.Y.'s own procedural gatekeeper provision in BCL §§ 626/627. The N.Y. "gatekeeping" provisions (BCL §§ 626/627) are intended to perform essentially the same function as the German "admission process," and were created for essentially the same reasons, that is, to permit the pursuit of legitimate claims while screening out frivolous or abusive cases.[17] Defendants suffer no prejudice. Under N.Y.'s § 626 procedural rules, ***they could have moved for a bond under § 627***.

II. Plaintiff Has Sufficiently Alleged Demand Futility Under N.Y. Law Because Detailed Factual Allegations of a Decade of Failed Oversight Show That All Supervisors Are "Interested" in the Wrongdoing and Face a Substantial Likelihood of Liability[18] for Egregious Misconduct That Could Not Have Been the Result of Sound Business Judgment

A. Demand Is Excused Because the FAC Details a Decade of Grossly Negligent Oversight by the Supervisors — Permitting a Pattern of Egregious Wrongdoing Centered in DB's N.Y. Headquarters — Resulting in $18 Billion in Penalties Imposed by N.Y. Regulators

The alleged wrongdoing by DB's fiduciaries was egregious. It lasted over a decade, was centered at DB's Wall Street headquarters and was punished by N.Y. regulators/prosecutors. FAC ¶¶ 9–43, 156–255. These ***verified*** allegations control at this pleadings stage, dooming Defendants' arguments based on demand futility.

In 2011–12 DB was reporting profits, paying dividends and had a reputation for

[17] The objectives behind the enactment of GSCA § 148, and in particular its "admission process," were laid out in the draft legislation. *See* Goette Ex. 13. According to the explanation provided with the draft bill, the "Problem and Objective" to which § 148 was directed was that, unless derivative litigation was permitted, "even obviously legitimate claims [were] not often asserted in serious cases." *Id.* at 2. Thus, as set out in the "Solution," "the draft [was] concerned with facilitating the enforcement of claims by a minority," while providing for "a procedure for admission … so that abuses and minority actions are ruled out in cases of minor or medium breaches of duty." *Id.*

[18] On a motion to dismiss, the Court must "liberally construe the complaint … and accept as true the facts alleged in the complaint." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002); *Barr*, 36 N.Y.2d at 375. Plaintiff is accorded "the benefit of every possible favorable inference." *511 W.*, 98 N.Y.2d at 152. The motion "must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *Id.*; *see also Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994).

honesty. Its stock reached $60 a share in 2011 — a $70 billion market capitalization. Now DB is the most sued and prosecuted bank in history paying $18 billion in penalties. It reported a 2019 $6 billion loss — the fourth multi-billion-dollar loss in five years. Its dividend is virtually gone. Most of its culpable executives have fled, ***pocketing over $80 million in*** "***face saving***" ***exit payments — in reality payoffs to secure their silence and protect the Supervisors***. Today a share of DB's stock sells for less than the price of a pack of cigarettes. *Id.* ¶¶ 3–4, 30–33, 43, 248, 254. Its survival is in doubt (*id.* ¶ 5):

> … [***T***]***hanks to*** [***DB's***] ***well-documented pattern of violating laws*** [***it is***] ***an international symbol of greed***, ***recklessness and hubris***. Its rap sheet includes manipulating international currency markets; playing a central role in rigging a crucial benchmark interest rate known as Libor; whisking billions of dollars in and out of Iran, Syria, Myanmar and other countries in violation of sanctions; laundering billions of dollars on behalf of Russian oligarchs, and misleading customers, investors and American, German and British regulators.
>
> ***
>
> ***The Federal Reserve Bank of New York has sharply rebuked Deutsche Bank for failing to address a litany of concerns at its US operations***, ***casting doubt on the German lender's ability to rehabilitate its business in the world's largest and most profitable banking market***. ***It was downgraded and labelled as being in a*** "***troubled condition***." … ***Deutsche's money-laundering and compliance measures continue to suffer from meaningful weaknesses***, ***which had not been satisfactorily addressed by management***.[19]

The Supervisors/Managers permitted and/or engaged in: (1) repeated money laundering and illegal transfers to assist international criminals and evade U.S. anti-terrorism sanctions; (2) the largest worldwide price fix in history and other "cartel conduct"; (3) fraudulent and deceptive conduct in selling billions of worthless mortgage-backed securities to U.S. customers, which DB's executives called "crap," "blow" and a

[19] *Deutsche Bank's US Operations Criticised by New York Fed*, FINANCIAL TIMES, May 13, 2020. FAC ¶ 7.

"Ponzi scheme"; and (4) violating the U.S. Foreign Corrupt Practices Act via bribes to influential Russian and Chinese nationals and Saudi Royals (*id*. ¶¶ 16, 122, 176, 186).

> ***Greed***, ***provincialism***, ***cowardice***, ***unfocused aggression***, ***mania***, ***egoism***, ***immaturity***, ***mendacity***, ***incompetence***, ***weakness***, ***pride***, ***blundering***, ***decadence***, ***arrogance***. ***If you are looking for words that explain the fall of Deutsche Bank***, ***you can choose freely and justifiably from among the above list***. ***All of the above terms were used in interviews with four Deutsche Bank CEOs***.
>
> The collapse of Deutsche Bank is the result of years, decades, of failed leadership, culminating in the complete loss of control of the company by top managers.
>
> When a bank like Deutsche, once an icon of respectability and solidity, transforms into a caricature of "The Wolf of Wall Street," something must have gone wrong and someone must have been responsible.
>
> And there are people who deserve blame: members of senior management and [Supervisory] board members over the course of several years.
>
> Deutsche Bank as we once knew it is dead. Deutsche Bank is broken when compared to that which it once was: a brand, a symbol, a German icon.
>
> The proud institution became a self-serve buffet for a few, who became fantastically rich. And so the work of generations went down the drain. And we are told that no one is to blame.[20]

This collapse occurred while Paul Achleitner, Supervisory Board Chair since 2012, has dominated the Board — ruling with an iron hand. "***Since Mr***. ***Achleitner took over as chairman of Deutsche Bank***, ***the once mighty lender has almost been in constant crisis mode***. ***It endured a maelstrom of misconduct scandals, police raids and eye-watering fines***." *Id*. ¶¶ 28, 29, 32, 47–48, 222–223.

According to N.Y. banking regulators, DB's N.Y. executives engaged in "improper, unsafe, unsound conduct" and "***repeatedly abused the trust of their customers***

[20] *How a Pillar of German Banking Lost its Way. The Story of the Self Destruction of Deutsche Bank*, DER SPIEGEL, Oct. 28, 2016. FAC ¶ 18.

and violated [***N.Y.***] ***State Law over the course of many years***." *Id.* ¶ 23. DB executives also "unlawfully, willfully and knowingly participated in [tax shelter] transactions" to cheat the U.S., conduct DB acknowledged "***was wrong and unlawful***." *Id.* ¶¶ 22–23.

DB's U.S./N.Y. banking subsidiary — alone among large banks — failed U.S. stress tests in 2015, 2016, 2017 and 2018, drawing the designation "troubled/problem bank." *Id.* ¶¶ 8, 22, 187–189, 257. The N.Y. Fed found DB had "serious" "systemic" failings in "controls against money laundering terrorist financing and sanctions." Regulators "lambasted the [DB's] lackadaisical oversight," at its N.Y. operations which "allowed a corrupt group of traders and offshore entities to improperly transfer more than $10 billion out of Russia" — "highly suggestive of financial crime." *Id.* ¶¶ 8, 22, 177. DB's then CEO John Cryan, admitted (*id.* ¶ 25):

> ***These legacy issues have not only cost us a lot of money; they have also cost us dearly in terms of reputation and trust.***
>
> ***
>
> ***Serious errors were made. The conduct did not meet our standards and was completely unacceptable.***

Achleitner has admitted: "***I made mistakes***." *Id.* ¶ 28. CEO Sewing admitted "***many mistakes have been made*** [***by DB***]," ***and the bank has paid*** "***high fines***" ***for these mistakes***." *Id.* ¶ 26. ***He criticized the managers***' "***over expansion*** [***of***] ***the*** [***N.Y.***] ***investment bank***." *Id.* He also admitted DB's accounting and compliance controls are so insufficient that another $13 billion must be spent on them. *Id.* The head compliance officer described DB as the "***most dysfunctional company she ever worked for***," while its IT chief said systems operated by "***trial and error***" — like sending "***airplanes into the sky, watching them crash and then trying to learn from the mistakes***." *Id.* ¶¶ 27, 149–153.

The failure of the Defendants to comply with their duties under the GSCA has resulted in a catastrophe for DB and its owners/shareholders. GSCA §§ 91, 93; FAC

¶¶ 116–117, 16, 24–26, 33. Yet these insiders have lined their own pockets, personally profiting from the criminal wrongdoing. ***DB's officials pocketed $80 billion in bonuses over a decade — more than the Bank reported as profits — during which time*** "***shareholders earned a net $20 billion from owning Deutsche Bank***." FAC ¶ 33.

Today, DB ***remains the subject of criminal, civil and regulatory investigations and suits here in N.Y.*** There is an SDNY criminal investigation involving DB's involvement in the alleged money laundering and other illegal activities of the now deceased sex trafficker Jeffrey Epstein, where DB compliance people detected suspicious transfers and insisted they should be reported to federal officials. They were not. Instead, the whistleblowers were fired. *Id.* ¶¶ 6–8, 142–148. This ***"pattern***" of wrongdoing is unprecedented. *Id.* ¶¶ 12–33, 123–205.

> **1. Laundering Russian Money**[21]
>
> In 2017, Deutsche Bank was fined a total of $630 million (€553.5 million) by U.S. and UK financial authorities over accusations of having laundered money out of Russia.
>
> Deutsche Bank's anti-money laundering control mechanisms failed to spot sham trades with a value of up to $10 billion ….
>
> "***These flaws allowed a corrupt group of bank traders and offshore entities to improperly and covertly transfer more than $10 billion out of Russia***."
>
> **2. Libor Interest Rate Scam**
>
> Deutsche Bank had been fined a record $2.5 billion dollars by authorities for its role in an interest rate scam.
>
> [***DB***] ***pleaded guilty to counts of criminal wire fraud***. ***Authorities said at least 29*** [***DB***] ***employees were involved in the scam***, ***while US regulators***

[21] Giulia Saudelli, *Deutsche Bank's 5 Biggest Scandals*, DEUTSCHE WELLE, Dec. 29, 2018. FAC ¶ 41.

> ***ordered the bank to fire seven employees, including directors and vice-presidents***.
>
> "***This case stands out for the seriousness and duration of the breaches by Deutsche Bank — something reflected in the size of today's fine***."
>
> **3. Violation of US Economic Sanctions**
>
> [DB] ***US sanctions against a number of countries, including Iran, Syria, Libya and Sudan using "non-transparent methods and practices" to disguise its actions. These transactions were not allowed under US laws that banned business transactions with countries accused of financing terrorism***.
>
> [***DB***] ***employees had devised strategies to get around the sanctions and carry out transactions worth $10.9 billion. The bank agreed to pay $258 million in settlements***.
>
> **4. Sale of Toxic Securities Leading Up to the Financial Crisis**
>
> ***The bank signed a $7.2 billion settlement with the US Department of Justice in 2017***, [for selling] investors bad mortgage-backed securities. US Attorney General Loretta Lynch said at the time "Deutsche Bank did not merely mislead investors: it contributed to an international financial crisis."
>
> Shareholders directed special wrath at Achleitner "***I have had enough of the way you destroy our wealth***[.]" … "***You're by far the worst chairman the bank has ever had***."

B. Demand Is Excused Due to the Egregiousness of the Pattern of Misconduct, the Blatant Violations of U.S./N.Y. Laws and DB's Internal Conduct/Compliance Codes and Quashing of Whistleblowers and Internal Investigations into the Decade of Wrongdoing Under Achleitner's Domination of the Board

After arguing *ad nauseum* that no provision of N.Y. law can be applied here, Defendants seek refuge in N.Y.'s demand futility jurisprudence. But it provides them no escape. Under N.Y. law, demand is futile when a ***majority*** of directors are incapable of making an impartial decision as to whether to bring suit. *Bansbach v. Zinn*, 1 N.Y.3d 1 (2003). A plaintiff may satisfy this standard by alleging that: (1) the directors are ***"interested*** in the challenged transaction," (2) they "***did not fully inform themselves*** about

the challenged transaction to the extent reasonably appropriate under the circumstances," or (3) "the challenged transaction was ***so egregious on its face that it could not have been the product of sound business judgment***." *Marx v. Akers*, 88 N.Y.2d 189, 200–01 (1996).

Like *HSBC*, where demand was found futile, this suit does not involve, as many derivative suits do, a single "transaction" or event — *e.g.*, a merger or asset sale, where outside professionals have provided protective opinions covering the Supervisors' actions. Here, as in *HSBC*, the FAC alleges a ***decade-long pattern of oversight failures***. *HSBC* stressed the 13-years-long duration and seriousness of the wrongdoing that board permitted and "payment in excess of $1.5 billion in fines and penalties to authorities" to dispose of the demand futility argument there. *See* 166 A.D.3d at 758–59. Here the criminal and other wrongdoing permitted by the DB Board is ***far worse***, ***more extensive***, ***lasted as long and resulted in over $18 billion in fines***. *See*, *e.g.*, FAC ¶ 4.

While Plaintiff need only meet one futility prong, Ms. Rosenfeld's FAC satisfies ***all three***. The FAC names ***all*** the Supervisors as Defendants (¶ 220) and pleads: (1) they are all "***interested***" because they are "controlled" by primary wrongdoer Achleitner who as Chair and *de facto* CEO orchestrated the wrongdoing and personally profited from it, as did each of them;[22] (2) they did not adequately inform themselves concerning the long "pattern" of wrongdoing in violation of U.S./N.Y. laws ***and*** DB's internal compliance codes; and (3) because the decade of misconduct that resulted in repeated pleas and $18 billion in penalties was ***egregious it could not have been the product of sound business***

[22] The DB Supervisors collectively pocketed between $5–6 million per year during the decade of wrongdoing — some $50–60 million overall — amounts justified by inflated profits DB reported due to the misconduct. When regulators or prosecutors came after DB, to satisfy them (while evading any personal accountability), those ***Defendants used the corporate till to pay out billions in fines to spare the actual wrongdoers inside DB any accountability***. ***This was an abuse of the Supervisors' control of DB, allowing them and Achleitner to profit personally while damaging DB***. FAC ¶¶ 33, 248–254.

judgment. *Marx*, 88 N.Y.2d at 200–01; *Barr*, 36 N.Y.2d at 381.

HSBC found demand futility because plaintiff's allegations of board knowledge were based upon a company policy requiring compliance violations be reported to the board. *See* 166 A.D.3d at 758. Emphasizing the "illegal purpose, magnitude, and duration of the alleged wrongdoing," the court in *HSBC* found that "the transactions should have come to the attention of senior management and the board of directors." *Id.* at 759.

The same is true here. The Supervisors told DB's shareholders that because of "an effective control and monitoring system" which "***requires a stringent compliance system***" ***with*** "***strict rules***" ***to assure*** "***adherence to laws***, [***and***] ***regulations***," ***the Supervisors*** "***have established sophisticated processes and structures***" ***including a*** "***red flag***" ***monitoring system which*** "***reports all violations of compliance requirements***." "***In money laundering***, ***corruption or financial crime the compliance management system of Deutsche Bank is geared to strict conformity with laws***." FAC ¶¶ 9–10, 19–20, 119. If such a "red flag" system existed, then the Supervisors must have known of and yet permitted the wrongdoing to occur. *Id.*[23]

Ms. Rosenfeld's verified complaint goes well beyond *HSBC* in pleading demand futility, by also alleging the Supervisors were "interested" in the wrongdoing

[23] Courts consistently hold that allegations that directors failed to take reasonable steps to remediate known compliance failures are sufficient to plead bad-faith conduct, excusing demand. *See, e.g.*, *In re Pfizer Inc. S'holder Derivative Litig.*, 722 F. Supp. 2d 453, 461–62 (S.D.N.Y. 2010) (Pervasiveness and magnitude of misconduct, "in the face of the board's express formal undertakings to directly monitor and prevent such misconduct," support an "inference of deliberate disregard by each and every member of the board … entirely reasonable."); *In re Veeco Instruments, Inc. Sec. Litig.*, 434 F. Supp. 2d 267, 278 (S.D.N.Y. 2006) (Complaint alleged that "the director-Committee members conscientiously permitted a known violation of law by the corporation to occur," which constitutes bad faith and excuses demand.); *In re Abbott Labs. Derivative S'holders Litig.*, 325 F.3d 795, 809 (7th Cir. 2003) (Duration of non-compliance supports that there was a "sustained and systematic failure to exercise oversight," "intentional in that the directors knew of the violations of law, [but] took no steps in an effort to prevent or remedy the situation … for such an inordinate amount of time result[ing] in substantial corporate losses, establishing a lack of good faith."). In light of the detailed allegations of Defendants' long course of misconduct, the Court should reject out of hand their arguments based on purported failure to state a claim under CPLR § 3013 (*see* Defs.' Br. at 32–33).

("transaction") because they were ***controlled by the prime wrongdoer***, Achleitner. *Marx*, 88 N.Y.2d at 200 (directors may be self-interested in the challenged transaction — either by virtue of "personal benefits" ***or*** "loss of independence" ***if controlled by a self-interested director***). Achleitner hand picks the members of the all-powerful "Chairman Committee" which runs DB, determines who gets on the Integrity Committee, nominated to or stays on the Supervisory Board, or who gets hired/fired. He is the "*de facto*" CEO of DB. FAC ¶¶ 28–29, 32, 47–48, 222–223.

In 2016, Georg Thoma, a DB Supervisor and Chair of the Board's Integrity Committee, undertook ***an investigation to determine if Achleitner and other Supervisors/Managers could be held responsible for the damage to DB***. *Id.* ¶¶ 232–247. ***Achleitner and the Supervisors quashed this investigation as too*** "***vigorous***," ***fired the CEO who had approved it, and kicked Thoma off the Board*** (*id*. ¶ 236):

> [Thoma] was left isolated ***after pushing to investigate Chairman Paul Achleitner and mounting intensive inquiries into Deutsche Bank executives***. … ***Deputy Chairman Alfred Herling criticized*** [***Thoma***] ***for being*** "***overzealous***" ***and spending too much in probing potential wrongdoing***.

With Thoma dispatched, Achleitner got a compliant DB Supervisor, Louise Parent (a N.Y. "professional corporate director" affiliated with Cleary Gottlieb), and a ***former Cleary Gottlieb partner***, ***Christof von Dryander***, ***who was DB's General Counsel***, ***to*** conduct a new "whitewash" investigation. *Id*. ¶¶ 35–37, 76. Parent had been a Supervisor and ***von Dryander a top legal officer of DB during the wrongdoing***. *Id.* They were conflicted and could not properly investigate conduct ***they***, ***or Achleitner, were involved in***. *Id.* ¶¶ 216–219, 240–246. The results of this "investigation" were ***never released***. *Id*. ¶ 246. DB owners/stockholders were simply told by DB's Supervisors that they "decided not to hold the Management Board members personally liable [because] there is

insufficient factual and legal basis for damage claims." *Id.* ¶¶ 232–247. Later DB hired Cerberus Capital, which ***recommended that Achleitner be ousted***: "***Cerberus lost faith in Deutsche Bank's chairman Paul Achleitner and is pushing for him to be replaced***." *Id*. ¶ 230. The Board terminated Cerberus. *Id*. ¶¶ 228–231.

DB's Supervisors have a history of obstructing government investigations and squashing whistleblowers (*id*. ¶¶ 120, 134–148), a further indication they cannot objectively weigh whether to bring — or vigorously prosecute — these claims against themselves (*id*. ¶ 155):

> [R]egulators blasted the bank for misplacing or destroying evidence and not cooperating sufficiently with investigators.
>
> ***Deutsche is getting its comeuppance for having avoided and arrogantly treated the regulators***. ***British and American regulators seem particularly eager to go after the haughty bank*** … ***and partly justified the high penalties they levied*** … ***by referring to the bank's insufficient cooperation***.
>
> The FCA had recently increased a penalty against Deutsche Bank for lack of cooperation in the investigation by 100.8 million to a total of 226.8 million. ***The US authorities which are demanding a further penalty from Deutsche Bank, have increased it due to a lack of cooperation***.

DB's top officials' hostility toward whistleblowers violated its Code of Conduct which protects them. *Id.* ¶¶ 11, 120, 134. One stated:

> "***There was cultural criminality***. … ***Deutsche Bank was structurally designed by management to allow corrupt individuals to commit fraud***. … ***I thought I was joining a winner, backed by a German notion of disciplined organization***. … ***Within months I was disillusioned***."
>
> "***I blew the whistle because I gradually came to realize that this bank was only semi-legal***"…. ***This was*** [***one of***] ***the biggest banks in the world and I didn't want to be part of it***."[24]

[24] Patrick Jenkins & Laura Noonan, *How Deutsche Bank's High-Stakes Gamble Went Wrong*, FINANCIAL TIMES, Nov. 8, 2017. *See* FAC ¶¶ 134–148.

Id. ¶ 136; *see also id.* ¶¶ 134–148, 224–227.

The FAC's allegations of Achleitner's control of the Board, his and the other Supervisors' personal profiting from the wrongdoing and their obstruction of government inquiries/investigations, retaliation against whistleblowers and quashing of the Thoma investigation, followed by the Parent/von Dryander whitewash, are additional reasons why the DB Board could never independently/objectively weigh whether or not to sue Achleitner, the departed managers they paid off to be silent, or themselves.

III. Ms. Rosenfeld Is Presumptively Entitled to Sue in Her Home Court in N.Y., Where DB's U.S. Headquarters Are and Where Most of the Wrongdoing Occurred; Defendants Have Not Met Their "Heavy Burden" of Showing "Inconvenience and Oppression" to Them of Defending a Case in a Venue Where DB Has Massive Operations and Billions of Dollars in Assets, Has Sued and Been Sued Countless Times, and Has Even Held Board Meetings

Because *HSBC* rejected a similar FNC motion, it dictates the FNC result here. There, in a derivative suit filed by an ***English resident***[25] involving an ***English incorporated bank headquartered in London***, but ***like DB***, ***having a big N.Y. operation where the wrongdoing occurred***, the Court rejected the FNC motion. *HSBC*, 166 A.D.3d at 759. By contrast, Ms. Rosenfeld is a New Yorker. Defendants' FNC arguments ignore the "deferential presumption" due to her choice of N.Y. as the forum ***as well as*** the FAC's allegations of wrongdoing at DB's U.S./N.Y. headquarters in N.Y. where DB paid $18 billion to authorities, *i.e.*, the N.Y. "nexus."

Ms. Rosenfeld's choice of a N.Y. forum can be overcome only by rebutting her "***presumptive entitlement***" to a N.Y. venue. This requires an ***evidentiary showing*** by Defendants, *i.e.*, a "***heavy burden***," that the FNC factors "***strongly favor***" the other forum and in the "***interests of justice*** the action should be heard" there. *Elmaliach v. Bank of*

[25] Baskin Aff. ¶ 7 & Ex. E at 2 ("Plaintiff Michael Mason-Mahon is a British citizen[.]").

China, Ltd., 110 A.D.3d 192, 208 (1st Dep't 2013); *Laurenzano v. Goldman*, 96 A.D.2d 852, 853 (2d Dep't 1983); *Broida v. Bancroft*, 103 A.D.2d 88, 92 (2d Dep't 1984).

The N.Y. contacts here are overwhelming. They not only support jurisdiction[26] but because those N.Y. contacts are inextricably intertwined with the underlying wrongdoing that DB's purported "***red flag***" ***compliance systems were to detect and the Supervisors were bound to prevent***, they also create an insuperable barrier to Defendants satisfying their "heavy burden" to show ***substantial inconvenience***, ***amounting to oppression*** to them and the lack of a N.Y. "***nexus***" necessary to deny a N.Y. resident his/her choice of a N.Y. forum, especially where the alternative forum is a foreign country.

Defendants do not seek dismissal in favor of a more convenient forum in another U.S. state, like Delaware. Here ***dismissal*** is the ***end of the suit*** because the "alternative" forum is a foreign country, where the ***pre-suit*** "***Court Procedures***" create impossible barriers, exposing Ms. Rosenfeld to emotional distress and mandatory fee-shifting, in a legal system where she cannot have a jury trial or seek punitive damages as is her right in N.Y. FAC ¶¶ 284–286.[27] There is no alternative forum available to Ms. Rosenfeld.

Given N.Y.'s centrality to international finance and commerce, its courts frequently adjudicate suits involving "foreign" laws and "foreign" corporations, ***including stockholder derivative suits***, ***where FNC motions are tested by the same rules as other cases and the application of foreign laws to the disputes do not dictate dismissal***.

[26] While Defendants "reserve their rights" on personal jurisdiction ***they do not dispute it now*** for purposes of their FNC motion. ***Personal jurisdiction must be assumed for Defendants' forum non conveniens argument motion***. ***In any event, it is pleaded in detail in the FAC*** ¶¶ 99–101, 256–288***.*** DB seems too clever by half in disputing jurisdiction over DB. *See* Defs.' Br. at 19–22. Are they seriously contesting jurisdiction over DB? If so, it ignores the facts and DB's general appearance.

[27] *Fedoryszyn v. Weiss*, 62 Misc. 2d 889 (Sup. Ct. Nassau Cnty. 1970), adopted the U.S. Supreme Court's reasoning in *Ross v. Bernnard*, 396 U.S. 531 (1970), and held that the nominal defendant corporation is entitled to a jury trial so long as its claims (despite having been brought derivatively — in an action in equity) demand a money judgment and are thus legal in nature.

Defendants seeking to deny plaintiff a N.Y. forum bear a "heavy burden" ***even if the plaintiff is not a N.Y. resident, and even if the substantive law of the alternative forum applies***, and an insurmountable one where the plaintiff is a New Yorker.

In *Elmaliach*, 110 A.D.3d at 208–09, Israeli citizens/residents sued a foreign bank that facilitated a terrorist attack. While the Court applied substantive Israeli law, it denied an FNC dismissal.

> The movant seeking dismissal has a "***heavy burden***" ***of establishing that New York is an inconvenient forum and that a substantial nexus between New York and the action is lacking***.
>
> ***
>
> The factors in weighing such a motion to dismiss include the burden on New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transaction at issue in the litigation, with no one factor controlling … the location of potential witnesses and documents and the potential applicability of foreign law. "***Unless the balance is strongly in favor of the defendant***; ***the plaintiff's choice of forum should rarely be disturbed***" ***even where the plaintiff is not a resident of New York***.
>
> ***
>
> "That another forum may have a substantial interest in adjudicating an action is but one factor to be weighed" in deciding a motion to dismiss based on *forum non conveniens*. Although we hold that New York's interest is not sufficient to require the application of ***New York law herein***, ***nonetheless New York has a sufficient interest and nexus with the claims***, ***because New York banking facilities were allegedly used*** ….

See also Banco Ambrosiano S.p.A. v. Artoc Bank & Trust, Ltd., 62 N.Y.2d 65, 74 (1984) (Defendants' "heavy burden" on FNC motion not satisfied in suit by Italian Bank against Bahamian bank with foreign law to apply.).

Where, as here, the plaintiff is a New Yorker, her selection of a N.Y. forum is entitled to a ***deferential presumption of entitlement***. In *Laurenzano*, 96 A.D.2d at 853, a N.Y. resident *shareholder* sued derivatively for a Delaware corporation headquartered in Florida. The FNC motion was denied (*id.*):

> Appellants [urge] that as Delaware law will apply, Delaware (or Florida) is more convenient forum.
>
> We disagree. Although the New York residence of a shareholder in a derivative action should not be deemed conclusive to establish New York as an appropriate forum … ***the burden of proof is on the party seeking to invoke the doctrine of forum non conveniens***…. ***The balance of factors*** "***must be very strongly in favor of the defendant***, ***before the plaintiff's choice of forum should be disturbed***[.]"

In *Broida*, 103 A.D.2d at 91–92, a N.Y. plaintiff sued derivatively for a Delaware corporation, which had business operations in N.Y. and was a "frequent litigant" here:

> "The vague principle that courts will not interfere with the internal affairs of a corporation whose foreignness is at best a metaphysical concept, must fall before the practical necessities of the modern business world." … We therefore hold that a suit which concerns the internal affairs of a foreign corporation should be entertained ***unless the same factors*** that would lead to dismissal under *forum non conveniens* principles suggest that New York is an inconvenient forum and that litigation in another forum would better accord with the legitimate interests of the litigants and the public[.]
>
> ***
>
> ***Plaintiffs***, ***as*** [***N.Y.***] ***residents***, ***are presumptively entitled to utilize their judicial system for dispute resolution***. … ***In fact, New York has a special responsibility to protect its citizens from questionable corporate acts when a corporation***, ***though having a foreign charter***, ***has substantial contacts with this State***.

See also Thor Gallery at S. DeKalb, LLC v. Reliance Mediaworks, 131 A.D.3d 431, 432 (1st Dep't 2015) (residence of a plaintiff ***held to generally be the most significant factor***). This presumption is entitled to even more weight when the alternative forum is thousands of miles away.

DB has a substantial presence in N.Y. Defendants DB and DB USA are "foreign corporations" and/or a "foreign banking corporation" within BCL §§ 626/1319 and/or NYBL § 200/6025. DB is registered to do business in N.Y. as are 20-plus of its subsidiaries. FAC ¶¶ 45–46. ***The N.Y. branch of DB*** is licensed by the N.Y. Fed and NYSDFS to conduct banking business and is required to maintain and pledge millions of

eligible high-quality assets with N.Y. banks. *Id.* ¶¶ 45, 257–261.[28] ***The DB Supervisory Board has even held ten meetings in the U.S., eight here in NYC.***[29]

DB owns billions in assets located in N.Y., including office towers at 60 Wall Street, and 130 Liberty Street. It has retail offices throughout N.Y., and over 9,000 U.S. employees generating $5 billion in annual revenues. DB's stock and other securities are listed and traded on the NYSE, 25% of DB's common shareholders are in the U.S., and it has sold millions of shares of stock to N.Y. residents. *Id.* ¶¶ 45, 256–264, 278–279.[30] Any tortious conduct of Defendants that took place in Germany was targeted at N.Y. and N.Y. residents, investors and customers, as N.Y. was one of the most important markets in the world to DB and the center of its U.S. operations. *Id*. at ¶ 262.

DB is responsible for the conduct of its N.Y. employees. DB admitted ***its*** "[***U.S.***] ***headquarters*** [***are***] ***located in New York, New York***," and it "admits, accepts, and acknowledges ***that it is responsible under*** [***U.S.***] ***law for the acts of its officers, directors, employees, and agents*** [***and***] ***due to this misconduct, DB, including the DB branches or agencies in the*** [***U.S.***], ***have been exposed to substantial financial risk, and have suffered actual financial loss***." *Id.* ¶¶ 271–272.

The bulk of the alleged wrongdoing detailed in the FAC occurred here, centered in the "***old***," ***corrupt Bankers Trust operation at 60 Wall Street***. Most of the $18 billion

[28] During the great financial crisis DB sought and received $78 billion in short-term loans from the N.Y. Fed to help DB USA stay liquid and DB to survive. FAC ¶ 281.

[29] The Affirmation of Achim Dahinten, a DB functionary, his other claims about who lives where is hearsay and should be disregarded as to those items.

[30] DB is a hierarchical enterprise, subject to the control of its Supervisors, who set, implement and oversee the enforcement of corporate-wide conduct policies. These codes were to ensure compliance with N.Y./U.S. laws. The failure to enforce these codes, which caused ***the damage to DB*** and the waste and loss of its assets, occurred principally in N.Y. FAC ¶¶ 45, 117–122, 267–270. *Rocha Toussier Y. Asociados S.C. v. Rivero*, 91 A.D.2d 137 (1st Dep't 1983) (Derivative suit for Mexican corporation alleging ***the mismanagement and waste of assets, i.e., the damage, occurred primarily in N.Y.***).

in penalties has been paid to N.Y. authorities, and the ongoing investigations of wrongdoing involving Epstein are here. FAC ¶¶ 6–7, 12, 123–133, 282.

In *Broida*, the Delaware corporation sued for derivatively was a "***frequent***" N.Y. litigant on the defense side, and it had ***once*** before "urged that [N.Y.] is an appropriate forum for corporate litigation in another case," the court found that the corporation "***ill behooves*** [***it***] ***to now urge the contrary***." 103 A.D.2d at 92–93. DB has certainly been a frequent N.Y. litigant. It has been subject to dozens of regulatory, criminal prosecutions, and private suits in N.Y. (FAC ¶¶ 274–277):

- N.Y. federal courts include: the 2017 $7.2 billion settlement with the U.S. DOJ in EDNY and the $203 million May 2012 reckless lending settlement; and the 2010 $550 million tax shelter fraud settlements with the U.S. DOJ in the SDNY;
- NYDFS suits include: the 2015 $258 million payment for sanction transfer violations; the 2018 $205 million payment for unlawful foreign exchange activities, the 2015 $2.5 billion payment to NYDFS for LIBOR price fixing; and the 2017 $425 million payment for the Russian mirror-trading scheme, ***all with Consent Orders***; and
- five private suits in the SDNY for violations of the U.S. securities laws.[31]

Even more important, DB, the corporate parent, has repeatedly sued — as plaintiff — in N.Y. state and federal courts — at least 33 times in the past 15 years. Baskin Aff. ¶ 8. ***DB has sued*** "***foreign***," ***e.g., Mexican, Cayman Islands, Delaware and New Jersey corporations*** (***including banks***), ***exploiting the benefits of the very civil court justice system they claim is too inconvenient for them to litigate in***. *Id.* In these cases, DB alleged venue was proper in N.Y. and in one case alleged "***Deutsche Bank is a citizen of New York,"*** to create diversity jurisdiction in the Southern District of New York. *Id.*

[31] In July 2020, DB was sued in a securities class action in the District of New Jersey, *Karimi v. Deutsche Bank AG*, No. 20-cv-8978, alleging some of the misconduct alleged here. Baskin Aff. ¶ 6.

Despite bearing the burden of proof on the FNC issue, not a single Supervisor has submitted a declaration detailing any personal hardship or inconvenience. That's because there isn't any. Any claims of hardship by these titans of international finance are crocodile tears. They are covered by huge D&O policies which will pay the fees and expenses of their defense and indemnify them. FAC ¶¶ 217–219. None of them will ever personally appear in Court here. Their depositions will be taken in Germany.

Regardless of where they now live, all the Supervisors made numerous trips to N.Y. — often in DB's private jets — as part of their failed oversight of the U.S. headquarters operation, ***including at least 8 Board meetings in NYC***. They can spend a million dollars to fly 20 Board members to NYC to wine and dine, but it's too inconvenient to defend this case here, where an insurance company is going to pay for their fees and expenses.[32]

While Defendants try to play a numbers game based on "residences," the location of defendants is just one factor of many and here they ignore the FAC's allegations of U.S. citizenship and N.Y. residence and substantial N.Y. ***connections of several defendants and other important actors***. First of all, DB and DB USA (DB's Wall Street-based banking subsidiary) are defendants. FAC ¶ 45. In addition, several individual defendants have substantial N.Y. contacts: (1) ***Jain***, DB CEO who ran DB's N.Y. operations, holds a "green card" and lives in a $7.2 million condo in N.Y. (*id*. ¶ 51); (2) Former CEOs ***Ackerman*** and ***Cryan*** have homes in NYC and Maryland respectively (*id*. ¶¶ 49, 53); (3) ***Hammonds*** (DB USA's operations), ***Ritchott*** (DB COO) and ***Riley*** (DB USA operations) are U.S. citizens living in the District of Columbia, N.Y. and Florida respectively (*id.* ¶¶ 62, 55, 64); (4)

[32] Defendants' claim that any judgment will not be enforceable in Germany is irrelevant. Many individual defendants live in the U.S. to collect from. All the individual defendants are insured under a multi-hundred-million-dollar D&O policy to be relied upon stateside to pay any judgment. FAC ¶ 217.

Krause (DB CFO) lives in California (*id.* ¶ 58); (5) DB Supervisors ***Dublon***, ***Thrain***, ***Clark*** and ***Eschelbeck*** are U.S. citizens living in NYC (*id*. ¶¶ 94, 71, 82, 84) while Supervisor ***Trogni*** lives in Connecticut (*id*. ¶ 68); (6) Supervisor ***Parent*** is a N.Y. resident U.S. citizen (*id*. ¶ 76); and (7) DB General Counsel ***von Dryander*** has substantial longstanding N.Y. contacts (*id*. ¶¶ 77–80).

These ***verified*** allegations show that many Supervisors and Managers live or work in NYC or elsewhere in the U.S. There is no perfect forum — no one country where everybody lives and/or works. Nor should there be since this case involves an international bank with operations and shareholders worldwide. But N.Y. is clearly a permissible forum and Defendants have not carried their "heavy burden" of showing lack of N.Y. nexus or displaced the "deferential presumption" due Ms. Rosenfeld's choice of N.Y. FNC is a doctrine of discretion — a weighing of all relevant factors, a center of gravity approach — where the plaintiff lives, the wrongdoing that occurred, what its impact was, the damage that occurred and where witnesses and documentary proof are located. ***In this case***, ***that is N.Y. — where DB has its U.S. headquarters***, ***and where Ms. Rosenfeld lives and sued***.

Special circumstances here give extra weight to the presumption that Ms. Rosenfeld's choice of a N.Y. forum be respected. In *Guidi v. InterContinental Hotels Corp.*, 224 F.3d 142, 146–147 (2d Cir. 2000), a U.S. citizen ***non-N.Y. resident*** widow whose husband had been shot to death in a terrorist attack in a hotel in Egypt brought suit in SDNY. Nothing in the case happened in the U.S. European victims sued in Egypt. The district court said the U.S. plaintiff had to sue in Egypt. Citing the U.S. Supreme Court's decisions in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. (Am.) Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947), Judge Oakes reversed:

> *Gilbert* acknowledged that "***the plaintiff's choice of forum should rarely be disturbed***," "***unless the balance*** [***of factors***] ***is strongly in favor of the defendant***." *Koster*, which involved a plaintiff who had chosen to sue in his home forum, more explicitly stated ***there is good reason why it should be tried in the plaintiff's home forum if that has been his choice***. He should not be deprived of the presumed advantages of his home jurisdiction except upon a clear showing of facts … [and] dismiss a case only "***when trial in the chosen forum would*** '***establish oppressiveness and vexation to a defendant out of all proportion to plaintiff's convenience***.'" Although a citizen's choice of forum is not dispositive for the purposes of forum non conveniens a ***plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum***.
>
> ***Plaintiffs are ordinary American citizens for whom litigating in Egypt presents an obvious and significant inconvenience, especially considering their adverse experience with that country to date***.
>
> [***We***] ***can see no reason to make an exception to the presumption*** that Plaintiffs' decision to bring their suit in New York rather than in a foreign country should not be disturbed.[33]

Judge Oakes noted: "the emotional burden on Plaintiffs returning to the country where they or their loves ones were shot in an act of religious terrorism," in honoring plaintiffs' choice of their N.Y. home forum. *Id*. at 145. Ms. Rosenfeld ***is a N.Y. resident and descendent of Holocaust victims and survivors***.[34] DB actively aided the Nazi state in perpetrating the Holocaust. FAC ¶ 46. Absent a compelling reason, Ms. Rosenfeld should not be required to seek permission to sue DB and its Supervisors/Managers in Germany.[35]

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[33] *See also Broukhim v. Hay*, 122 A.D.2d 9 (2d Dep't 1986) (finding that Iran is not an available forum to Iranian citizens of Jewish faith suing in N.Y. over loans to Iranians made in Iran).

[34] "I was born in Israel in 1960 to parents who survived the horrors of the Holocaust …. They fled the conflagration of Europe after World War II. I have lived in New York City since arriving on the shores of the United States in 1966[.]" Rosenfeld Decl. ¶ 2.

[35] As to the statute of limitations defense Defendants throw in as an afterthought, this is a factual matter and thus cannot be resolved at the pleadings stage. *See Fed. Hous. Fin. Agency v. Morgan Stanley ABS Capital I Inc*., 59 Misc. 3d 754, 781 (Sup. Ct. N.Y. Cnty. 2018) (rejecting a limitations defense based on N.Y.'s "liberal pleading standards"). Moreover, the FAC pleads substantial wrongdoing ***within the shortest possible applicable*** limitations periods (six years under the GSCA or five years under N.Y. law). FAC ¶¶ 161–205 (covering 2014–20). The FAC also pleads a continuing course of misconduct involving the same actors over the past decade, during which DB has been under the control of Achleitner and his fellow wrongdoing directors which would toll or prevent the running of the statute of limitations. *Id*. ¶ 105; *see also Airco Alloys Div., Airco, Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 80 (4th Dep't 1980).

The DB Supervisors and Managers have no entitlement to oversee and operate what they have allowed to become an international criminal enterprise with massive operations in N.Y. where DB's securities are traded on the NYSE, violating N.Y. and U.S. laws while inflicting damage on N.Y. resident victims and DB owners/stockholders here — pocketing millions for themselves, and then thumbing their noses at N.Y.'s courts. Their demand that Ms. Rosenfeld go to Frankfurt, Germany, DB's hometown, where its top officials are powerful, to petition for permission to sue them on pain of paying their fees if she fails, has neither legal nor factual merit. It lacks any sense of proportionality or fairness as well.

CONCLUSION

For all the foregoing reasons, the Court should deny Defendants' motion and allow Plaintiff's meritorious derivative claims to proceed in New York.

Dated: New York, New York
October 23, 2020

Respectfully submitted,

s/ Clifford S. Robert
Clifford S. Robert

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Certification Pursuant to Commercial Division Rule 17

The undersigned certifies that the foregoing memorandum complies with the 35-page limitation (excluding the caption, table of contents, table of authorities and signature block) provided by the parties' agreement and as permitted by the Court (Dkt. No. 32). Executed on October 23, 2020, in New York, New York.

s/ Clifford S. Robert
Clifford S. Robert

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZAHAVA ROSENFELD, derivatively as a shareholder of Deutsche Bank AG and on behalf of DEUTSCHE BANK AG, Plaintiff, vs. PAUL ACHLEITNER *et al*., Defendants, - and - DEUTSCHE BANK AG, Nominal Defendant.	Index No. 651578/2020

Affirmation of Prof. Dr. Peter Mankowski
in Support of Plaintiff's Opposition to Defendants' Motion
to Dismiss the Verified Amended Shareholder Derivative Complaint

I, Prof. Dr. Peter Mankowski, state the following under the penalties of perjury under the laws of New York:

IDENTIFICATION AND CREDENTIALS

1. I was born on 11 October 1966 in Hamburg, Germany. I studied law at Hamburg from 1985 to 1990 with my First State Exam at Hamburg in 1990. After my *Rechtsreferendariat* (mandatory legal apprenticeship) from 1991–1994 in Hamburg and London, I passed my Second State Exam 1994 in Hamburg. I obtained my Dr. iur. 1994 in Hamburg with the highest degree *summa cum laude*. From 1994 to 2000 I was Wissenschaftlicher Assistent (Assistant Professor) with the Institute for Private International and Comparative Law of the University of Osnabrück, Germany. My *Habilitation* took place in the year 2000 in Osnabrück.

2. After an Interim Professorship 2000/2001 in Bielefeld I was appointed as Full Professor holding the chair for private law, private international law and comparative law at the University of Hamburg on April 1, 2001 which post I have held ever since. I have been Director of the Seminar for Private International Law and Comparative Law of the University of Hamburg since 2003 and Managing Director of the Seminar for Private Law of the University of Hamburg from 2008 to 2012 plus from 2016 to 2020.

3. I won the Kurt-Hartwig-Siemers Award of the Hamburgische Wissenschaftliche Stiftung (Hamburgian Scientific Foundation) in 1996, the Heinz-Maier-Leibnitz Award of the Deutsche Forschungsgemeinschaft (German Research Society) and the Bundesministerium für Forschung (Federal Ministry for Scientific Research) in 1997, and the Berenberg Award for Scientific Language in 2018.

4. My academic record comprises some 1,300 publications, with a special attention to, and a particular focus on, matters of private international law, international

procedural law and private law respectively.

5. My book publications include: Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (Tübingen 1995); Beseitigungsrechte (Tübingen 2003); Staudinger, BGB, Internationales Ehe- und Unterhaltsrecht (Berlin 1996, revised eds. Berlin 2003, 2011 and 2016); *von Bar/Mankowski*, Internationales Privatrecht I: Allgemeine Lehren (2nd ed. München 2003); *Magnus/Mankowski* (eds.), Brussels I Regulation (2nd ed. München 2012); *Magnus/Mankowski* (eds.), Brussels IIbis Regulation (2nd ed. Köln 2016); *Magnus/Mankowski* (eds.), Brussels Ibis Regulation (Köln 2016); Rechtskultur (Tübingen 2016); *Magnus/Mankowski* (eds.), Rome I Regulation (Köln 2017); *Mankowski* (ed.), Commercial Law (Baden-Baden/Oxford/München 2019); *Magnus/Mankowski* (eds.), Rome II Regulation (Köln 2019); *von Bar/Mankowski*, Internationales Privatrecht II: Besonderer Teil (2nd ed. München 2019); and *Mankowski* (ed.), Research Handbook on the Brussels Ibis Regulation (Cheltenham 2020).

6. I am a substantial contributor to a number of leading commentaries on European or German Acts regulating private international law and international procedural law in particular, including *Rauscher* (ed.), Europäisches Zivilprozessrecht/Europäisches Internationales Privatrecht, vol. I: Brüssel Ia-VO (4th ed. Köln 2015; 5th ed. forthcoming Köln 2020/21).

7. I have been asked by counsel for plaintiff Zahava Rosenfeld to provide analysis and opinions regarding certain issues of German and comparative law, and to review and comment on the Affirmation prepared by Prof. Dr. Wulf Goette and filed by the defendants.

SUMMARY

8. My principal opinions are as follows:

(1) The "admission procedure" of Section 148 of the German Stock Corporation Act ("GSCA") is procedural in nature.

(2) Art. 24 pt. 2 Brussels I Regulation Recast does ***not*** provide for or create exclusive jurisdiction in the sense that only a German court may adjudicate a shareholder derivative claim seeking damages in favor of a German stock corporation, and the statute may not be interpreted to provide for exclusive jurisdiction in this sense.

(3) GSCA Section 148 does ***not*** provide for or create exclusive jurisdiction in the sense that only a German court may adjudicate a shareholder derivative claim seeking damages in favor of a German stock corporation, and the statute may not be interpreted to provide for exclusive jurisdiction in this sense.

(4) I disagree with the opinion of Prof. Dr. Goette that a German court would refuse, under Section 328(1) of the German Code of Civil Procedure (ZPO), to recognize or enforce a judgment rendered in this case.

9. The reasons for and analysis underlying these opinions are set out in the following paragraphs.

OPINION

I. German Courts Do Not Have Exclusive International Jurisdiction under Art. 24 pt. 2 Brussels I Regulation Recast

10. The analysis regarding whether German courts have exclusive international jurisdiction has to start with rules of European Union (EU) law that may be possibly applicable. EU law enjoys precedence to national rules of EU Member States as a matter

of hierarchy of rules. This applies to both primary and secondary EU law.[1] Accordingly, the Brussels I Regulation Recast[2] enjoys precedence to any rules on jurisdiction to be found in German domestic law.[3]

11. Art. 24 pt. 2 Brussels I Regulation Recast provides, in relevant part, as follows:

> Article 24
>
> The following courts shall have exclusive jurisdiction, regardless of domicile:
> …
> 2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;
> …

12. Art. 24 pt. 2 Brussels I Regulation Recast is the immediate successor to Art. 22 pt. 2 Brussels I Regulation. The succession has been a mere renumbering, without any change as to substance or wording.

13. Art. 22 pt. 2 Brussels I Regulation has consistently been construed strictly and narrowly by the (now) Court of Justice of the European Union (CJEU), formerly named the European Court of Justice (ECJ). The exclusive jurisdiction under the article is limited strictly to disputes in which a party challenges the ***validity*** of a decision of the Board —

[1] Seminal *Flaminio Costa v. E.N.E.L.* (Case 6/64), ECLI:EU:C:1964:66 = [1964] ECR 1259, 1269-1271.

[2] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EU 2012 L 351/1, found at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R1215&from=EN.

[3] *See* only *Ansgar Staudinger,* in: *Rauscher,* EuZPR/EuIPR, vol. I (4th ed. 2015) Einleitung Brüssel Ia-VO notes 27-28; *Magnus,* in: *Magnus/Mankowski,* Brussels Ibis Regulation (2016) Introduction note 37.

meaning, the power of the Board to have made the decision – not the content of the decision or, put another way, the way in which that power was exercised.

14. The then ECJ's decision in *Hassett v South Eastern Health Board* dealt specifically with the breadth of Art. 22 pt. 2 Brussels I Regulation. There, the question was whether Art. 22 pt. 2 Brussels I Regulation "is to be interpreted as meaning that proceedings … in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, concern the validity of the decisions of the organs of a company within the meaning of that provision."[4] The then ECJ answered in the negative: Art. 22 pt. 2 Brussels I Regulation "must be interpreted as covering only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs," not "the manner in which that power was exercised." [5]

15. Subsequent decisions have similarly restricted the scope of Art. 22 pt. 2 Brussels I Regulation to disputes challenging the power to decide, not the decision itself.[6] It does *not* suffice if a decision of the board is concerned indirectly; mere incidental questions do not determine characterisation.[7] All this applies also to the successor of Art.

[4] *Nicole Hassett v. South Eastern Health Board* and *Cheryl Doherty v. North Western Health Board* (Case C-372/07), ECLI:EU:C:2008:534 para. 16; *Bose,* Das Europäische Internationale Privat- und Prozessrecht der *actio pro socio* (2015) pp. 190-191, 341.

[5] *Nicole Hassett v. South Eastern Health Board* and *Cheryl Doherty v. North Western Health Board*, (Case C-372/07), ECLI:EU:C:2008:534 para. 31.

[6] *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts v JP Morgan Chase Bank NA, Frankfurt Branch* (Case C-144/10), ECLI:EU:C:2011:300 paras. 33-47; *Akçil & Ors v Koza Ltd & Anor*, [2019] UKSC 40 paras. 31-39.

[7] *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts v JP Morgan Chase Bank NA, Frankfurt Branch* (Case C-144/10), ECLI:EU:C:2011:300 paras. 33-47.

22 pt. 2 Brussels I Regulation, namely Art. 24 pt. 2 Brussels I Regulation Recast.

16. Art. 24 pt. 2 Brussels Ibis Regulation Recast does not apply to suits against organs for detrimental transfer of assets of the company or for collusion to the detriment of the company.[8] Generally, it does neither apply to suits founded in liability of organs towards the company[9] nor to suits for damages.[10]

17. Such proceedings do not have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs. They do not attack the constitution or the existence of the respective company, nor the validity of any decision of its organs. By contrast, they pursue prominent and important purposes of effective corporate governance.

18. To summarize, positively Art. 24 pt. 2 Brussels I Regulation Recast does not vest exclusive jurisdiction in the German courts for derivative suits concerning companies having their respective seat in Germany.

II. German Courts Do Not Have Exclusive International Jurisdiction under Section 148 GSCA (Aktiengesetz)

A. Section 148 GSCA has to give way to EU law

19. Negatively, the overlay of European Union law, and the European legal duty of "conforming interpretation," provide another compelling reason to conclude that the

[8] *Shahar v Tsitsekkas* [2004] EWHC 2659, [2004] All ER (D) 283 (Nov.) (Ch.D., *Lawrence Collins* J.); *Mankowski,* in: *Rauscher,* EuZPR/EuIPR, vol. I (4th ed. 2015) Art. 24 Brüssel Ia-VO note 83.

[9] Oberlandesgericht Celle 16 August 2006 – Case 9 U 20/06, IPRspr. 2006 Nr. 128 p. 288 = ECLI:DE:OLGCE:2006.0816.9U20.06.0A; *Killias,* in: *Schnyder,* LugÜ (2011) Art. 22 Nr. 2 LugÜ note 79; *Mankowski,* in: *Rauscher,* EuZPR/EuIPR, vol. I (4th ed. 2015) Art. 24 Brüssel Ia-VO note 83.

[10] OGH [Austrian Supreme Court] JBl 2007, 804, 807; OGH GesRZ 2011, 374, 376 with case note *Simotta*; *Jaspert,* EuGVÜ-Gerichtsstände und Anspruchsdurchsetzung gegen ausländische herrschende Unternehmen (Diss Bielefeld 1995) p. 84; *Mankowski,* in: *Rauscher,* EuZPR/EuIPR, vol. I (4th ed. 2015) Art. 24 Brüssel Ia-VO note 84.

Bundestag did not intend to limit derivative actions for damages to only courts in Germany, to the exclusion of courts in other countries. EU law, which includes but is not limited to Directives and Regulations, "has primacy over any conflicting law of the Member States. Not only is it stronger than earlier national law, but it also has a limiting effect on laws adopted subsequently."[11]

20. Negatively, EU law ***prohibits*** "exclusive jurisdiction" treatment of cases such as those encompassed in Section 148. This prohibition has existed already prior to the enactment of Section 148; and a German or other EU court, accordingly, would not interpret Section 148 to provide for exclusive jurisdiction in Germany, to the exclusion of courts in other EU countries.

21. It is worth noting that the four sections of the GSCA that do by terms provide for exclusive jurisdiction [§§ 98, 132, 246 and 396] would each fall within the bounds of Art. 24 pt. 2 Brussels Regulation Recast.

22. As is germane here, an EU Regulation (then the Brussels I Regulation[12]) dealing with matters of jurisdiction regulated the kinds of cases that could — and by extension could not — be matters of "exclusive jurisdiction" within a Member State (meaning, that a court in a different Member State would not be permitted to adjudicate the dispute). This Regulation was in force and effect when Section 148 was enacted. Art. 22 pt. 2 of the Brussels Regulation dealt specifically with corporate matters. A derivative

[11] *E.g.*, "The ABC of EU Law" (2016), found at https://op.europa.eu/webpub/com/abc-of-eu-law/en/#chap7.

[12] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC 2001 L 12/1, found at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN.

action, such as this case, seeking ***damages*** in favor of a corporation with its seat in a Member State, fell ***outside*** of the permitted range of "exclusive jurisdiction" cases under the Brussels Regulation. In other words, under EU law, a derivative damages case could not have been designated as a matter of jurisdiction exclusive to Germany (or any other Member State). In other words, the "exclusive jurisdiction" argument articulated by Prof. Dr. Goette would impermissibly place Section 148 in conflict with EU law.

23. There exists in German law a presumption flowing from Art. 4(3) TEU that, in enacting new legislation, the German legislator — like all legislators of EU Member States — intends to legislate in conformity with EU law, not in contradiction to it.

B. The admission procedure under Section 148(2) GSCA is procedural in nature

24. The plain language of Section 148(2) reveals that it, and in particular the "admission procedure" contained in the statute, is considered procedural in German law. The very title of the section — in English translation, "Court Procedure for Petitions Seeking Leave to File an Action for Damages" — confirms the procedural nature of the section. In German, the title of Section 148 is "Klagezulassungsverfahren." The word "Klage" means "lawsuit" or "action," and "Zulassungsverfahren" means "admission procedure."

25. The "admission procedure" under Section 148 in essence, is a "gatekeeping" provision. It is all about judicial permission: An admission grants permission to successful applicants for a derivative suit as the main suit[13] whereas the denial of an admission negates such permission.

[13] *Mock*, RabelsZ 72 (2008), 264, 297.

26. Section 148 describes the "admission procedure" for a shareholder derivative claim seeking damages in favor of a German stock corporation, if (but only if) such action is filed in Germany. By its own terms, Section 148 does not apply to derivative actions filed outside of Germany.

27. German rules on jurisdiction are binding only upon courts in Germany. German legislation on jurisdiction cannot administer the jurisdiction of courts outside Germany. For any procedural issue and for ascertaining its own jurisdiction, every court has to apply its own law according to the principle of *lex fori* governing international procedural law virtually all around the world. German legislation effectively cannot negate and erase jurisdiction vested in a court by its own *lex fori*. If New York courts under New York law enjoy international jurisdiction, German law cannot take this away from them effectively.

28. In connection with an action filed in Germany, subsections (2) and (4) of Section 148, taken together, provide that the same German court will adjudicate both the admission procedure and the action for damages. Therefore, it would not be possible to pursue the admission procedure in a German court, then pursue the damages claims in a court in a different country (whether in the EU, or outside the EU) if one was compelled to take this literally and as an exhaustive regulation.

29. The Draft Bill which introduced the current version of Section 148, and the accompanying rationale for the passage of what became Section 148 confirm the procedural nature of the admission procedure; the Explanatory Memorandum reflects that "[t]he actual legal action is preceded by an admissibility procedure before the trial court, which can be initiated as long as the asserted claim of the company is not time-barred. This

is a procedure under the German Code of Civil Procedure."[14] In German the admission procedure is characterised as "Vorschaltverfahren", *i.e.*, pre-proceedings to the main proceedings.[15] It is a first step, establishing judicial permission, to the second step of the main proceedings.[16]

30. Furthermore, to the extent German commentaries deal with the subject, the procedural nature of Section 148 is confirmed. In particular, *Mock,* in: beck-online.Großkommentar zum Aktiengesetz (the most in-depth commentary that is attached as Exhibit 25 to Prof. Dr. Goette's Affirmation), states in part that "foreign civil procedural law can then be applied [instead of the Section 148 admission procedure] if the private international law of the respective Member State qualifies the procedural authority conveyed by the procedure for admission of an action as procedural law [.]"[17]

C. Section 148 GSCA does not vest exclusive international jurisdiction in the German courts

31. Section 148 does ***not*** provide for or create exclusive jurisdiction in the sense that only a German court may adjudicate a shareholder derivative claim seeking damages in favor of a German stock corporation, and the statute may not be interpreted to provide for exclusive jurisdiction in this sense. This view is confirmed by the language, structure

[14] Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG) – Begründung [der Bundesregierung], Deutscher Bundestag Drucksache 15/5092, 20.

[15] *Holzborn/Bunnemann,* BKR 2005, 51, 55; *Happ,* in: Festschrift Harm Peter Westermann (2008), p. 971, 979; *Herrler,* in: *Grigoleit,* AktG (2013) § 148 AktG note 11; *Michael Arnold,* in: Münchener Kommentar zum AktG, vol. III: §§118-178 AktG (4th ed. 2018) § 148 AktG note 1; *Johann Brehm/Schümmer,* EWiR 2019, 397, 398; *Grigoleit/Rachlitz,* in: *Grigoleit,* AktG (2nd ed. 2020) § 148 AktG note 7; *Spindler,* in: *Karsten Schmidt/Lutter,* AktG (4th ed. 2020) § 148 AktG note 24; *Hüffer/Jens Koch,* AktG (14th ed. 2020) § 148 AktG note 10; *Mock,* in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 102.

[16] *Holzborn/Jänig,* in: *Bürgers/Körber,* AktG (4th ed. 2017) § 148 AktG note 1; *Zwissler,* in: *Wachter,* AktG (3rd ed. 2018) § 148 AktG note 1.

[17] *Mock,* in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 47.

and legislative history of the statute.

32. The language of Section 148 does not support the view that only and solely a German court may entertain a derivative action for damages in favor of a German stock corporation. While Section 148 does specify the proper court for a derivative action that has been filed in Germany, it does not provide that all derivative actions seeking damages in favor of a German stock corporation must be filed in Germany.[18]

33. The GSCA contains four provisions that provide explicitly, in terms, for "exclusive jurisdiction": Sections 98, 132, 246 and 396 GSCA. The word "ausschließlich" (= exclusive) is used in each of Sections 98, 132, 246 and 396, but not in Section 148. Section 148 does thus ***not*** provide for or mention "exclusive jurisdiction." The Deutscher Bundestag (the German federal legislative body equivalent to the U.S. House of Representatives) knew how to provide for exclusive jurisdiction and did so in those four sections, but not in Section 148.

34. Other sections of the GSCA specify exclusive jurisdiction by explicit reference to and incorporation of the exclusive jurisdiction provision contained in Section 246(3), namely, *e.g.*, Sections 249(1) and 275(4). But Section 148 does not.

35. The systematic context within the Act introducing Section 148 further strengthens the argument against any "exclusive jurisdiction" as regards international jurisdiction, and adds a historical-genetical dimension to it. The legislature dealt with two principal topics in the "Draft bill on corporate integrity and modernization of the right of rescission." One of those two topics dealt with derivative claims (Section 148), while the

[18] *See Mock,* RabelsZ 72 (2008), 264, 297; *id.,* in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 47.

other dealt with rescission (or annulment) of a resolution of a shareholder's meeting (GSCA Sections 241 *et seq*.). The provision for a "Contesting Action" seeking such rescission/annulment is one of the four sections of the GSCA that provides explicitly, in such terms, for "exclusive jurisdiction."; *see* Section 246(3) GSCA. The explicit provision for "exclusive jurisdiction" in connection with rescission/annulment, and the failure to similarly provide for "exclusive jurisdiction" in connection with the derivative claim for damages in favor of a German stock corporation, strengthens the inference that the legislature did not intend to limit derivative actions for damages to courts in Germany.

36. In another prominent instance related to corporate law and financial market law, Section 32b(1) of the Zivilprozessordnung (Code on Civil Procedure or ZPO) constitutes exclusive jurisdiction for false or misleading public capital market disclosures, and exclusive jurisdiction in the event that such disclosures have not been made, and explicitly employs the word "exclusive." It reads:

> Section 32b Exclusive jurisdiction for false or misleading public capital market disclosures, and exclusive jurisdiction in the event that such disclosures have not been made
> (1) For complaints in which:
> 1. The compensation of damages caused by false or misleading public capital market disclosures, or caused by the failure to make such disclosure, or
> 2. The compensation of damages caused by the use of false or misleading public capital market disclosures, or caused by the failure to inform the public that such public capital market disclosures are false or misleading, or
> 3. A claim to performance under a contract based on an offer pursuant to the Securities Purchase and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz)
> is being asserted, that court shall have exclusive jurisdiction that is located at the registered seat of the issuer concerned, of the offeror concerned of other capital investments, or of the targeted company, where said registered seat is situate within Germany and the complaint is directed, at least also among others, against the issuer, the offeror, or the targeted company.

37. This bears particular relevance since Section 32b(1) ZPO is designed as a

"*lex* anti-Americana" and aimed at establishing a defensive shield and protection for German corporate defendants against suits in the U.S.[19] Section 32b(1) ZPO underlines that the German legislator very well knows how to use jurisdiction rules and exclusive jurisdiction in particular as a defensive device if it really intends so. The respective legislative techniques were well known in 2005 when both Section 32b ZPO and Section 148 were promulgated. That Section 148 does not travel down the same avenue as Section 32b(1) ZPO is indicative and telling. This is the more telling since Section 32b(1) ZPO was introduced[20] in the same year of 2005 as Section 148(2), (4) and since all these rules employ the same, thus common connecting factor of the company's seat in Germany.

38. In German *procedural* law in general it is common opinion that exclusive jurisdiction needs to be legislated for *explicitly* if it is warranted.[21] In the absence of the term "ausschließlich", directly or by explicit reference and incorporation, it should be at least presumed, if not downrightly concluded *e contrario,* that there is no exclusive jurisdiction. Legal certainty, foreseeability and predictability which are of paramount importance as regards issues of jurisdiction firmly demand so.

39. Whereas some of the German writings on Section 148(2) are confined to mere one-liner assertions of this rule conveying exclusive jurisdiction without giving any

[19] *See Burkhard Hess,* WM 2004, 2329, 2332; *id.,* AG 2006, 809, 815; *Reuschle,* WM 2004, 2334, 2343; *von Hein,* RIW 2004, 602, 604; *Gregor Bachmann,* IPRax 2007, 77, 86; *Herbert Roth,* in: *Stein/Jonas,* vol. 5: §§ 328-510c ZPO (23rd ed. 2015) § 328 ZPO note 75.

[20] By Art. 2 Nr. 2 Gesetz zur Einführung von Kapitalanleger-Musterverfahren vom 16. August 2005, BGBl. 2005 I 2437.

[21] *Schultzky,* in: *Zöller,* ZPO (12th ed. 2020) § 12 ZPO note 11; *Wern,* in: *Prütting/Gehrlein,* ZPO (12th ed. 2020) § 12 ZPO note 5; *Patzina,* in: Münchener Kommentar zur ZPO, vol. I: §§ 1-354 ZPO ZPO (6th ed. 2020) § 12 ZPO note 27; *Smid/Sabine Hartmann,* in: *Wieczorek/Schütze,* ZPO, vol. 1: Einleitung; §§ 1-49 ZPO (5th ed. 2020) Vor §§ 12-37 ZPO note 16.

explanation[22] (Prof. Dr. Goette joins this camp in paras. 41–42 of his Affirmation) and some commentaries do not express any view as to exclusivity or non-exclusivity,[23] other academic writers concede that Section 148(2) does not cater explicitly for jurisdiction to be exclusive, but surmise that exclusivity should be implied from the purpose pursued.[24] This is unconvincing, even inadmissible, in light of Art. 101(1) 2nd sentence Grundgesetz (German Constitution) which guarantees that a lawsuit can be filed in the courts in which German Acts vest jurisdiction. Any exclusive jurisdiction erases jurisdiction by other courts than the one designated. Implicated exclusive jurisdiction would invade into territory already held by the general rules on jurisdiction. In turn, there is no room left for such implication.

40. The Explanatory Memorandum by the Federal Government accompanying the Draft Bill graces Section 148(2) 1st sentence with a single sentence:[25] "Absatz 2 regelt nach bewährtem Vorbild die Konzentration der Zuständigkeit auf das Landgericht des Sitzes der Gesellschaft." This ought to be translated as: "Following proven models, (2) rules on the concentration of jurisdiction to the Landgericht [district court] at the company's seat." Nothing in this indicates that *international* jurisdiction was reflected, addressed or encompassed.

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[22] *Happ,* in: Festschrift Harm Peter Westermann (2008), p. 971, 978; *Gerold Bezzenberger/Tilman Bezzenberger,* in: Großkommentar zum AktG, Instalment 29 (4th ed. 2008) § 148 AktG note 165; *Hüffer/Jens Koch,* AktG (14th ed. 2020) § 148 AktG note 12.

[23] *Michael Arnold,* in: Münchener Kommentar zum AktG, vol. III: §§ 118-178 AktG (4th ed. 2018) § 148 AktG note 56; *Tretter,* in: *Schüppen/Bernhard Schaub* (eds.), Münchener AnwaltsHandbuch Aktienrecht (3rd ed. 2018) § 41 para. 61.

[24] *Rieckers/Vetter,* in: Kölner Kommentar zum AktG, vol. 3/2 (3rd ed. 2015) § 148 AktG note 367; *Spindler,* in: *Karsten Schmidt/Lutter,* AktG (4th ed. 2020) § 148 AktG note 14.

[25] Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG) – Begründung [der Bundesregierung], Deutscher Bundestag Drucksache 15/5092, 22.

41. Prof. Dr. Goette's Affirmation does not distinguish properly between two distinct issues, that is, (1) which German court is proper if a Section 148 action is brought in Germany, and (2) whether a derivative action for damages in favor of a German stock corporation may be brought in a court outside of Germany. By loosely applying the term "exclusive jurisdiction" to the former, it is made (erroneously) to appear that courts outside of Germany necessarily lack jurisdiction in cases described in the latter.

42. It appears that any references to "exclusive jurisdiction" in academic writings refer to "local jurisdiction" or "venue", meaning jurisdiction within Germany only and not to international jurisdiction. Applying Section 148(2) 1st sentence to international jurisdiction *per analogiam*[26] is one thing, attributing exclusivity to this in the international arena is quite another and very distinct thing. The statutory language and structure, and the overlay of EU law as just described, make clear that exclusive jurisdiction in the EU or in the international sense does not exist. Nothing in Section 148 states or implies that, while EU courts may exercise jurisdiction, courts outside the EU may not.[27] Simply stated, Section 148 does not exclude jurisdiction of the courts of the EU Member States, or courts in countries outside the EU.

43. The structure of the derivative action strongly suggests that jurisdiction may be laid in countries other than Germany, because the company itself, when bringing the same claims, has the discretion to file outside of Germany. The scope of a Section 148 claim is set out in subsection (1) thereof. By reference to Section 147(1) (which further

[26] *Mock,* RabelsZ 72 (2008), 264, 297; *id.,* in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 47.

[27] *Cf. Mock,* RabelsZ 72 (2008), 264, 297; *id.,* in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 47.

references Sections 46-48, 53 and 117), the scope includes "claims of the company for damages" against third parties, as well as founders, managers, supervisors and others. The company, when acting on its own behalf, has discretion to file such claims wherever in the world it deems proper and advantageous. Such claims may, for example, be filed outside of Germany because of choice of court agreements of issues or of personal or specific jurisdiction, or other reasons. Nothing in Section 148 purports to limit a derivative action to German courts, just as nothing in the GSCA limits the company itself to German courts in connection with actions under Sections 46, 47, 48, 53 or 117.

44. Nominally, the derivative claimant sues on the company's behalf, and functionally he steps into the company's shoes as is the basic idea underpinning any *actio pro socio*. Hence he should be in a position to avail himself of all options as to international jurisdiction which are available to the company itself.[28] The company, on the other hand, could avail itself of the whole catalogue of heads of jurisdiction available under the Brussels Ibis Regulation Recast[29] or under the ZPO, depending upon where the respective defendant is domiciled.

45. The majority of commentators accepts that the admission procedure can take place before an arbitration tribunal.[30] Insofar it would be subject to party autonomy, and the jurisdiction of the German courts could be derogated which would be impermissible in the event of proper exclusive jurisdiction characterised, *i.e.*, by being immune against derogation by the parties.

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[28] *Mock*, RabelsZ 72 (2008), 264, 297.

[29] *Mock*, in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 47.

[30] *Mock*, in: Festschrift Wienand Meilicke (2010), p. 489, 506-507; *id.*, in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 104; *Rieckers/Vetter*, in: Kölner Kommentar zum AktG, vol. 3/2 (3rd ed. 2015) § 148 AktG note 383.

D. Section 148 is ineffective as an instrument of corporate governance

46. Derivative actions are aimed at pursuing an important function for corporate governance and to overcome institutional failure by the organs of the respective company. To this avail, Section 148 establishes a special kind of *actio pro socio*[31] in order to overcome a severe collective action problem.[32] On paper it grants an instrument to control and to supervise to a qualified minority of shareholders.[33]

47. Section 148 in practice fails to fulfil its purpose. In practice, the admission procedure is dead law.[34] In the years since its promulgation only two decisions have been published, and both of them have denied admission.[35] Other instances which could have possibly been settled prior to a court verdict have not been reported in general or in economic newspapers in Germany, either.

48. The hurdles erected in Section 148(1) are too high and exact a deterring effect. Consequentially, Section 148 is ineffective as an instrument of corporate governance.

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[31] Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG) – Begründung [der Bundesregierung], Deutscher Bundestag Drucksache 15/5092, 23; Oberlandesgericht Köln 19 October 2018 – Case 18 W 53/17, AG 2019, 395, 396; *Gerold Bezzenberger/Tilman Bezzenberger*, in: Großkommentar zum AktG, Instalment 29 (4th ed. 2008) § 148 AktG note 2; *Zwissler*, in: *Wachter*, AktG (3rd ed. 2018) § 148 AktG note 1; *Spindler*, in: *Karsten Schmidt/Lutter*, AktG (4th ed. 2020) § 148 AktG note 2.

[32] *Mock*, in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 12. *See also* Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG) – Begründung [der Bundesregierung], Deutscher Bundestag Drucksache 15/5092, 20.

[33] *See* only *Spindler*, in: *Karsten Schmidt/Lutter*, AktG (4th ed. 2020) § 148 AktG note 3.

[34] *See Mock*, in: beck-online.Großkommentar zum Aktiengesetz (2020) § 148 AktG note 22.

[35] Oberlandesgericht Köln 19 October 2018 – Case 18 W 53/17, AG 2019, 395 (comments by *Mock*, AG 2019, 385; *Johann Brehm/Schümmer*, EWiR 2019, 397); Landgericht München 29 March 2007 – Case 5 HK O 12931/06, AG 2007, 458 = NZG 2007, 477 (comment by *Kort*, EWiR 2007, 481).

III. Enforcement of a future U.S. judgment entered in this case, in Germany under Section 328(1) pt. 1 ZPO

49. I have read Prof. Dr. Goette's opinion to the effect that a German court would, on the basis of Section 328(1) pt. 1 ZPO, decline to recognize or enforce a judgment entered in this case (para. 60 of his Affirmation). This opinion therefore is simply a consequential statement of Prof. Dr. Goette's (erroneous) opinion on the question of exclusive (direct) jurisdiction.

50. Because, as discussed above, there is no exclusive direct jurisdiction of the German courts, I respectfully disagree with Prof. Dr. Goette's opinion. The necessary premise for this opinion is lacking. It is certainly true that recognition in Germany would be barred insofar as Germany claimed exclusive international direct jurisdiction for her courts.[36] Yet Germany does not claim so in the present instance.

51. Section 328(1) pt. 1 ZPO rules out recognition of foreign judgments in Germany where "[t]he courts of the state to which the foreign court belongs do not have jurisdiction according to German law." It establishes the so-called mirror image rule. In essence, in order to recognise a judgment rendered by a court in a non-Member State of the Brussels Ibis Regulation (or the 2007 Lugano Convention),[37] Germany requires that State to have sufficiently strong connections to the case justifying the jurisdiction of that State's courts.

52. Whether a sufficiently strong connection exists is to be judged according to the standards established by the German rules on direct jurisdiction. This encompasses the

[36] *See* only *Herbert Roth*, in: *Stein/Jonas*, vol. 5: §§ 328-510c ZPO (23rd ed. 2015) § 328 ZPO note 75; *Gottwald,* in: Münchener Kommentar zur ZPO, vol. I: §§ 1-354 ZPO (6th ed. 2020) § 328 ZPO note 91.

[37] Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ EC 2007 L 339/3, found at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22007A1221%2803%29.

whole array of heads of jurisdiction of German law,[38] as enshrined particularly (but not exhaustively) in Sections 12-38 ZPO. The underpinning rationale is evident: Germany is not going to censure foreign States for claiming jurisdiction where in a case in a *vice versa* scenario Germany herself would claim jurisdiction.[39]

53. Insofar as a defendant in the present case is a resident of the United States, Sections 12; 13 ZPO for natural persons and Sections 12; 17 ZPO for companies establish a sufficiently strong connection to the United States.

54. In regards to other defendants, Section 23 ZPO might come into play basing jurisdiction on the location of personal assets.[40] This is a generous ground for indirect jurisdiction.[41]

55. Furthermore, insofar as defendants have exerted tortious activities in the United States, Section 32 ZPO would be an address to turn to, for present purposes vesting indirect jurisdiction in the courts of the place where the harmful event giving rise to the damage occurred, or the courts of the place where the damage occurred. Both places are on principally equal footing, following the so-called principle of ubiquity. A relevant damage to plaintiff occurred where they suffered losses in the value of their Deutsche Bank AG shares due to entrepreneurial decisions made by the defendants for Deutsche Bank AG.

56. Section 328(1) pt. 1 ZPO is exhaustive and *lex specialis* insofar as jurisdictional issues are at stake; it bars any jurisdictional issue from being pleaded under

[38] *See* only *Schütze,* in: in: *Wieczorek/Schütze,* ZPO, vol. 5/1: §§ 300-329 ZPO (4th ed. 2015) § 328 ZPO note 51; *Gottwald,* in: Münchener Kommentar zur ZPO, vol. I: §§ 1-354 ZPO (6th ed. 2020) § 328 ZPO note 92.

[39] *See* only *Geimer,* Internationales Zivilprozessrecht (8th ed. 2020) para. 2896.

[40] *See generally* BGH 29 April 1999 – Case IX ZR 263/97, BGHZ 141, 286 para. 10; *Gottwald,* in: Münchener Kommentar zur ZPO, vol. I: §§ 1-354 ZPO (6th ed. 2020) § 328 ZPO note 92.

[41] *See* BGH 29 April 1999 – Case IX ZR 263/97, BGHZ 141, 286 para. 10.

the additional head of violating German public policy, Section 328(1) pt. 4 ZPO.[42]

I affirm this 20th day of October, 2020, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

Hamburg, Germany

Prof. Dr. Peter Mankowski

[42] *Geimer,* Internationales Zivilprozessrecht (8th ed. 2020) para. 2897d; *Wazlawik,* RIW 2002, 691, 695.

Certification Pursuant to Commercial Division Rule 17

The undersigned certifies that the foregoing Affirmation complies with the word-count limitation set forth in Rule 17 of the Rules of the Commercial Division and contains 5,949 words (excluding the caption and signature block). Executed on October 20, 2020, in Hamburg, Germany.

Prof. Dr. Peter Mankowski

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZAHAVA ROSENFELD, derivatively as a shareholder of DEUTSCHE BANK AG and on behalf of DEUTSCHE BANK AG, Plaintiff, vs. PAUL ACHLEITNER *et al*., Defendants, - and - DEUTSCHE BANK AG, Nominal Defendant.	Index No. 651578/2020

Affirmation of James D. Baskin
in Support of Plaintiff's Opposition to Defendants' Motion
to Dismiss the Verified Amended Shareholder Derivative Complaint

I, James D. Baskin, state as follows:

1. I am one of the attorneys representing plaintiff Zahava Rosenfeld in this shareholder derivative action. I am admitted to practice in the States of California and Texas; I have applied for *pro hac vice* admission in this action.

2. An English translation of the German Stock Corporation Act ("GSCA") is attached as Exhibit A. This translation was prepared by the international law firm of Norton Rose Fulbright and may be accessed online at https://www.nortonrosefulbright .com/-/media/files/nrf/nrfweb/imported/german-stock-corporation-act.pdf (last visited October 21, 2020).

3. Attached as Exhibit B is a collection of articles concerning corporate governance in Germany and the European Union.

4. Attached as Exhibits C-1 through C-4 are certain materials concerning Defendants' expert Prof. Dr. Wulf Goette. Exhibit C-1 is a copy of his page on the website of the German law firm Gleiss Lutz, one of the largest law firms based in Germany. Exhibit C-2 is an article referencing the Gleiss Lutz firm's representation of Deutsche Bank in a large litigation. Exhibit C-3 is an article referencing the ongoing relationship of Ropes & Gray and the Gleiss Lutz firm. I searched the University of Heidelberg website but was unable to find any mention of Prof. Dr. Goette as a member of its faculty; he is listed instead as an "Honorary Professor/Lecturer" (Ex. C-4) with his occupation listed as "lawyer, Gleiss Lutz."

5. Deutsche Bank USA's website (www.db.com/usa/content/en/Contact.html) reflects that Deutsche Bank's "Head Office USA" is located at 60 Wall Street, New York, New York. *See* Exhibit D.

6. Deutsche Bank and certain of its current and former executives were sued in a securities class action filed in the United States District Court for the District of New Jersey on July 15, 2020 in a case entitled *Ali Karimi v. Deutsche Bank Aktiengesellschaft, et al.*, No. 20-cv-8978. The amended complaint in that case alleges some of the same misconduct alleged in Ms. Rosenfeld's complaint and may be found at http://securities.stanford.edu/filings-documents/1074/DBA00_15/2020930_r01c_20CV08978.pdf. Of the eight Deutsche Bank securities class actions reflected in the Stanford Securities database, six were filed in the Southern District of New York.

7. Attached as Exhibit E is a true and correct copy of Justice Driscoll's original decision dismissing *Michael Mason-Mahon v. Douglas J. Flint, et al.*, Index No. 602052/2014 (N.Y. Sup. Ct. Nassau Cnty. Nov. 19, 2015). This is the decision that was reversed in the *HSBC* decision by the Second Department in *Mason-Mahon v. Flint*, 166 A.D.3d 754 (2d Dep't 2018). As Justice Driscoll noted in his original decision of dismissal, "Plaintiff Michael Mason-Mahon is a British citizen and shareholder in HSBC Holdings, plc … , an English company headquartered in London." Ex. E at 2.

8. As reflected in the list attached hereto as Exhibit F, Deutsche Bank AG has repeatedly brought lawsuits, as plaintiff, in New York state and federal courts — at least 33 times in the past 15 years. Deutsche Bank AG has sued "foreign," *e.g.*, Mexican, Cayman, Delaware, and New Jersey corporations (including banks). In these cases, Deutsche Bank alleged venue was proper in New York. In one case filed in the United States District Court for the Southern District of New York, Deutsche Bank AG alleged it was "a citizen of New York." *See Deutsche Bank AG v. Corporacion Andina de Fomento*, No. 05 Civ. 6723, Dkt. No. 1 (Compl.) ¶ 5 (S.D.N.Y. July 26, 2005) ("Complete diversity

of citizenship exists because … Deutsche Bank is a citizen of New York[.]"). In that complaint, the term "Deutsche Bank" was defined to include Deutsche Bank AG and Deutsche Bank Trust Company Americas. *See id.* at 1.

9. Attached hereto as Exhibits G-1, G-2 and G-3 are court decisions referred to in paragraphs 14 and 15 of Prof. Dr. Mankowski's Affirmation.

10. Attached as Exhibit H is a true and correct copy of Ms. Rosenfeld's letter to Deutsche Bank, requesting that her Deutsche Bank shares be recorded in the share register.

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct. Executed on October 22, 2020, in La Jolla, California.

James D. Baskin

EXHIBIT A

EXHIBIT A

Financial institutions
Energy
Infrastructure, mining and commodities
Transport
Technology and innovation
Life sciences and healthcare

NORTON ROSE FULBRIGHT

German Stock Corporation Act (*Aktiengesetz*)

English translation as at May 10, 2016

Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 3500 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, Africa, the Middle East and Central Asia.

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Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

German Stock Corporation Act (*Aktiengesetz*)

English translation as at May 10, 2016

Norton Rose Fulbright
December 2016

Stock Corporation Act

as of September 6, 1965

(BGBl. I p. 1089) FNA 4121-1

Last amended by Article 5 Amendment Act dated 10 May 2016 (BGBl. I p. 1142)

Book One. Stock Corporation
Division One. General Provisions

§ 1 Nature of the Stock Corporation

(1) [1]The stock corporation is a company that constitutes a separate legal entity. [2]Liability to creditors with respect to obligations of the company shall be limited to the company's assets.

(2) The company shall have a capital divided into shares.

§ 2 Number of Founders

One or more persons who subscribe to shares against contributions shall establish the company's articles of association (the articles).

§ 3 Commercial Enterprise; Listing

(1) The company shall constitute a commercial enterprise even if the purpose of the enterprise does not comprise commercial activity.

(2) Stock exchange listed within the meaning of this law are those corporations whose shares have been admitted to a market that is regulated and supervised by state recognized authorities and that takes place regularly and is directly or indirectly accessible to the public.

§ 4 Business Name

The business name of the company shall contain, even if it is continued according to § 22 of the Commercial Code or similar legal provisions, the designation '*Aktiengesellschaft*' or a generally understood abbreviation of this designation.

§ 5 Domicile

The company's domicile shall be the location in Germany designated in the articles.

§ 6 Share Capital

The share capital shall be denominated in Euro.

§ 7 Minimum Par Value of the Share Capital

The minimum par value of the share capital shall be fifty thousand euros.

§ 8 Form and Minimum Par Value of Shares

(1) Shares may be established either as par or as non-par.

(2) [1]Par shares shall have a par value of at least one euro. [2]Shares set at lower par value shall be null and void. [3]The issuers shall be jointly and severally liable to the holders thereof for any damage resulting from such issue. [4]Higher share par values shall be stated in multiples of one euro.

(3) [1]Non-par shares have no par value. [2]Non-par shares of a company participate equally in its share capital. [3]The portion of the share capital corresponding to one non-par share may not fall below one euro. [4](2) sentence 2 and 3 shall apply accordingly.

(4) The proportion of the share capital is determined in the case of par shares according to the relationship of the par value to the share capital in the case of non-par shares according to the number of shares.

(5) Shares shall not be divisible.

(6) The foregoing provisions shall also apply to certificates (interim certificates) issued to shareholders prior to the issue of share certificates.

§ 9 Issue Price of Shares

(1) Shares may not be issued at a price lower than par value or the proportionate amount of the share capital relating to the non par share (minimum issue price).

(2) Shares may be issued at a price higher than par value.

§ 10 Share Certificates and Interim Certificates

(1) [1]Share certificates are in registered form. [2]They may be in bearer form if

1. the company is listed on the stock exchange or

2. the right to demand individual certificates is excluded and the global certificate is deposited with one of the following:

a) a securities clearing and depository bank within the meaning of § 1 (3) of the Deposit Act;

b) an authorised central securities depository (CSD) or an authorised third-country CSD pursuant to Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 236/2012 (Official Journal of the European Union L 257 of 28 August 2014, p. 1); or

c) any other foreign depository who complies with the conditions set forth in § 5 (4) sentence 1 of the Deposit Act.

[3]In the case of sentence 2 No. 2, § 67 shall apply accordingly as long as the global certificate has not been deposited.

(2) [1]Share certificates shall be in registered form if they are issued prior to full payment of the issue price. [2]The amount of partial payments shall be indicated on the share certificate.

(3) Interim certificates shall be in registered form.

(4) [1]Interim certificates in bearer form shall be null and void. [2]The issuers shall be jointly and severally liable to the holders thereof for any damage resulting from such issue.

(5) The articles may limit or exclude the right to demand individual certificates for the shares.

§ 11 Classes of Shares

[1]Shares may confer different rights, in particular with regard to the distribution of profits and assets. [2]Shares conferring identical rights shall constitute one class.

§ 12 Voting Rights. No Multiple Voting Rights

(1) Each share shall confer voting rights. Preferred shares that confer no voting rights may be issued in accordance with the provisions of this Act.

(2) Multiple voting rights shall be prohibited.

§ 13 Signatures on Share Certificates

[1]For share certificates and interim certificates, a facsimile signature shall be sufficient. [2]The validity of the signature may be made contingent upon compliance with prescribed form requirements. [3]Any such form requirements shall be set out in the certificate.

§ 14 Jurisdiction

Unless otherwise specified, references in this Act to the court shall be references to the court of the company's domicile.

§ 15 Affiliated Enterprises

Legally separate enterprises that with respect to each other are subsidiary and parent enterprise (§ 16), controlled or controlling enterprises (§ 17), members of a group (§ 18), enterprises with cross-shareholdings (§ 19), or parties to an enterprise agreement (§§ 291,292) shall constitute affiliated enterprises.

§ 16 Subsidiaries and Parent Enterprises

(1) If the majority of shares in a legally separate enterprise are held by another enterprise or if another enterprise is entitled to the majority of the voting rights (majority holding), such enterprise shall constitute a subsidiary and the other enterprise shall constitute its parent enterprise.

(2) [1]The portion of shares that is held by an enterprise shall be determined, in the case of corporations, by the ratio of the aggregate par value of shares held to the nominal capital, and, in the case of companies with non-par shares, by the number of shares. [2]In the case of corporations, own shares held by it shall be deducted from the nominal capital; in the case of companies with non-par shares, own shares held by it shall be deducted from the number of shares. [3]Shares held by another person on behalf of the enterprise shall be deemed equivalent to own shares.

(3) [1]The portion of the voting rights to which an enterprise is entitled shall be determined by the ratio of the number of voting rights exercisable in respect to the shares held by such enterprise to the aggregate number of all voting rights. [2]Voting rights arising from own shares held by the enterprise and shares deemed equivalent to such company shares pursuant to (2) sentence 3, shall be deducted from the aggregate number of all voting rights.

(4) Shares held by a controlled enterprise or held by another person on behalf of the enterprise or an enterprise controlled by it and, if the owner of the enterprise is a sole proprietor, shares that constitute private property of the owner, shall be deemed to constitute shares held by the enterprise.

§ 17 Controlled and Controlling Enterprise

(1) Legally separate enterprises over which another enterprise (controlling enterprise) is able to exert, directly or indirectly, a controlling influence, shall constitute controlled enterprises.

(2) A majority owned enterprise shall be presumed to be controlled by the enterprise with a majority shareholding in it.

§ 18 Groups and Members of Groups

(1) [1]If a controlling and one or more controlled enterprises are subject to the common direction of the controlling enterprise, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group. [2]If enterprises are parties to a control agreement (§ 291) or if one enterprise has been integrated into the other (§ 319), such enterprises shall be deemed to be subject to common management. [3]A controlled enterprise and its controlling enterprise shall be presumed to constitute a group.

(2) If legally separate enterprises are subject to common direction, although none of such enterprises controls the other, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group.

§ 19 Enterprises with Cross-Shareholdings

(1) [1]Enterprises which have a domestic domicile that are organized as corporations and which are affiliated in such manner that each enterprise holds more than one fourth of the shares

of the other, shall constitute enterprises with cross-shareholdings. [2]§ 16 (2) sentence 1 and (4) shall apply in determining whether an enterprise holds more than one fourth of the shares of the other enterprise.

(2) If one of the enterprises with cross-shareholdings has a majority holding in the other enterprise or if one of such enterprises is able to exert, directly or indirectly, a controlling influence over the other, one such enterprise shall constitute the controlling and the other the controlled enterprise.

(3) If each of the enterprises with cross-shareholdings has a majority holding in the other enterprise, or if each is able to exert, directly or indirectly, a controlling influence over the other, each enterprise shall constitute a controlling and a controlled enterprise.

(4) § 328 shall not apply to enterprises that constitute controlling or controlled enterprises pursuant to (2) or (3).

§ 20 Disclosure Obligations

(1) [1]As soon as an enterprise holds more than one fourth of the shares of a company with domestic domicile, it shall promptly inform such company thereof in writing. [2]§ 16 (2) sentence 1 and (4) shall apply in determining whether the enterprise holds more than one fourth of the shares.

(2) For purposes of the disclosure requirement pursuant to (1), shares held by an enterprise shall be deemed to include:

1. shares whose transfer may be required by such enterprise, or an enterprise controlled by it, or any other person on behalf of such enterprise or an enterprise controlled by it;

2. shares that such enterprise, or an enterprise controlled by it, or any other person on behalf of such enterprise or an enterprise controlled by it, is obligated to acquire.

(3) If such enterprise is organized as a corporation, it shall, as soon as it holds more than one fourth of the shares of a company, not including any shares attributable to it pursuant to (2), promptly inform such company thereof in writing.

(4) As soon as any enterprise acquires a majority holding (§ 16 (1)), it shall promptly inform such company thereof in writing.

(5) If the holding falls below the level requiring disclosure pursuant to (1), (3) or (4), the company shall be promptly informed thereof in writing.

(6) [1]The company shall promptly announce in the company's journals the existence of a shareholding of which it has been informed pursuant to (1) to (4) disclosing the enterprise holding such shares. [2]If the company has been informed that such shareholding has fallen below the level requiring disclosure pursuant to (1) or (4), such fact shall also be announced promptly in the company's journals.

(7) [1]Rights arising from shares that are held by an enterprise that is required to make disclosure pursuant to (1) or (4) may not, for as long as such enterprise has not made such disclosure, be exercised by such enterprise, by an enterprise controlled by it or by any other person on behalf of such enterprise or an enterprise controlled by it. [2]This shall not apply to claims according to § 58 (4) and § 271 if the notification was not intentionally

omitted and has subsequently been made.

(8) (1) to (7) shall not apply to shares of an issuer within the meaning of § 21 (2) of the Securities Trade Act.

§ 21 Disclosure Obligations of the Company

(1) [1]As soon as the company holds more than one fourth of the shares of another corporation with domestic domicile, it shall promptly inform such enterprise thereof in writing. [2]§ 16 (2) sentence 1 and (4) shall apply accordingly in determining whether the company holds more than one fourth of the shares.

(2) As soon as the company acquires a majority holding (§ 16 (1)) in another enterprise, it shall promptly inform such enterprise thereof in writing.

(3) If the holding falls below the level requiring disclosure pursuant to (1) or (2), the company shall promptly inform the other enterprise thereof in writing.

(4) [1]Rights arising from shares that are held by a company required to make disclosure pursuant to (1) or (2) may not be exercised for as long as the company has not made such disclosure. [2]§ 20 (7) sentence 2 shall apply accordingly.

(5) (1) to (4) shall not apply to shares of an issuer within the meaning of § 21 (2) of the Securities Trade Act.

§ 22 Proof of Disclosed Holdings

An enterprise to which disclosure has been made pursuant to § 20 (1), (3) or (4), or § 21 (1) or (2) may at any time require proof of the existence of the shareholding.

Division Two. Formation of the Company

§ 23 Establishment of the Articles

(1) [1]The articles shall be established in the form of a notarial deed. [2]Attorneys-in-fact shall require a power of attorney certified by a notary.

(2) The deed shall specify:

1. the founders;
2. the par value of par-value shares, the issue price of non-par shares and, if more than one class of shares exists, the class of shares subscribed by each founder;
3. the paid-in amount of the share capital.

(3) The articles shall determine:

1. the company's business name and domicile;
2. the purpose of the enterprise; in particular in the case of enterprises engaged in industry and trade, the articles shall specify the kind of products and goods to be

produced and traded;

3. the amount of the share capital;

4. the segmentation of the share capital either in par-value shares or in non-par shares; the par value of par-value shares and the number of shares of each par value; the number of non-par shares and, if more than one class of shares exists, the classes of shares and the number of shares in each class;

5. whether shares are to be issued in bearer or registered form;

6. the number of members of the management board or the rules for determining such number.

(4) In addition, the articles shall contain provisions regarding the form of announcements by the company.

(5) [1]The articles may contain different provisions from the provisions of this Act only if this Act explicitly so permits. [2]The articles may contain additional provisions, except as to matters that are conclusively dealt with in this Act.

§ 24 [repealed]

§ 25 Announcements by the Company

[1]Whenever provisions of law or the articles determine that announcements by the company shall be made in the company's journals, such announcements shall be published in the Federal Gazette.

§ 26 Special Benefits. Formation Expenses

(1) Any special benefit granted to a particular shareholder or a third party shall be stipulated in the articles and the beneficiary shall be identified.

(2) The aggregate amount of expenditures to be paid at the expense of the company to shareholders or other persons as compensation or remuneration for the formation or preparation thereof shall be separately stipulated in the articles.

(3) [1]Absent such stipulation, any relevant agreements and any transaction in execution thereof shall be unenforceable with respect to the company. [2]Such unenforceability shall be incapable of being cured by amendment of the articles once the company has been registered in the commercial register.

(4) Such stipulations may only be amended after the company has been registered in the commercial register for five years.

(5) The provisions in the articles regarding such stipulations may only be deleted by means of amendment of the articles after the company has been registered in the commercial register for thirty years and all legal relationships that constituted the basis for such stipulations have been settled for not less than five years.

§ 27 Contributions in kind. Acquisition of Assets. Repayment of Contributions

(1) [1]If shareholders are required to make contributions other than by cash payments of the issue price of the shares (Contributions in kind), or if the company is required to acquire existing or future facilities or other assets (acquisitions of assets), the articles shall stipulate the purpose of the contribution in kind or acquisition of assets, the person from whom the company is to acquire such object, and the par value or, in case of non-par shares, the number of shares to be issued for the contribution in kind or the consideration to be granted for the acquisition of assets. [2]If the company is required to acquire an asset for which a consideration is to be granted which is to be applied towards the contribution payable by a shareholder, such acquisition shall be deemed a contribution in kind.

(2) Contributions in kind or acquisitions of assets may only comprise assets that have an ascertainable economic value; obligations to provide services may not be made the object of Contributions in kind or acquisitions of assets.

(3) [1]If a shareholder's cash contribution is to be evaluated as a contribution in kind in full or in part (disguised contribution in kind) from an economic point of view and due to an arrangement made in connection with the acquisition of the cash contribution, this does not release the shareholder from his obligation to make a contribution. [2]However, any agreement regarding the contribution in kind and any transaction in execution thereof shall not be unenforceable. [3]The value of the asset at the point in time of the filing of the company for registration with the commercial register or at the point in time of the surrender of the asset to the company, if this is done at a later point in time, shall be offset against the shareholder's continuing obligation to make a capital contribution. [4]The set-off shall not be effected prior to the registration of the company in the commercial register. [5]The burden of proof for the value of the asset lies with the shareholder.

(4) [1]If before the contribution a payment to the shareholder was agreed which, from an economic point of view, corresponds to the repayment of the contribution and which is not to be evaluated as a disguised contribution in kind within the meaning of (3), this only releases the shareholder from his obligation to make a capital contribution if the payment is covered by entitlement to full restitution which may fall due at any time or may become due by termination without notice by the company. [2]Such payment or the agreement on such payment shall be stated in the filing pursuant to § 37.

(5) § 26 (4) shall apply to the amendment of lawfully made stipulations, § 26 (5) shall apply to the deletion of the relevant provisions in the articles.

§ 28 Founders

The shareholders who have established the articles shall be the founders of the company.

§ 29 Establishment of the Company

The company shall be established upon subscription of all shares by the founders.

§ 30 Appointment of the Supervisory Board, the Management and the External Auditors

(1) [1]The founders shall appoint the first supervisory board of the company and the external

auditors for the first full or partial fiscal year. [2]Such appointments shall be made in the form of a notarial deed.

(2) The provisions governing the appointment of employee representatives to the supervisory board shall not apply to the composition and the appointment of the first supervisory board.

(3) [1]The members of the first supervisory board may not be appointed beyond the adjournment of the shareholders' meeting that is to resolve approval of the acts of management in respect of the first full or partial fiscal year. [2]The management board shall, within a reasonable time prior to the expiration of the term of office of the first supervisory board, announce which statutory provisions in its opinion govern the composition of the successor supervisory board; §§ 96 to 99 shall apply.

(4) The supervisory board shall appoint the first management board.

§ 31 Appointment of the Supervisory Board in Case of Formation on the Basis of Contributions in kind or Acquisition of Assets

(1) [1]If the articles provide for a contribution in kind or an acquisition of assets to be made by contribution or acquisition of an enterprise in whole or in part, the founders shall appoint only as many members of the supervisory board as the shareholders' meeting is to elect, without being bound by nominations pursuant to the statutory provisions that, in the opinion of the founders, govern the composition of the supervisory board following such contribution or acquisition. [2]If, however, such procedure would result in only two members of the supervisory board being appointed, the founders shall appoint three members to the supervisory board.

(2) A quorum for the supervisory board appointed pursuant to (1) sentence 1 shall exist if one half, but in no event less than three, of its members participate in the passing of resolutions, unless the articles provide otherwise.

(3) [1]The management board shall promptly, upon such contribution or acquisition of an enterprise in whole or in part, announce which statutory provisions in its opinion govern the composition of the supervisory board. [2]§§ 97 to 99 shall apply accordingly. [3]The term of office of the previous members of the supervisory board shall expire only if the supervisory board is required to be composed in accordance with statutory provisions other than those which the founders considered to be governing, or if the founders appointed three members of the supervisory board despite the fact that the supervisory board also is to include employee representatives.

(4) (3) shall not apply if the enterprise or part thereof is contributed or acquired after the announcement by the management board pursuant to § 30 (3) sentence 2.

(5) § 30 (3) sentence 1 shall not apply with respect to members of the supervisory board appointed by the employees pursuant to (3).

§ 32 Formation Report

(1) The founders shall render a written report on the transactions in connection with the formation of the company (formation report).

(2) [1]The formation report shall set forth the material facts in connection with the adequacy of Contributions in kind or acquisitions of assets. [2]The following shall be stated

1. any preceding transactions entered into with a view to such contribution or acquisition;

2. the costs of acquisition and production during the preceding two years;

3. in case of the transfer of an enterprise to the company, the earnings for the last two fiscal years.

(3) In addition, the formation report shall specify whether and to what extent shares have been subscribed at formation on behalf of a member of the management board or the supervisory board and whether and in which manner a member of the management board or the supervisory board has obtained a promise of any special benefit or any compensation or remuneration for the formation or preparation thereof.

§ 33 Formation Audit. General

(1) The members of the management board and the supervisory board shall audit the transactions in connection with the formation of the company.

(2) In addition, an audit by one or more auditors (formation auditors) shall be made if:

1. a member of the management board or the supervisory board is one of the founders; or

2. shares have been subscribed at formation on behalf of a member of the management board or the supervisory board; or

3. a member of the management board or the supervisory board has obtained a promise of any special benefits or compensation or remuneration for the formation or preparation thereof; or

4. the formation involves Contributions in kind or acquisitions of assets.

(3) [1]In the cases of (2) numbers 1 and 2, the certifying notary (§ 23(1) sentence 1) may conduct the audit instead of a foundation auditor on behalf of the founders; the provisions on the formation audit shall apply accordingly. [2]If the notary does not conduct the audit, the court shall appoint the formation auditors. [3]An appeal may be made against such decision.

(4) Unless the audit requires additional expertise, formation auditors shall be:

1. persons who are sufficiently trained and experienced in accounting;

2. auditing firms at least one of whose legal representatives is sufficiently trained and experienced in accounting.

(5) [1]No formation auditor may be appointed who does not qualify to serve as special auditor pursuant to § 143 (2). [2]The foregoing shall apply with respect to persons and auditing firms over whose management the founders, or persons on whose behalf the founders have subscribed to shares, exert a substantial influence.

§ 33a Formation on the Basis of Contributions in kind or Acquisition of Assets without External Formation Audit

(1) An audit by a formation auditor is not necessary in case of formation on the basis of Contributions in kind or acquisition of assets (§ 33 (2) No. 4) as far as the contribution consists of:

1. transferable securities or financial market instruments within the meaning of § 2 (1) and (1a) of the Securities Trade Act if they are evaluated with the weighted average price at which they were traded within the three months prior to their actual contribution on one or more organised markets within the meaning of § 2 (5) of the Securities Trade Act;

2. assets other than those listed in No. 1 if an evaluation is applied that was established by an independent, sufficiently skilled and experienced authorised expert taking into account the generally accepted valuation principles and the fair value and if the valuation date was not more than six months before the date of the actual contribution.

(2) (1) does not apply if the weighted average price of the securities or the financial market instruments ((1) No. 1) was materially influenced by extraordinary circumstances or if it has to be assumed that the fair value of the other assets ((1) No. 2) on the date of their actual contribution is considerably lower than the value assumed by the authorised expert due to circumstances that are new or that have newly emerged.

§ 34 Scope of the Formation Audit

(1) The audit by the members of the management board and the supervisory board and the audit by the formation auditors shall extend in particular to:

1. whether the statements of the founders concerning the subscription of shares, the contributions to the share capital and the stipulations pursuant to §§ 26 and 27 are accurate and complete;

2. whether the value of the assets contributed or acquired equals or exceeds the minimum issue price of the shares to be issued or the value of the consideration to be given for these.

(2) [1]A written report concerning such matters shall be rendered in respect of each audit. [2]Such report shall describe each asset which has been contributed or acquired and shall set out the valuation methods applied in ascertaining the value thereof. This and the statement pursuant to (1) No. 2 is not required for the audit report by the members of the management board and the supervisory board as far as an external formation audit is not required pursuant to § 33a.

(3) [1]One copy each of the report of the formation auditors shall be submitted to the court and the management board. [2]The report shall be available for public inspection at the court.

§ 35 Differences of Opinion between Founders and Formation Auditors. Remuneration and Expenses of Formation Auditors

(1) The formation auditors may require the founders to furnish them with all information and documentation necessary for a conscientious audit.

(2) [1]The court shall decide any differences of opinion between the founders and the formation auditors regarding the scope of information and documentation to be furnished by the founders. [2]Such decision is not subject to a contesting action. [3]The audit report shall not be rendered for so long as the founders refuse to comply with such decision.

(3) [1]The formation auditors shall be entitled to reimbursement of reasonable cash expenses and remuneration for their services. [2]The court shall set such expenses and remuneration. [3]An appeal may be made against such decision; appeals on points of law are not permitted. [4]A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.

§ 36 Registration of the Company

(1) All founders and all members of the management board and the supervisory board shall file the company to the court for registration in the commercial register.

(2) Except in the case of Contributions in kind, such filing may be made only after the amount called on each share has been duly paid in (§ 54 (3)), and, to the extent not already utilised for the payment of taxes and fees arising in connection with the formation, is at the free disposal of the management board.

§ 36a Shareholders' Contributions

(1) In case of contributions in cash, the amount called (§ 36 (2)) must amount to at least one fourth of the minimum issue price and, in case shares were issued for a higher price, also include the surplus amount.

(2) [1]Contributions in kind shall be made in full. [2]If the contribution in kind consists of an obligation to transfer an asset to the company, such obligation shall be fulfilled within five years after the registration of the company in the commercial register. [3]The value of the contribution in kind shall amount to the minimum issue price and, in case shares were issued for a higher price, also include the surplus amount.

§ 37 Contents of the Filing for Registration

(1) [1]The filing shall state that the requirements of § 36 (2) and § 36a have been met and shall specify the price at which shares have been issued and the amount paid in. [2]Proof shall be furnished that the amount paid in is definitely at the free disposal of the management board. [3]If the amount has been paid in by crediting an account pursuant to § 54 (3), such proof shall consist of a written confirmation issued by the bank the account is kept with. [4]Such bank shall be liable to the company for the accuracy of such confirmation. [5]If taxes and fees have been defrayed from the amount paid in, evidence as to the nature and amount of such payments shall be furnished.

(2) [1]The members of the management board shall certify in the filing that no circumstances prevail which preclude their appointment pursuant to § 76 (3) sentence 2 No. 2 and 3 as well as sentence 3 and that they have been advised of their obligation to make full disclosure to the court. [2]The instruction pursuant to § 53 (2) of the Federal Central Registry Act may be given in writing; it may also be given by a notary or a notary appointed abroad, by a representative of a similar profession in the field of giving legal advice or a consular officer.

(3) The filing shall furthermore specify:

1. a business address in Germany;

2. the manner and extent of the management board members' authority to represent.

(4) The following shall be appended to the filing:

1. the articles and the deeds establishing the articles and concerning the subscription to the shares by the founders;

2. in case of §§ 26 and 27, the agreements on which the stipulations are based or which were entered into in execution thereof, and an account of the formation expenses which are to be borne by the company; such account shall list the kind and amount of remuneration and the recipients thereof;

3. the documents relating to the appointment of the management board and the supervisory board;

3a. a list of members of the supervisory board stating each member's last name, first name, occupation, and place of residence;

4. the formation report and the audit reports of the members of the management board and the supervisory board and of the formation auditors, together with underlying documentation.

(5) For the submission of documents pursuant to this Act, 12(2) of the Commercial Code shall apply accordingly.

§ 37a Filing for Registration in Case of Formation on the Basis of Contributions in kind or Acquisition of Assets without External Formation Audit

(1) [1]If an external formation audit is omitted pursuant to § 33a, this fact has to be declared upon filing for registration. [2]Each asset which has been contributed or acquired shall be described. [3]The filing must include a declaration stating that the value of the assets contributed or acquired equals or exceeds the par value of the shares to be issued or the value of the consideration to be given for these. [4]The value, the source of valuation and the valuation method applied shall be stated.

(2) The persons making the filing shall additionally confirm in the filing that they have not gained knowledge about any extraordinary circumstances which might have considerably influenced the weighted average price of the securities or financial market instruments to be contributed within the sense of § 33a (1) No. 1 during the last three months preceding the day of their actual contribution and that they have not gained knowledge of any circumstances indicating that the fair value of the assets in the sense of § 33a (1) No. 2 is considerably lower on the day of their actual contribution due to new or newly discovered circumstances than the value determined by the expert.

(3) The following shall be attached to the filing for registration:

1. documentation on the determination of the weighted average price at which the securities or financial market instruments to be contributed have been traded on an organised market during the last three months preceding the day of their actual contribution;

2. each expert opinion based on the assessment in the cases of § 33a (1) No. 2.

§ 38 Examination by the Court

(1) [1]The court shall examine whether or not the company has been duly established and duly filed for registration. [2]If the company has not been duly established and duly filed for registration, the court shall deny registration.

(2) [1]The court may also deny registration if the formation auditors state, or if it is manifest, that the formation report or the audit report of the members of the management board and the supervisory board is inaccurate or incomplete or does not comply with statutory provisions. [2]The foregoing shall also apply if the formation auditors state, or if the court is of the opinion, that the value of assets contributed or acquired is materially less than the minimum issue price of the shares to be issued or the value of the consideration to be given for these.

(3) [1]If the filing contains the declaration pursuant to § 37a (1) sentence 1, the court shall, with regard to the value of the assets contributed or acquired, examine exclusively whether the conditions of § 37a have been met. [2]The court may only refuse registration in case of an apparent and considerable overvaluation.

(4) On the grounds of a deficient, missing or null provision of the articles, the court may only refuse registration according to (1), to the extent that such provision, its absence or invalidity:

1. relates to facts or legal relationships that according to § 23 (3) or other mandatory legal provisions must be determined in the articles or that must registered in the commercial register or that must be published by the court;

2. violates provisions that predominantly serve the protection of the company's creditors or are otherwise in the public interest; or

3. results in the invalidity of the articles.

§ 39 Contents of the Registration

(1) [1]The registration entry of the company shall specify the company's business name and domicile, a business address in Germany, the purpose of the enterprise, the amount of the share capital, the date of establishment of the articles and the members of the management board. [2]If a person, who is an authorised recipient of statements and services with legally binding effect on the company, is registered in the commercial register with a German address, such information shall also be stated; such authorisation to receive shall be deemed to exist for third parties until it is deleted from the commercial register and the deletion has been announced, unless the lack of authorisation to receive was known to the third party. [3]In addition, the authority of the members of the management board to represent the company shall be registered.

(2) If the articles contain any provisions regarding the duration of the company or regarding the authorised capital, such provisions shall also be registered.

§ 40 [repealed]

§ 41 Acts on behalf of the Company prior to Registration, Prohibition of Share Issues

(1) [1]The stock corporation shall not exist as such prior to its registration in the commercial register. [2]Any person who acts on behalf of the company prior to registration shall be personally liable; if more than one person so acts, such persons shall be jointly and severally liable.

(2) If the company assumes obligations entered into in its name prior to its registration by agreement with the debtor by substituting itself for such debtor, the validity of such assumption of obligations shall not require the consent of the creditor, provided that such assumption has been agreed upon, and communicated to the creditor by the company or the debtor, within three months from the date of registration of the company.

(3) In no event may the company assume obligations arising under agreements regarding special benefits, formation expenses, or Contributions in kind and acquisitions of assets that have not been stipulated in the articles.

(4) [1]Shares may not be transferred and share certificates and interim certificates may not be issued prior to registration of the company in the commercial register. [2]Share certificates and interim certificates issued prior to such registration shall be null and void. [3]The issuers shall be jointly and severally liable to the shareholders for any damage resulting from such issue.

§ 42 One Person Companies

If all the shares belong to one shareholder solely or jointly with the company, then this fact together with the sole shareholder's surname, given name, date of birth and place of residence shall be notified to the court without delay.

§ 43, 44 [repealed]

§ 43 [repealed]

§ 44 [repealed]

§ 43 [repealed]

§ 44 [repealed]

§ 45 Transfer of Domicile

(1) A transfer of the company's domicile within Germany shall be filed for registration to the court of the previous domicile.

(2) [1]If the company's domicile is transferred from the district of the court to the previous domicile, such court shall without further application promptly communicate such transfer to the court of the new domicile. [2]The registration for the previous domicile as well as the deeds kept at the court of the previous domicile shall be appended to the notification; if the register is kept electronically, the registrations and documents shall be transferred electronically. [3]The court of the new domicile shall examine whether the transfer has been duly resolved and whether § 30 of the Commercial Code has been complied with. [4]If such transfer has been duly resolved and § 30 of the Commercial Code has been complied with the court shall register the transfer of domicile and enter in its commercial register the matters communicated to it without further examination. [5]The transfer of domicile shall become effective upon registration. [6]Such registration shall be communicated to the court of the previous domicile. [7]Such court shall make the necessary cancellations without further application.

(3) [1]If the company's domicile is transferred to another location within the district of the court of the previous domicile, the court shall examine whether the transfer of domicile has been duly resolved and whether § 30 of the Commercial Code has been complied with. [2]If such transfer of domicile has been duly resolved and § 30 of the Commercial Code has been complied with, such court shall register the transfer of domicile. [3]The transfer of domicile shall become effective upon registration.

§ 46 Liability of Founders

(1) [1]The founders shall be jointly and severally liable to the company for the accuracy and completeness of the statements made for purposes of formation and relating to subscription to shares, payments on the shares, appropriation of amounts paid-in, special benefits, formation expenses, Contributions in kind and acquisitions of assets. [2]The founders shall further be liable for ascertaining that the agency designated to receive subscription payments on share capital (§ 54 (3)) is qualified and that any amounts paid-in are at the free disposal of the management board. [3]Without prejudice to their liability for compensation of other damages, they shall be required to make up any deficiencies in subscription payments and to reimburse any remuneration that was not included in the formation expenses.

(2) If the founders intentionally or by gross negligence cause damage to the company through contributions, acquisitions of assets or formation expenses, all founders shall be jointly and severally liable to the company for damages.

(3) A founder shall be relieved of such liability if the facts giving rise to liability were not known to him and could not have been known to him even if he had employed the diligence of a prudent businessman.

(4) If the company shall suffer a loss as a result of a shareholder being insolvent or unable to make a contribution in kind, the founders who accepted the participation of such shareholder with knowledge of his insolvency or inability to make contributions shall be jointly and severally liable to the company for damages.

(5) [1]Persons on whose behalf the founders have subscribed to shares shall have the same

liability as the founders. [2]Such persons shall not be excused for their own lack of knowledge of facts that a founder acting on their behalf knew or should have known.

§ 47 Liability of Persons other than the Founders

In addition to the founders and the persons on whose behalf the founders have subscribed to shares, the following persons shall be jointly and severally liable to the company for damages:

1. whoever receives remuneration which was not included in the formation expenses despite the fact that such remuneration is required to be so included by the applicable provisions and who knew or under the circumstances should have known that such receipt of remuneration was concealed or intended to be concealed or who knowingly participated in such concealment;

2. whoever knowingly participates in causing damage to the company intentionally or by gross negligence by means of contributions or acquisitions of assets;

3. whoever, prior to registration of the company in the commercial register or within two years from the date of the registration publicly advertises the shares for distribution and knew or, if he had employed the diligence of a prudent businessman, should have known of the inaccuracy or incompleteness of the statements rendered for purposes of formation (§ 46 (1)) or of damage to the company through contributions or acquisitions of assets.

§ 48 Liability of the Management Board and the Supervisory Board

[1]Members of the management board and of the supervisory board who violate their obligations in connection with the formation of the company shall be jointly and severally liable to the company for any resulting damage; in particular, they shall be liable for ascertaining that the agency designated to receive payments on the shares (§ 54 (3)) is qualified and that any amounts paid in are at the free disposal of the management board. [2]With respect to the duty of care and the liability of the members of the management board and the supervisory board in connection with the company's formation, §§ 93 and 116 shall also apply, with the exception of § 93 (4) sentences 3 and 4 and (6).

§ 49 Liability of Formation Auditors

§ 323 (1) to (4) of the Commercial Code regarding the liability of external auditors shall apply accordingly.

§ 50 Waiver and Settlement

[1]The company may not waive or compromise claims for damages against the founders, any other persons who are liable, and against members of the management board and the supervisory board (§§ 46 to 48) prior to the expiration of three years from the date of the registration of the company in the commercial register, and may only waive or compromise such claims if the shareholders' meeting consents thereto and no minority whose aggregate holding equals or exceeds one-tenth of the share capital records an objection in the minutes.

[2]The foregoing period of time shall not apply if the person liable for damages is insolvent and enters into a settlement with his creditors to avoid or terminate insolvency proceedings.

§ 51 Limitation Period of Damage Claims

[1]Damage claims of the company pursuant to §§ 46 to 48 shall be time barred after expiration of a period of five years [2]Such period shall commence upon the registration of the company in the commercial register or, if the act giving rise to the liability for damages has been committed thereafter, upon commission of such act.

§ 52 Post-Formation Acquisition

(1) [1]Agreements entered into by the company which require it to acquire existing or future facilities or other assets for a consideration exceeding one-tenth of the share capital and which are entered into within two years from the date of registration of the company in the commercial register, shall become effective only upon the consent of the shareholders' meeting and registration of such agreements in the commercial register. [2]Absent such consent and registration, any transaction in execution of such agreements shall be unenforceable.

(2) [1]An agreement pursuant to (1) shall be made in writing and duly signed unless any other form is prescribed. [2]Such agreement shall be displayed for inspection by shareholders at the offices of the company as from the date of notice of the shareholders' meeting resolving on such consent. [3]On request, every shareholder is to be given a copy. [4]The obligations pursuant to sentences 2 and 3 shall not arise if the agreement has been made accessible on the company's Internet page during the same period of time. [5]The agreement shall be made accessible at the shareholders' meeting. [6]The management board shall explain it at the beginning of the proceedings. [7]The agreement shall be appended to the minutes.

(3) [1]Prior to the passing of the resolution by the shareholders' meeting, the supervisory board shall examine the agreement and render a written report (report on post-formation acquisition). [2]§ 32 (2) and (3) regarding the formation report shall apply accordingly to the report on post-formation acquisition.

(4) [1]In addition, prior to the passing of such resolution, an audit shall be made by one or more formation auditors. [2]§ 33 (3) to (5), §§ 34 and 35 regarding the formation audit shall apply accordingly. [3]Under the conditions of § 33a an audit by the formation auditors may be omitted.

(5) [1]The resolution of the shareholders' meeting shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [2]If the agreement has been entered into within the first year from the date of registration of the company in the commercial register, the shares of the consenting majority shall amount to not less than one fourth of the total share capital. [3]The articles may provide for larger capital majorities and additional requirements.

(6) [1]Upon consent of the shareholder's meeting, the management board shall file the agreement for registration in the commercial register. [2]The agreement together with the report on post-formation acquisition and the report of the formation auditors shall be appended to the registration and all underlying documentation. [3]If an external formation audit is omitted pursuant to (4) sentence 3, § 37a shall apply accordingly.

(7) [1]The court may deny registration if registration would be objectionable because the formation auditors state or it is manifest that the report on post-formation acquisition is inaccurate or incomplete or does not comply with statutory provisions, or that the consideration given for the assets to be acquired is unreasonably high. [2]If the filing for registration contains the declaration pursuant to § 37a (1) sentence 1, § 38 (3) shall apply accordingly.

(8) The date when the agreement was concluded, the date of consent of the shareholders' meeting and the party or parties to the agreement entered into with the company shall be entered in the register.

(9) The foregoing provisions shall not apply if it is the purpose of the enterprise to acquire such assets or if such assets are acquired in the course of judicial execution.

§ 53 Damage Claims in Case of Post-Formation Acquisition

§§ 46, 47 and 49 to 51 regarding damage claims of the company shall apply accordingly to post-formation acquisitions. [2]With respect to such provisions the members of the management board and the supervisory board shall be substituted for the founders. [3]They shall be required to employ the care of a diligent and conscientious manager. [4]Whenever such provisions stipulate that periods shall commence on the date of registration of the company in the commercial register, such periods shall commence on the date of registration of the agreement regarding the post-formation acquisition.

Division Three. Legal Relationships of the Company and the Shareholders

§ 53a Equal Treatment of Shareholders

Shareholders shall be treated equally under equivalent circumstances.

§ 54 Principal Obligation of Shareholders

(1) The obligation of the shareholders to make contributions shall be limited to the share issue price.

(2) Unless the articles provide for Contributions in kind, the shareholders shall pay in the share issue price.

(3) [1]Any amount called prior to the company having been filed for registration in the commercial register may be put at the free disposal of the management board only in legal tender credit to an account maintained with a credit institution or an enterprise operating under § 53 (1) sentence 1 or § 53b (1) sentence 1 or (7) of the Banking Act in the name of the company or of the management board. [2]Claims of the management board arising from such payments shall be deemed to constitute claims of the company.

(4) [1]The statute of limitation for claims of the company to receive capital contributions shall be ten years from the time such claims arose. [2]Insolvency proceedings have been instituted over the company's assets, the statute of limitation shall not begin running prior to the expiration of six months from the date on which the insolvency proceedings were instituted.

§ 55 Ancillary Obligations of Shareholders

(1) [1]If the transfer of shares requires the consent of the company, the articles may impose upon shareholders, in addition to the obligation to make contributions to share capital, recurring obligations other than the payment of money. [2]The articles shall specify whether such obligations are to be performed for consideration or without consideration. [3]The share certificates and interim certificates shall specify the existence and scope of such obligations.

(2) The articles may provide for penalties in the event such obligation has not been performed or has been improperly performed.

§ 56 No Subscription of Own Shares; Acquisition of Shares through a Controlled Enterprise or Subsidiary

(1) The company may not subscribe own shares.

(2) [1]A controlled enterprise may not acquire shares of the controlling enterprise, and a subsidiary may not acquire shares of its parent company, either as founder or subscriber or by exercising a conversion or subscription right granted in connection with a conditional capital increase. [2]A violation of this provision shall not make such acquisition unenforceable.

(3) [1]Any person who acquires a share, whether as founder or subscriber or by exercising a conversion or subscription right granted in connection with a conditional capital increase, on behalf of the company or a controlled enterprise or subsidiary, shall not be exempt from liability by virtue of the fact that he did not acquire such share on his own behalf. [2]He shall be liable for the full contribution irrespective of any agreement with the company or the controlled enterprise or subsidiary. [3]Such person shall have not rights arising from the share before he acquires the share on his own behalf.

(4) [1]If, in the case of a capital increase, shares are subscribed in violation of (1) or (2), each member of the management board shall be liable to the company for the full contribution. [2]The foregoing shall not apply if the member of the management board proves that he has not been at fault.

§ 57 No Repayment of Capital, no Payment of Interest on Contributions

(1) [1]Contributions may not be repaid to shareholders. [2]The payment of the purchase price in case of a permitted acquisition of own shares shall not be deemed to constitute a repayment of contributions. [3]Sentence 1 shall not apply to contribution payments made in case of existing control agreements or profit transfer agreements (§ 291) or covered by entitlement to full consideration or restitution towards the shareholder. [4]Sentence 1 shall also not apply to the restitution of a shareholder loan and payments for claims from legal acts corresponding to a shareholder loan from an economic point of view.

(2) Interest may be neither promised nor paid to shareholders.

(3) Prior to the dissolution of the company, only distributable profits may be distributed to the shareholders.

§ 58 Appropriation of Annual Net Profit

(1) [1]The articles may provide, in respect of those cases where the shareholders' meeting is to approve the annual financial statements, that amounts of the annual net profit are to be transferred to other profit reserves. [2]On the basis of such a provision of the articles, amounts not exceeding one half of the annual net profit may be transferred to other profit reserves. [3]Amounts which are to be transferred to the legal reserve and losses carried forward shall first be deducted from the annual net profit.

(2) [1]If the management board and the supervisory board approve the annual financial statements, they may transfer amounts not exceeding one half of the annual net profit to other reserves. [2]The articles may provide that the management board and the supervisory board are authorised to transfer larger or smaller amounts, in the case of companies whose shares are traded on a public exchange, only a larger amount. [3]On the basis of such authorisation the management board and the supervisory board may not transfer amounts to other profit reserves if the other profit reserves exceed, or upon such transfer would exceed, one half of the share capital. [4](1) sentence 3 shall apply accordingly.

(2a) [1](1) and (2) notwithstanding, the management board and the supervisory board may transfer to other profit reserves the capitalized portion of the increase in value of fixed and current assets. The amount of such reserves shall be shown separately in the balance sheet; it may also be stated in the notes to the financial statements.

(3) [1]In its resolution on the appropriation of distributable profit, the shareholders' meeting may transfer additional amounts to profit reserves or carry such amounts forward as profit. [2]If the articles contain appropriate authorisation, the shareholders' meeting may also resolve on appropriation of distributable profit other than as provided by sentence 1 or other than by distribution to shareholders.

(4) [1]The shareholders shall be entitled to receive distributable profit to the extent such profit is not excluded from distribution to shareholders by law, the articles, a resolution of the shareholders' meeting pursuant to (3) or because such profit constitutes an additional expense pursuant to the resolution on the appropriation of profits. [2]The entitlement shall fall due on the third business day following the resolution of the shareholders' meeting. [3]A later due date may be determined in the resolution of the shareholders' meeting or in the articles.[1]

(5) To the extent provided by the articles, the shareholders meeting may also resolve a distribution in kind.

§ 59 Advance Payment of Distributable Profit

(1) The articles may authorise the management board to make an advance payment on account of the estimated distributable profit to shareholders after the close of the fiscal year.

(2) [1]The management board may make such advance payment only if preliminary financial statements for the past fiscal year show an annual net profit. [2]The advance payment may not in any event exceed one half of the annual net profit after deducting amounts that are to be transferred to profit reserves pursuant to law or the articles.

1 § 58 (4) sentences 2 and 3 shall enter into force on January 1, 2017.

[3]Moreover, the advance payment may not exceed one half of the distributable profit of the preceding year.

(3) The payment of an advance shall require the consent of the supervisory board.

§ 60 Distribution of Profit

(1) The shareholder shall have a share in the profits of the company in proportion to their share in the share capital.

(2) [1]If contributions to share capital have not been made in the same proportion for all shares, shareholders shall first be paid from the distributable profit an amount of four per cent of the contributions made. [2]If the profit is insufficient to make such payment, the amount to be paid shall be determined on the basis of an appropriately lower per centage. [3]Contributions which have been made during the course of the fiscal year, shall be taken into account in proportion to the time which has elapsed since the date of such contributions.

(3) The articles may provide for another method of distributing profit.

§ 61 Compensation of Ancillary Obligations

The company may pay consideration not exceeding the value of services performed for recurring obligations which shareholders are obligated to perform in addition to contributions to share capital, pursuant to the articles, irrespective of whether or not a distributable profit is shown in the balance sheet.

§ 62 Liability of Shareholders for Receipt of Prohibited Benefits

(1) [1]Shareholders shall make restitution to the company for benefits received from the company contrary to the provisions of this Act. [2]If they have received such benefits in the form of dividends, the obligation to make restitution shall exist only if they knew, or as a result of negligence did not know, that they were not entitled to such receipt.

(2) [1]The claim of the company may also be asserted by the company's creditors if they are unable to obtain satisfaction from the company. [2]If insolvency proceedings have been instituted over the company's assets, the receiver in insolvency shall exercise the rights of the company's creditors against the shareholders during the course of the insolvency proceedings.

(3) [1]The statute of limitation for any claims pursuant to the foregoing provisions shall be ten years and begins running from the receipt of the benefit. [2]§ 54 (4) sentence 2 shall apply accordingly.

§ 63 Consequences of Delayed Subscription Payments

(1) [1]Shareholders shall be required to pay contributions upon call by the management board. [2]Such call shall be announced in the company's journals, unless the articles provide otherwise.

(2) [1]Shareholders who fail to make payment of the amount called within the requisite period of time shall be required to pay interest thereon from the due date at the rate of five per cent per annum. [2]The right to claim further damages shall not be precluded.

(3) The articles may stipulate penalties for late payment.

§ 64 Expulsion of Defaulting Shareholders

(1) Shareholders who fail to make payment of amounts called within the requisite period of time may be granted a period of grace with the warning that upon the expiration of such period their shares and subscription payments will be declared forfeited.

(2) [1]Such grace period shall be announced three times in the company's journals. [2]The first announcement shall be made no later than three months, the last no later than one month prior to expiration of such period. [3]Not less than three weeks shall elapse between each announcement. [4]If the transfer of shares requires the consent of the company, it shall suffice if a single notice is made to each defaulting shareholder in lieu of such announcements; provided that in such case a grace period shall be set which is not less than one month from the date of receipt of such notice.

(3) [1]Shareholders who nevertheless fail to pay amounts called shall be declared to have forfeited their shares and subscription payments in favour of the company by announcement in the company's journals. [2]Such announcement shall specify the shares declared to have been forfeited by serial number and any other distinguishing features.

(4) [1]New certificates shall be issued in replacement of old certificates; such new certificates shall state the amount in default and all partial payments made. [2]The expelled shareholder shall be liable to the company for any loss arising from such amount in default or amounts called subsequently.

§ 65 Payment Obligation of Preceding Shareholders

(1) [1]Each predecessor of the expelled shareholder entered in the share register shall be liable to the company for payment of the amount in default to the extent that such amount cannot be obtained from his successors. [2]The company shall notify the immediate predecessor of any call for payment made to his successor. [3]It shall be presumed that payment cannot be obtained if such payment has not been received within one month from the date of call for payment and notification of the predecessor. [4]A new certificate shall be issued against payment of the amount in default.

(2) [1]Each predecessor shall be liable only for payment of amounts that have been called within a period of two years. [2]Such period shall commence on the date on which the transfer of the share has been filed for registration in the company's share register.

(3) [1]If payment of the amount in default cannot be obtained from the predecessors, the company shall promptly sell the share at the official stock exchange quotation through a stockbroker and, in the absence of a stock exchange quotation, by means of public

auction. [2]If adequate results cannot be expected from an auction at the company's domicile, the share shall be sold at an appropriate location. [3]The time, location and object of the auction shall be announced publicly. [4]The expelled shareholder and his predecessors shall be notified separately; such notification need not be made if impracticable. [5]Such announcement and notification shall be made not less than two weeks prior to the auction.

§ 66 No Release of Shareholders from their Obligations

(1) [1]The shareholders and their predecessors may not be released from their payment obligations pursuant to §§ 54 and 65. [2]A set-off against a claim of the company pursuant to §§ 54 and 65 shall not be permitted.

(2) (1) shall apply accordingly to the obligation to make restitution for benefits received contrary to the provisions of this Act, the liability of expelled shareholders for losses and the liability of shareholders for damages resulting from not making a contribution in kind duly.

(3) Shareholders may be released from the obligation to make contributions by an ordinary capital reduction or by a capital reduction through redemption of shares, provided, however, that in the case of an ordinary capital reduction the amount of such release may not exceed the amount by which the share capital is reduced.

§ 67 Registration in the Share Register

(1) [1]Regardless of a securization, registered shares shall be entered in the company's share register stating the name, date of birth and address of the shareholder, as well as the number of shares or share number and in the case of par-value shares the amount. [2]The shareholder shall be obligated to provide the information required pursuant to sentence 1 to the company. [3]The articles may provide for further details regarding the conditions under which registrations of shares in one's own name, belonging to another person, is admissible. [4]Shares belonging to domestic, EU or foreign investment portfolios pursuant to the Capital Investment Act, the shares or stocks of which are not exclusively kept by professional or semi-professional investors, shall be considered shares of the domestic, EU or foreign investment portfolio even if they are jointly owned by the investors; if the investment portfolio is not a separate legal entity, the shares shall be deemed shares of the management company of the investment portfolio.

(2) [1]In relation to the company, only a person who has been registered as such in the share register shall be deemed a shareholder. [2]There are however, no voting rights resulting from registrations exceeding a limit set out in the articles pursuant to (1) sentence 3 or with regard to the duty to disclose that the shares belong to another person set out in the articles is not fulfilled. [3]Furthermore, there are no voting rights for shares as long as a disclosure request pursuant to (4) sentence 2 or sentence 3 has not been fulfilled after the expiration of the limitation period.

(3) If the registered share is transferred to another person, deletion and the new entry shall occur upon notification and proof.

(4) [1]Credit institutions participating in the transfer or custodianship of registered shares must provide the company with the necessary information to maintain the share register against repayment of the necessary costs. [2]The registered person shall notify the company upon request within a reasonable time period to what extent he owns the shares for which he is registered as holder in the share register; as far as this is not applicable, the person shall

provide the information set out in (1) sentence 1 on the person for whom he holds the shares. [3]This shall apply accordingly for the person whose data is provided pursuant to sentence 2. (1) sentence 4 shall apply accordingly; sentence 1 shall apply to the allocation of costs. [5]If the holder of registered shares is not registered in the share register, the depository institution shall, upon request of the company, take the necessary steps to ensure that it is registered separately in the share register in lieu of the company against reimbursement by the company of all necessary expenses. [6]§ 125 (5) shall apply accordingly. [7]If, in connection with the transfer of registered shares, a credit institution is temporarily entered separately into the share register, the entry shall not give rise to any obligations resulting from paragraph (2) or pursuant to § 128 and does not lead to the applicability of limits set out in the articles pursuant to (1) sentence 3.

(5) [1]If, in the opinion of the company, a person has been wrongly registered as shareholder in the share register, the company may cancel the registration only if it has previously notified the persons concerned of the intended cancellation and has granted them a reasonable period of time to make an objection. [2]The cancellation may not be made if a person concerned objects thereto within such period.

(6) [1]Each shareholder may demand from the company information about the data relating to him entered in the share register. [2]In the case of unlisted companies, the articles may further provide for this. [3]The company may utilise the register data as well as the data provided pursuant to (4) sentence 2 and 3 for its tasks in relationship to the shareholders. [4]It may only use the data to advertise for the company to the extent that the shareholder does not object. [5]The shareholders shall be appropriately informed of their right to object.

(7) The foregoing provisions shall apply accordingly to interim certificates.

§ 68 Transfer of Registered Shares. Restriction on Transferability

(1) [1]Registered shares shall also be transferable by endorsement. [2]§§ 12, 13 and 16 of the Bills of Exchange Act shall apply accordingly to the form of the endorsement, legitimation of the holder and his obligation to surrender.

(2) [1]The articles may make the transfer subject to the consent of the company. [2]Such consent shall be granted by the management board. [3]The articles may, however, provide that the supervisory board or the shareholders' meeting shall resolve on the granting of consent. [4]The articles may specify the reasons for which consent may be refused.

(3) The company shall be obligated to verify the accuracy of the chain of endorsements and the declarations of assignment, but shall not be required to examine the signatures.

(4) The foregoing provisions shall apply accordingly to interim certificates.

§ 69 Common Title to a Share

(1) If more than one person is entitled to a share, they may exercise the rights arising from the share only through a common representative.

(2) Such persons shall be jointly and severally liable for the obligations in respect of the share.

(3) [1]If the company is required to make a statement with legal effect to shareholders and the persons sharing common title have failed to designate a common representative to the company, it shall suffice if such statement is made to any of the persons sharing common title. [2]In the case of more than one heir of a shareholder, the foregoing shall only

apply to such statements that are made no later than one month after succession to the inheritance.

§ 70 Computation of the Period of Shareholding

[1]If the exercise of rights arising from a share requires that the shareholder has been the holder of such share for a certain period of time, the right to demand transfer of title from a credit institution, a financial services institute, or an enterprise operating under § 53 (1) sentence 1 or § 53b (1) sentence 1 or (7) of the Banking Act shall be deemed equivalent to ownership. [2]The period during which the share was owned by a predecessor shall be attributed to the shareholder, provided that he has acquired the share without consideration from his fiduciary, as a successor in legal interest by operation of law, in connection with the liquidation of a community of interest, or as a result of a transfer of assets pursuant to § 14 of the Insurance Supervision Act or § 14 of the Building Loan Associations Act.

§ 71 Acquisition of Own Shares

(1) A company may only acquire own shares:

1. if the acquisition is necessary to avert severe and imminent damage to the company;
2. if the shares are to be offered for purchase to the employees or former employees of the company or of an affiliated enterprise;
3. if the acquisition is made to compensate shareholders pursuant to § 305 (2), or § 320b or to § 29 (1), § 125 sentence 1 in connection with § 29 (1), § 207 (1) sentence 1 of the Transformation Law;
4. if the acquisition is made without consideration or made by a credit institution in execution of a purchase order;
5. by universal succession;
6. on the basis of a resolution of the shareholders' meeting to redeem shares pursuant to the provisions governing a reduction of share capital; or
7. if it is a credit institution or finance institution on the basis of a resolution by the shareholders' meeting for the purposes of trading in securities. The resolution must determine that the trade volume of the shares to be acquired for this purpose may not exceed five per cent of the share capital; it must determine the highest and lowest price. The authorisation may not apply for more than five years; or
8. on the basis of an authorisation from the shareholders' meeting lasting no more than five years that sets the lowest and highest price and may not exceed 10 per cent of the share capital. Dealing in own shares shall be excluded as the purpose. § 53a shall apply to acquisition and disposal. Acquisition and disposal via the stock exchange shall be sufficient for fulfilment. The shareholders meeting may resolve a different disposal; § 186 (3), (4) and 193 (2) No. 4 shall apply accordingly in such case. The shareholders' meeting may authorise the management board to cancel the own shares without a further resolution of the shareholders' meeting.

(2) [1]The shares acquired for the purposes under (1) Nos. 3, 7 and 8 together with other

company shares that the company has already acquired may not represent more than 10 per cent of the share capital. Such acquisition is furthermore only permitted if the company can form, at the point in time of acquisition, a reserve in the amount of the expenses for the acquisition, without reducing the share capital or another reserve required by law or the articles that may not be used for payments to shareholders. [3]In the cases of (1) Nos. 1, 2, 4, 7 and 8, the acquisition is only permitted if the nominal amount of the share has been paid in full.

(3) [1]In the cases of (1) Nos. 1 and 8, the management board shall inform the shareholders' meeting about the purpose of the acquisition, the number of shares acquired, the amount of the share capital that they represent, the proportion of the share capital, and the price for the shares. [2]In the case of (1) No. 2, the shares must be given to the employees within one year of their acquisition.

(4) [1]A violation of (1) or (2) shall not make the acquisition of own shares ineffective. [2]However, an obligation to acquire own shares is null and void to the extent that it violates (1) or (2).

§ 71a Evasive Transactions

(1) [1]Any transaction providing for the grant of an advance or loan or the provisions of security by the company to another person for the purpose of acquiring shares in the company shall be null and void. [2]The foregoing shall not apply to transactions in the ordinary course of business of credit institutions or financial services institutions nor to the grant of an advance or loan or the provision of security for the purpose of the purchase of shares by employees of the company or an affiliated enterprise; provided, however, that such transactions shall also be null and void if the company at the point in time of the acquisition of the shares would not be in a position to create the reserve for the acquisition without reducing either the share capital or any reserve which is required to be created by law or the articles and which may not be used for payments to shareholders. [3]Sentence 1 shall also not apply to transactions in case of existing control agreements or profit transfer agreements (§ 291).

(2) Any transaction between the company and another person which entitles or obligates such other person to acquire shares in the company on behalf of the company or a controlled enterprise or a subsidiary shall be null and void if the acquisition of the shares by the company would violate § 71 (1) or (2).

§ 71b Rights arising from Own Shares

The company shall have no rights in respect of own shares.

§ 71c Sale or Redemption of Own Shares

(1) If the company has acquired own shares in violation of § 71 (1) or (2), such shares shall be sold within one year from the date of their acquisition.

(2) If the shares that a company has lawfully acquired pursuant to § 71 (1) and continues to hold represent more than 10 per cent of the company' s share capital, the shares in excess of such per centage shall be sold not later than three years from the date of their acquisition.

(3) If own shares have not been sold within the periods provided in (1) and (2), they shall be redeemed in accordance with § 237.

§ 71d Acquisition of Own Shares through Third Parties

[1]A third party acting in its own name but on behalf of the company may acquire or hold shares in the company only if the company would be permitted to make such acquisition pursuant to § 71 (1) sentences 1 to 5 and 7 and 8(2). [2]The foregoing shall apply to the acquisition or holding of shares in the company by a controlled enterprise or a subsidiary of the company and to the acquisition or holding by a third part acting in its own name but on behalf of a controlled enterprise or subsidiary of the company. [3]For purposes of computing the share in the share capital pursuant to § 71 (2) sentence 1 and § 71 c (2), such shares shall be deemed to be shares of the company. [4]For the rest, § 71 (3) and (4) and §§ 71a to 71c shall apply accordingly. [5]Such third party, controlled enterprise or subsidiary shall upon demand procure that the company receives title to such shares. [6]The company shall reimburse the purchase price of the shares.

§ 71e Pledge of Own Shares

(1) If the company takes own shares as a pledge, this shall be considered an acquisition of own shares pursuant to § 71 (1) and (2), § 71d. [2]A credit institution or financial services institution, however, may take in the ordinary course of business a pledge of own shares in an amount not exceeding the portion of the share capital specified in § 71 (2) sentence 1. [3]§ 71a shall apply accordingly.

(2) [1]A violation of (1) shall make unenforceable the pledge of own shares if the issue price of the pledged shares has not been paid in full. [2]A contract providing for the pledge of own shares shall be null and void if the acquisition of such shares would violate (1).

§ 72 Cancellation of Share Certificates by Invalidation Proceedings

(1) [1]A share certificate or interim certificate that has been lost or destroyed may be cancelled by means of invalidation proceedings in accordance with the Act on Court Procedure for Family Matters and Non-litigious Matters. [2]§ 799 (2) and § 800 of the Civil Code shall apply accordingly.

(2) The rights arising from dividend coupons issued to the bearer that are not yet due shall be cancelled on the date of the cancellation of the share certificate or interim certificate.

(3) The cancellation of a share certificate pursuant to §§ 73 or 226 shall not preclude the cancellation of the certificate pursuant to (1).

§ 73 Cancellation of Share Certificates by the Company

(1) [1]If the wording of share certificates has become inaccurate by reason of a change in legal circumstances, the company may, with the permission of the court, cancel the share certificates that have not been surrendered to it for correction or replacement despite request for surrender. [2]If the inaccuracy arises from a change in the par value of the shares, such certificates may be cancelled only if the par value has been reduced to effect a reduction of share capital. [3]Registered shares may not be cancelled solely by

reason of the fact that the name of the shareholder is no longer correct. [4]An appeal may be made against the decision of the court; a contesting action against a decision granting permission shall be precluded.

(2) [1]The request to surrender share certificates shall give warning of cancellation and make reference to the permission of the court. [2]Cancellation may be made only after such request has been announced in the manner prescribed for the period of grace pursuant to § 64 (2). [3]Cancellation shall become effective upon publication in the company's journals. [4]Such announcement shall designate the share certificates which have been cancelled in such a manner that it may be ascertained from the announcement itself whether a share certificate has been cancelled.

(3) [1]In lieu of the cancelled share certificates, subject to provision in the articles according to § 10 (5), new share certificates shall be issued and delivered to the person entitled thereto or deposited with the court if the company is entitled to make such deposit. [2]The court of the company's domicile shall be notified of such delivery or deposit.

(4 § 226 shall apply if shares are consolidated in connection with a reduction of share capital.

§ 74 New Certificates in Lieu of Damaged or Defaced Certificates or Interim Certificates

[1]If a share certificate or interim certificate has been damaged or defaced in such a manner that the certificate is no longer fit for circulation, the person entitled thereto may require the company to issue a new certificate against surrender of the old certificate, if the material contents and the distinguishing features of the certificate are still clearly recognizable. [2]Such person shall bear and advance the expenses.

§ 75 New Dividend Coupons

New dividend coupons may not be issued to the holder of the coupon renewal certificate if the holder of the share certificate or of the interim certificate objects to such issue; such new dividend coupons shall be delivered to the holder of the share certificate or the interim certificate if he presents such certificate.

Division Four: Constitution of the Company
Section One. Management Board

§ 76 Leadership of the Stock Corporation

(1) The management board shall have direct responsibility for the management of the company;

(2) [1]The management board may comprise one or more persons. [2]In the case of companies having a share capital of more than 3 million euros, the management board shall comprise not less than two persons, unless the articles provide that it shall comprise one person. [3]The provisions governing the appointment of a labour director to the management board shall remain unaffected.

(3) [1]Only a natural person with full legal capacity may be a member of the management board. [2]A person may not be a member of the management board who:

1. is a person under guardianship who in managing his or her property is fully or partially subject to approval (§ 1903 of the Civil Code);

2. has been prohibited by judicial decision or an enforceable administrative order from engaging in any profession, line of occupation, trade or branch of industry, as far as the purpose of the enterprise encompasses in whole or in part such prohibited activity;

3. due to one or several wilfully committed crimes, has been convicted

   a) of a failure to file for insolvency proceedings (delayed filing of insolvency);

   b) of a criminal offence pursuant to §§ 283 to 283d of the Penal Code (insolvency offences);

   c) of making false statements pursuant to § 399 of this Act or § 82 of the German Limited Liability Companies Act;

   d) of any misrepresentation pursuant to § 400 of this Act, § 331 of the Commercial Code, § 313 of the Transformation Act or § 17 of the Transparency and Disclosure Act;

   e) sentenced to a prison sentence of no less than one year pursuant to §§ 263 to 264a or §§ 265b to 266a of the Penal Code;

such exclusion shall apply for a period of five years from the date on which the judgment has become final, whereby such period shall not include any time during which the convicted person has been confined to an institution by order of the authorities.

[3]Sentence 2 No. 3 shall apply accordingly to convictions abroad due to offences comparable to the offences set out in sentence 2 No. 3.

(4) [1]The management board of companies which are listed on a stock exchange or subject to co-determination shall determine target ratios for the percentage of women at the two management levels below the management board. [2]If the percentage of women is below 30 per cent upon determination of the target ratios, the target ratios may not be lower than the rate already achieved. [3]Concurrently, time periods for attaining the target ratios shall be set. [4]The periods shall not exceed five years.

§ 77 Management

(1) [1]If the management board comprises more than one person, the members of the management board shall manage the company jointly. [2]The articles or the bylaws for the management board may provide otherwise; however, the articles or by-laws may not provide that one or more members of the management board may resolve differences of opinion within the management board against the majority of its members.

(2) [1]The management board may issue by-laws of the management board unless the articles confer the authority to issue such by-laws upon the supervisory board or the supervisory board issues by-laws for the management board. [2]The articles may make binding provisions in respect of specific matters relating to the by-laws. [3]Resolutions of the management board regarding the by-laws shall require a unanimous vote.

§ 78 Representation

(1) [1]The management board shall represent the company in and out of court. [2]If the company does not have a management board (rudderless management), the company shall be represented by the supervisory board in case declarations of intent are made towards the company or documents are sent to the company.

(2) [1]If the management board comprises more than one person, the members of the management board shall represent the company jointly, unless the articles provide otherwise. [2]If a statement with legal effect is to be given to the company, it shall suffice if such statement is made to one member of the management board or, in case of (1) sentence 2, to one member of the supervisory board. [3]Declarations of intent towards the company may be made and documents for the company may be sent to the representatives of the company pursuant to (1) using the business address entered in the commercial register. [4]Irrespective of the above, such declarations or documents may be made or sent, respectively, using the registered address of the person authorised to accept these pursuant to § 39 (1) sentence 2.

(3) [1]The articles may also provide that particular members of the management board may represent the company by acting either solely or jointly with a registered authorised officer (*Prokurist*). [2]The supervisory board may also so provide if authorised to do so by the articles. [3](2) sentence 2 shall apply accordingly in such cases.

(4) [1]Members of the management board authorised to represent the company by acting jointly may authorise individual liquidators to engage in certain transactions or kinds of transactions. [2]The foregoing shall apply accordingly if an individual member of the management board is authorised to represent the company by acting jointly with a registered authorised officer (*Prokurist*).

§ 79 [repealed]

§ 80 Details on Business Letters

(1) [1]All business letters which are directed to a specific recipient shall state the company's legal form and domicile, the court of registration of the company's domicile, the number under which the company has been registered in the commercial register as well as the surname and at least one forename in full of each member of the management board and of the chairman of the supervisory board. [2]The chairman of the management board shall be designated as such. [3]If information is provided regarding the company's capital, the amount of the share capital shall in any event be stated and, if the issue price has not been paid in full, the aggregate amount of the contributions outstanding.

(2) The information pursuant to (1) sentences 1 and 2 need not be given in communications or reports which are made in the course of an existing business relationship and for which forms are customarily used in which only the particulars of the specific transaction need be inserted.

(3) [1]Order forms shall be deemed to be business letters in the meaning of (1) sentence 1. (2) shall not apply thereto.

(4) All letterheads and order forms used by a branch of a company with its seat abroad must indicate the register where the branch is registered and the registration number; for the

rest, the provisions of 1 to 3 apply to information regarding head offices and branch offices, to the extent foreign law does not require deviations. [2]If the foreign company is in liquidation then this fact and all the liquidators are to be indicated.

§ 81 Change in the Management Board and its Members' Authority to Represent the Company

(1) The management board shall file for registration in the commercial register any change in the management board or in the authority of a member of the management board to represent the company.

The documents concerning such changes shall be appended to each filing in original or officially certified copy.

(3) The new members of the management board shall assure in the filing that no circumstances prevail which preclude their appointment pursuant to § 76 (3) sentence 2 No. 2 and 3 as well as sentence 3 and that they have been advised of their obligation to make full disclosure to the court. 2§ 37 (2) sentence 2 shall apply.

§ 82 Restrictions on the Authority to Represent and Manage

(1) The authority of the management board to represent the company may not be restricted.

(2) The members of the management board shall be obligated in the relationship to comply with the restrictions in respect of the authority to manage the company which, in accordance with the provisions, governing the stock corporation, are imposed by the articles, the supervisory board, the shareholder's meeting and the bylaws for the management board and the supervisory board.

§ 83 Preparation and Execution of Resolutions of Shareholders' Meeting

(1) [1]The management board shall, at the request of the shareholders' meeting, be obligated to prepare any matter that falls within the competence of the shareholders' meeting. [2]The foregoing shall apply to the preparation and execution of agreements that become effective only with the consent of the shareholders' meeting. [3]The resolution of the shareholders' meeting regarding such preparation and execution shall require the same majority as is required for the resolution on the respective matter or, as the case may be, the granting of consent to such agreements.

(2) The management board shall be obligated to execute any resolution adopted by the shareholders' meeting in respect of matters falling within the competence of the shareholders' meeting.

§ 84 Appointment and Removal of the Management Board

(1) [1]The supervisory board shall appoint the members of the management board for a period not exceeding five years. [2]Such appointment may be renewed or the term of office may be extended, provided that the term of each such renewal or extension shall not exceed five years. [3]Such renewal or extension shall require a new resolution of the supervisory

board, which may be adopted no more than one year prior to the expiration of the current term of office. [4]The term of office may be extended without a new resolution of the supervisory board only in the case of an appointment for less than five years, provided that the aggregate term of office does not, as a result of such extension, exceed five years. [5]The foregoing shall apply accordingly to the contract of employment; such contract may provide, however, that in the event of an extension of the term of office, the contract shall continue in effect until the expiry of such term.

(2) If more than one person is appointed as member of the management board, the supervisory board may appoint one member as chairman of the management board.

(3) [1]The supervisory board may revoke the appointment of a member of the management board or the appointment of a member as chairman of the management board for cause. [2]Such cause shall include in particular a gross breach of duties, inability to manage the company properly, or a vote of no confidence by the shareholders' meeting, unless such vote of no confidence was made for manifestly arbitrary reasons. [3]The foregoing shall also apply to the management board appointed by the first supervisory board. [4]Such revocation shall be enforceable until rendered unenforceable by a judicial decision that has become final and may not be appealed. [5]Rights arising under the contract of employment shall be governed by general provisions of law.

(4) The provisions of the Act on the Co-determination of Employees in the Supervisory Board and Management Boards in the Mining and Iron and Steel Producing Industries in the revised version published in the Federal Law Gazette Part III, Section 801-2 – the 'Coal and Steel Co-determination Act' – regarding the special majority requirements for resolutions of the supervisory board on the appointment of a labour director to the management board or the revocation of such appointment shall remain unaffected.

§ 85 Appointment by the Court

(1) [1]If the management board does not have the required number of members, the court shall make, in urgent cases, the necessary appointments upon motion by a party concerned. [2]An appeal may be made against such decision.

(2) The office of a member of the management board appointed by the court shall terminate as soon as the vacancy is filled.

(3) [1]The member of the management board appointed by the court shall be entitled to reimbursement of reasonable cash expenses and remuneration for his services. [2]If the member of the management board appointed by the court and the company do not reach agreement, the court shall fix the amount of expenses and remuneration. [3]An appeal may be made against such decision; appeals on points of law are not permitted. [4]A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.

§ 86 [repealed]

§ 87 Principles Governing Remuneration of Members of the Management Board

(1) [1]The supervisory board shall, in determining the aggregate remuneration of any member

of the management board (salary, profit participation, reimbursement of expenses, insurance premiums, commissions, incentive-based compensation promises such as subscription rights and additional benefits of any kind), ensure that such aggregate remuneration bears a reasonable relationship to the duties and performance of such member as well as the condition of the company and that it does not exceed standard remuneration without any particular reasons. [2]The remuneration system of listed companies shall be aimed at the company's sustainable development. [3]The calculation basis of variable remuneration components should therefore be several years long; in case of extraordinary developments, the supervisory board shall agree on a possibility of remuneration limitation. [4]Sentence 1 shall apply accordingly to pensions, payments to surviving dependents and similar payments.

(2) [1]If the situation of the company deteriorates after the determination so that a continued payment of remuneration under (1) would be unreasonable for the company, the supervisory board or, in case of § 85 (3), the court upon petition of the supervisory board shall reduce remuneration to a reasonable level. [2]Pensions, payments to surviving dependents and similar payments may only be reduced pursuant to sentence 1 within the first three years after resignation from the company. [3]Such reduction shall not affect the other terms of the contract of employment. [4]The member of the management board may terminate, however, his contract of employment as of the end of the text calendar quarter upon giving six weeks' notice.

(3) If insolvency proceedings have been instituted over the company's assets and the receiver in insolvency has given notice of termination of the contract of employment of a member of the management board, such member may claim compensation of damages arising as a result of such termination only for the period of two years following termination of such employment.

§ 88 Prohibition of Competition

(1) [1]Absent the consent of the supervisory board, members of the management board may neither engage in any trade nor enter into any transaction in the company's line of business on their own behalf or on behalf of others. [2]Absent such consent, they may be neither a member of the management board, nor a manager or general partner of another commercial enterprise. [3]The consent of the supervisory board may be granted only for a specific trade or business, a specific commercial enterprise, or for specific kinds of transactions.

(2) [1]If a member of the management board violates such prohibition, the company may claim damages. [2]In lieu thereof, the company may require that the member treat the transactions made for his own account as having been made on behalf of the company and remit any remuneration obtained for transactions made on behalf of another person or assign his claim to such remuneration.

(3) [1]The Partnership has three months from the date on which the other members of the management board and the members of the supervisory board obtained knowledge, or without gross negligence should have obtained knowledge of the act giving rise to the damage claim, to make any claims. [2]Irrespective of such knowledge or lack of knowledge as a result of gross negligence, the statute of limitation for such claims shall be five years from the time when they arose.

§ 89 Grant of Credit to Members of the Management Board

(1) [1]The company may grant credit to members of the management board only pursuant to a resolution of the supervisory board. [2]Such resolution may authorise only the grant of specific credit transactions or kinds of credit transactions, and for not more than three months an advance. [3]Such resolution shall make provision as to the payment of interest on, and repayment of, any loan. [4]Permission to make drawings in excess of the remuneration due to the member of the management board, in particular permission to draw advances of remuneration shall constitute a grant of credit. [5]The foregoing shall not apply to credits that do not exceed an amount equal to one month's salary.

(2) [1]The company may grant credit to its registered authorised officers (*Prokuristen*) and general managers only with the consent of the supervisory board. [2]A controlling company may grant credit to legal representatives, registered authorised officers (*Prokuristen*) or general managers of a controlled enterprise only with the consent of its supervisory board; a controlled company may grant credit to legal representatives, registered authorised officers (*Prokuristen*) or general managers of the controlling enterprise only with the consent of the supervisory board of the controlling enterprise. [3](1) sentences 2 to 5 shall apply accordingly.

(3) [1](2) shall also apply to credits to the spouse or a minor child of a member of the management board, or other legal representatives, registered authorised officers (*Prokuristen*) or general managers. [2]Moreover, such shall apply to credits granted to any third party acting on behalf of any such persons or on behalf of a member of the management board, other legal representative, registered authorised officers (*Prokuristen*) or general manager.

(4) [1]If a member of the management board, registered authorised officer (*Prokurist*) or general manager is also a legal representative or member of the supervisory board of another legal entity or member of a commercial partnership, the company may grant credit to such legal entity or commercial partnership only with the consent of the supervisory board; (1) sentences 2 and 3 shall apply accordingly. [2]The foregoing shall not apply if such legal entity or commercial partnership is affiliated with the company or if the credit is granted to finance the payment of goods that the company supplies to such legal entity or commercial partnership.

(5) Any credit granted in violation of the provisions of (1) to (4), shall be repaid immediately, irrespective of any agreement to the contrary, unless the supervisory board subsequently consents.

(6) If the company is a credit institution or financial services institution to which § 15 of the Banking Act apply, the provisions of the Banking Act shall apply in lieu of (1) to (5).

§ 90 Reports to the Supervisory Board

(1) [1]The management board shall report to the supervisory board on:

1. intended business policy and other fundamental matters regarding the future conduct of the company's business (in particular plans regarding financing, investment and personnel) responding to deviations of actual developments from objectives reported in the past and stating the reasons thereof;

2. the profitability of the company, in particular the return on equity;

3. the state of business, in particular revenues, and the condition of the company;

4. transactions that may have a material impact upon the profitability or liquidity of the company.

[2]If the company is a parent enterprise (§ 290 (1), (2) of the Commercial Code), then the report shall also deal with the subsidiary enterprise and with joint enterprises (§ 319 (1) of the Commercial Code). [3]In addition, reports to the chairman of the supervisory board shall be made on the occurrence of other significant developments, such significant developments shall also include circumstances concerning the business of an affiliated enterprise which become known to the management board and which may have a material impact upon the condition of the company.

(2) Reports pursuant to (1) sentence 1, Nos. 1 to 4, shall be made as follows:

1. reports pursuant to No. 1 not less than once a year, unless changes in circumstances or new matters necessitate an immediate report;

2. reports pursuant to No. 2 at the meeting of the supervisory board resolving an approval of the annual financial statements;

3. reports pursuant to No. 3 regularly, but not less than quarterly;

4. reports pursuant to No. 4 sufficiently early, if possible, to enable the supervisory board to express its opinion before such transactions entered into.

(3) [1]The supervisory board may require at any time a report from the management board on the affairs of the company, on the company's legal and business relationships with affiliated enterprises, and on the circumstances concerning the business of such enterprises that may have a material impact upon the condition of the company. [2]Any member may also request such report, which shall, however, only be given to the supervisory board.

(4) [1]The report shall comply with the principles of conscientious and accurate reporting. [2]They shall be made sufficiently early, if possible, and, with the exception of the report pursuant to (1) sentence 3, generally in text form.

(5) [1]Each member of the supervisory board shall have the right to take cognisance of the reports. [2]If the reports have been made in writing, they shall be submitted to each member of the supervisory board upon demand, unless the supervisory board has resolved otherwise. [3]The chairman of the supervisory board shall inform the members of the supervisory board of reports made pursuant to (1) sentence 3 no later than at the next following meeting of the supervisory board.

§ 91 Organisation; Accounting

(1) The management board shall ensure that the requisite books of account are maintained.

(2) The management board shall take suitable measures, in particular surveillance measures, to ensure that developments threatening the continuation of the company are detected early.

§ 92 Duties of the Management in the Event of Losses, Overindebtedness or Insolvency

(1) If upon preparation of the annual balance sheet or an interim balance sheet it becomes apparent, or if in the exercise of proper judgment it must be assumed that the company has incurred a loss equal to one half of the share capital, the management board shall promptly call a shareholders' meeting and advise the meeting thereof.

(2) [1]If the company becomes insolvent or overindebted, the management board may not make any payments. [2]The foregoing shall not apply to payments made after this time that are nonetheless compatible with the care of a diligent and conscientious manager. [3]The same obligation shall apply to the managing board for payments to shareholders as far as such payments were bound to lead to the stock corporation's insolvency, unless this was unforeseeable even when employing the care set out § 93 (1) sentence 1.

§ 93 Duty of Care and Responsibility of Members of the Management Board

(1) [1]In conducting business, the members of the management board shall employ the care of a diligent and conscientious manager. [2]They shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company. [3]They shall not disclose confidential information and secrets of the company, in particular trade and business secrets, which have become known to the members of the management board as a result of their service on the management board. [4]The duty referred to in sentence 3 shall not apply with regard to a recognized auditing agency pursuant to § 342b of the Commercial Code within the scope of the audit.

(2) [1]Members of the management board who violate their duties shall be jointly and severally liable to the company for any resulting damage. [2]They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager. [3]If the company takes out an insurance covering the risks of a member of the managing board arising from his work for the company, such insurance should provide for a deductible of no less than 10 per cent of the damage up to at least an amount equal to 1.5 times the fixed annual compensation of the managing board member.

(3) The members of the management board shall in particular be liable for damages if, contrary to this Act:

1. contributions are repaid to shareholders;
2. shareholders are paid interest or dividends;
3. own shares or shares of another company are subscribed, acquired, taken as a pledge or redeemed;
4. share certificates are issued before the issue price has been paid in full;
5. assets of the company are distributed;
6. payments are made contrary to § 92 (2);

7. remuneration is paid to members of the supervisory board;

8. credit is granted;

9. in connection with a conditional capital increase, new shares are issued other than for the specified purpose or prior to full payment of the consideration.

(4) [1]The members of the management board shall not be liable to the company for damages if they acted pursuant to a lawful resolution of the shareholders' meeting. [2]Liability for damages shall not be precluded by the fact that the supervisory board has consented to the act. [3]The company may waive or compromise a claim for damages not prior to the expiry of three years after the claim has arisen, provided that the shareholders' meeting consents thereto and no minority whose aggregate holding equals or exceeds one-tenth of the share capital records an objection in the minutes. [4]The foregoing period of time shall not apply if the person liable for damages is insolvent and enters into a settlement with his creditors to avoid or terminate insolvency proceedings.

(5) [1]The claim for damages of the company may also be asserted by the company's creditors if they are unable to obtain satisfaction from the company. [2]However, in cases other than those set out in (3), the foregoing shall apply only if the members of the management board have manifestly violated the duty of care of a diligent and conscientious manager; (2) sentence 2 shall apply accordingly. [3]Liability for damages with respect to the creditors shall be extinguished neither by a waiver nor by a compromise of the company nor by the fact that the act that has caused the damage was based on a resolution of the shareholder's meeting. [4]If insolvency proceedings have been instituted over the company's assets, the receiver in insolvency shall exercise the rights of the creditors against the members of the management board during the course of such proceedings.

(6) For companies that are listed on a stock exchange at the point in time of the violation of duty, claims under the foregoing provisions shall be time barred after the expiration of a period of ten years; for other companies, claims under the foregoing provisions shall be time barred after the expiration of a period of five years.

§ 94 Deputies of Members of the Management Board

The provisions relating to members of the management board shall also apply to their deputies.

Section Two. Supervisory Board

§ 95 Number of Members of the Supervisory Board

[1]The supervisory board shall comprise three members. [2]The articles may provide for a specified higher number. [3]Such number shall be divisible by three if this is required to comply with the co-determination requirements. [4]The maximum number of members of the supervisory board for companies with a share capital of:

up to	1,500,000 euros	nine
more than	1,500,000 euros	fifteen
more than	10,000,000 euros	twenty-one

[5]The foregoing shall not affect provision to the contrary which are contained in the Employees Co-determination Act of May 4, 1976 (Federal Law Gazette I p. 1153), the Coal and Steel Co-determination Act and the Supplemental Act on the Co-determination of Employees in the Supervisory Boards and Management Boards in the Mining and the Iron and Steel Producing Industries in the revised version published in the Federal Law Gazette Part III, Section 801-3 – 'the Supplemental Co-determination Act'.

§ 96 Composition of the Supervisory Board

(1) The supervisory board is composed of

in case of companies subject to the Co-determination Act, of supervisory board members of the shareholders and the employees;

in case of companies subject to the Coal and Steel Co-determination Act, of supervisory board members of the shareholders and the employees and of further members;

in case of companies subject to §§ 5 to 13 of the Supplemental Co-Determination Act, of supervisory board members of the shareholders and the employees and of one further member;

in case of companies subject to § 76 (1) of the One-Third Co-determination Act, of supervisory board members of the shareholders and the employees;

in case of companies subject to the Act on Employee Co-determination within Cross-border Mergers of December 21, 2006 (Federal Law Gazette I p.3332), of supervisory board members of the shareholders and the employees;

in case of other companies, only of supervisory board members of the shareholders.

(2) [1]In case of listed companies which are subject to the Co-determination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act, the supervisory board shall be composed of at least 30 per cent of women and at least 30 per cent of men. [2]The minimum percentage shall be complied with by the supervisory board in its entirety. [3]If the shareholders' or employee representatives vis-à-vis the chairman of the supervisory board raise an objection against such overall compliance on the basis of a majority resolution passed prior to the election, the minimum percentage for the respective election shall be complied with separately by the shareholders and employees, respectively. [4]In all cases, numbers shall be mathematically rounded up or down to a whole number of persons. [5]If a higher percentage of women on either side decreases subsequently and if an objection to overall compliance is then raised from such side, the other side's appointments shall not become ineffective as a result thereof. [6]An election of the members of the supervisory board by the shareholders' meeting and an appointment to the supervisory board in breach of the minimum percentage requirement shall be null and void. [7]If an election is declared null and void for other reasons, any elections meanwhile conducted shall insofar not constitute a breach of the minimum percentage requirement. [8]The election of the employees' supervisory board members shall be subject to the laws on co-determination mentioned in sentence 1.

(3) [1]In case of listed companies which resulted from a cross-border merger and whose supervisory or management bodies according to the Act on the co-determination of employees shall, in case of a cross-border merger, comprise an equal number of shareholders' and employee representatives, the respective supervisory or management

body shall comprise at least 30 per cent of both women and men. [2](2) sentences 2, 4, 6 and 7 shall apply accordingly.

(4) The supervisory board shall be composed in accordance with the statutory provisions last applied unless, pursuant to § 97 or § 98, other statutory provisions govern which have been specified in an announcement of the management board or in a judicial decision.

§ 97 Announcement Concerning the Composition of the Supervisory Board

(1) [1]If the management board is of the opinion that the composition of the supervisory board does not comply with applicable statutory provisions, it shall promptly announce such fact in the company's journals and at the same time by notices displayed in all designated offices of the company and the members of its group. [2]The statutory provisions that are applicable in the opinion of the management board shall be specified in such announcement. [3]Such announcement shall state that the supervisory board will be composed in accordance with such provisions, unless parties with standing pursuant to § 98 (2) make motion to the court having jurisdiction pursuant to § 98 (1) within one month from the date of the announcement in the Federal Gazette.

(2) [1]If no motion has been made to the court having jurisdiction pursuant to § 98 (1) within one month from the date of the announcement in the Federal Gazette, the new supervisory board shall be composed in accordance with the statutory provisions specified in the announcement of the management board. [2]The provisions of the articles regarding the composition of the supervisory board, the number of members of the supervisory board and the election, removal and delegation of members of the supervisory board shall, in so far as they conflict with the applicable statutory provisions, cease to be effective as at the adjournment of the first shareholders' meeting called after the expiration of such one month period, but in any event no more than six months after the expiration of such period. [3]As at the same date the term of office of the previous members of the supervisory board shall expire. [4]A shareholder's meeting held within such six month period may, by simple majority, substitute new provisions for those provisions in the articles that cease to be effective.

(3) No announcement concerning the composition of the supervisory board may be made while judicial proceedings pursuant to § 98 and 99 are pending.

§ 98 Judicial Decision Concerning the Composition of the Supervisory Board

(1) If it is disputed or uncertain which statutory provisions shall apply to the composition of the supervisory board, the exclusive jurisdiction to decide such issue upon application shall lie with the regional court of the district in which the company is domiciled.

(2) [1]The following shall have standing to make such motion

1. the management board;
2. each member of the supervisory board;
3. each shareholder;

4. the central labour council of the company or, if the company has only one labour council, such labour council;

5. the central managing employees council of the company or, if the company has only one managing employees council, such managing employees council;

6. the central labour council of another enterprise whose employees participate directly or through electors in the election of members of the supervisory board of the company pursuant to the statutory provisions whose application is disputed or uncertain, or, if only one labour council exists in such other enterprise, such labour council;

7. the central managing employees council of another enterprise whose employees participate directly or through electors in the election of members of the supervisory board of the company pursuant to the statutory provisions whose application is disputed or uncertain, or, if only one managing employees council exists in such other enterprise, such managing employees council;

8. not less than one-tenth or one hundred of the employees who participate directly or through electors in the election of members of the supervisory board of the company pursuant to the statutory provisions whose application is disputed or uncertain;

9. the central organisations of the labour unions which would, pursuant to the statutory provisions whose application is disputed or uncertain, have a right to nominate members;

10. labour unions that would, pursuant to the statutory provisions whose application is disputed or uncertain, have a right to nominate members.

[2]If either the application of the Co-determination Act or the application of certain provisions of the Co-determination Act is disputed or uncertain, then in addition to those having standing to make motion pursuant to sentence 1, one-tenth of the workers who are entitled to vote, or one-tenth of the employees designated in § 3 (1) No. 1 of the Co-determination Act who are entitled to vote, or one-tenth of the managerial employees within the meaning of the Codetermination Act who are entitled to vote, shall also have standing to make motion hereunder.

(3) (1) and (2) shall apply accordingly in the event of a dispute as to whether the external auditor has correctly determined the relevant revenue ratios pursuant to § 3 or § 16 of the Supplemental Co-Determination Act.

(4) [1]If the composition of the supervisory board does not comply with the judicial decision, the new supervisory board shall be composed in accordance with the statutory provisions specified in such decision. [2]§ 97 (2) shall apply accordingly, except that the six-month period shall commence on the date on which such decision becomes final and may not be appealed.

§ 99 Procedure

(1) The procedure shall be governed by the provisions of the Act on Court Procedure in Family Matters and Non-litigious Matters, unless (2) to (5) provide otherwise.

(2) [1]The regional court shall announce the motion in the company's journals. [2]The

management board, each member of the supervisory board, and the labour councils and central organisations that have standing to make motion pursuant to § 98 (2) shall be heard.

(3) [1]The decision of the regional court shall be made by decree setting out the grounds on which the decision is based. [2]Such decision of the regional court may be appealed. [3]Such appeal may be based only on a violation of the law; § 72 (1) sentence 2 and § 74 (2) and (3) of the Act on Court Procedure in Family Matters and Non-litigious Matters as well as § 547 of the Code of Civil Procedure shall apply accordingly. [4]Such appeal may only be made by filing a notice of appeal signed by an attorney at law. [5]The state government may by regulation transfer jurisdiction for several higher regional courts to one higher regional court if required to ensure uniformity of decisions. [6]The state government may transfer such power to the state ministry of justice.

(4) [1]The court shall serve its decision on the party having made motion and on the company. [2]Furthermore, the court shall announce the decision in the company's journals without setting out the grounds on which the decision is based. [3]Appeal may be made by each party having standing to make motion pursuant to § 98 (2). [4]The period for filing the notice of appeal shall commence on the date on which the decision was announced in the Federal Gazette, but, in the case of the party having made motion and the company, not prior to service of the decision.

(5) [1]The decision shall become binding only when it has become final and may not be appealed. [2]Such decision shall be binding for and against everyone. [3]The management board shall promptly submit the binding decision to the commercial register.

(6) [1]The party having made motion shall be liable for the costs, in whole or in part, if equity so requires. [2]The parties' own costs shall not be reimbursed.

§ 100 Personal Qualifications of Members of the Supervisory Board

(1) [1]Only a natural person with full legal capacity may be a member of the supervisory board. [2]A person under guardianship who in managing his or her property is fully or partially subject to approval (§ 1903 of the Civil Code) may not be a member of the supervisory board.

(2) [1]A person may not be a member of the supervisory board who:

1. is already a member of the supervisory board in ten commercial enterprises which are required by law to form a supervisory board;

2. is the legal representative of a controlled enterprise of the company;

3. is the legal representative of another corporation whose supervisory board includes a member of the management board of the company; or

4. was a member of the management board of the same listed company during the past two years, unless he is elected upon nomination by shareholders holding more than 25 per cent of the voting rights in the company.

[2]In determining the maximum number for purpose of sentence 1, No. 1, no account shall be taken of up to five seats which a legal representative (or, in the case of a sole proprietorship, the owner) of the controlling enterprise of a group holds in supervisory boards of commercial enterprises which are members of such group and which are required by law to form a supervisory board. In determining the maximum number for

the purpose of sentence 1, No. 1, supervisory board seats within the meaning of No. 1 for which the member was elected chairperson shall be taken into account twice.

(3) The other personal qualifications of the supervisory board members of the employees and of the additional members shall be determined by the Co-determination Act, the Coal and Steel Co-determination Act, the Supplemental Co-determination Act, the One-Third Co-determination Act and the Act on Employee Co-determination within Cross-border Mergers

(4) The articles may stipulate personal qualifications only for those members of the supervisory board who are elected by the shareholders' meeting without being bound by nominations, or who are appointed to the supervisory board pursuant to the articles.

(5) In case of companies which are capital-market oriented within the meaning of § 264d of the Commercial Code, CRR credit institutions within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or insurance undertakings within the meaning of Article 2 (1) of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (Official Journal L 374, 31 December 1991, p. 7) as last amended by Directive 2006/46/EC (Official Journal L 224, 16 August 2006, p. 1), at least one member of the supervisory board shall have expertise knowledge in the fields of accounting or annual auditing; the members in their entirety shall be familiar with the sector in which the company operates.

§ 101 Appointment of the Members of the Supervisory Board

(1) [1]The members of the supervisory board shall be elected by the shareholders' meeting, unless they are to be appointed to the supervisory board or elected as representatives of the employees pursuant to the Codetermination Act, the Supplemental Codetermination Act, the One-Third Co-determination Act or the Act on Employee Co-determination within Cross-border Mergers. [2]The shareholders' meeting shall be bound by nominations only pursuant to § 6 to 8 of the Coal and Steel Co-determination Act.

(2) [1]The right to appoint members to the supervisory board may only be granted by the articles and only to specific shareholders or the holders of specific shares. [2]The right to appoint may be granted to holders of specific shares only if the shares are in registered form and if their transfer requires the consent of the company. [3]Shares of holders of the right to appoint shall not be deemed to constitute a separate class. [4]Rights to appoint may be granted only with respect to no more than one-third in aggregate of the shareholder representatives in the supervisory board as determined by law or the articles.

(3) [1]It shall not be permitted to appoint deputies of members of the supervisory board. [2]However, for each member of the supervisory board a substitute member may be appointed who shall become a member of the supervisory board if the regular member ceases to hold office prior to the expiration of his term of office, except for the additional member to be elected pursuant to the Coal and Steel Co-determination Act or the Supplemental Co-determination Act upon nomination by the other members of the supervisory board. [3]Such substitute member may only be appointed at the same time as the respective regular member of the supervisory board. [4]The provisions governing members of the supervisory board shall govern his appointment, the invalidity of such appointment and actions to set it aside.

§ 102 Term of Office of Members of the Supervisory Board

(1) [1]The members of the supervisory board may not be appointed for a period of time extending beyond the adjournment of the shareholders' meeting resolving on ratification of the acts of management for the fourth fiscal year following the commencement of their respective term of office. [2]The fiscal year in which such term of office commences shall not be taken into account.

(2) The term of office of a substitute member shall expire not later than the expiration of the term of office of the regular member of the supervisory board who has ceased to hold office.

§ 103 Removal of Members of the Supervisory Board

(1) [1]Members of the supervisory board who have been elected by the shareholders' meeting without being bound by nominations may be removed pursuant to resolution of the shareholders' meeting prior to the expiration of their term of office. [2]Such resolution shall require a majority of not less than three-fourths of the votes cast. [3]The articles may provide for another majority and additional requirements.

(2) [1]A member of the supervisory board who has been appointed to the supervisory board pursuant to the articles may at any time be removed and replaced by another person by the person who has the right to appoint. [2]If the requirements specified in the articles in respect of the right to appoint are no longer met, the shareholders' meeting may remove the appointed member by a simple majority of votes.

(3) [1]Upon motion by the supervisory board, the court shall remove a member of the supervisory board, for cause relating to the person of such member. [2]The supervisory board shall resolve on such motion by simple majority. [3]If such member of the supervisory board has been appointed to the supervisory board pursuant to the articles, shareholders whose aggregate holding amounts to one-tenth of the share capital or represents an amount of the share capital corresponding to one million euros may also make such motion. [4]An appeal may be made against such decision.

(4) The Co-determination Act, the Coal and Steel Co-determination Act, the Supplemental Co-determination Act, the One-Third Co-determination Act, the Act on the Participation of Employees in a European Company and the Act on Employee Co-determination within Cross-border Mergers shall apply, in addition to (3), to the removal of members of the supervisory board who were neither elected by the shareholders' meeting without being bound by nominations, nor appointed to the supervisory board pursuant to the articles.

(5) The provisions governing removal of a member of the supervisory board shall also apply to the removal of a substitute member.

§ 104 Appointment by the Court

(1) [1]If the supervisory board does not have the requisite number of members to constitute a quorum, the court shall restore it to the requisite number upon motion by the management board, a member of the supervisory board or a shareholder. [2]The management board shall be obligated to make such motion promptly, unless restoration to such number may be expected to occur prior to the next meeting of the supervisory board. [3]If the supervisory board is required to include representatives of the employees, such motion may also be made by:

1. the company's central labour council or, if only one labour council exists in the company, such labour council, and, if the company is the controlling enterprise of a group, the group labour council,

2. the company's central managing employees labour council or, if only one managing employees council exists in the company, such managing employees council, and, if the company is the controlling enterprise of a group, the group managing employees council,

3. the central labour council of another enterprise whose employees participate directly or through electors in the election or, if such other enterprises has only one labour council, such labour council;

4. the central managing employees council of another enterprise whose employees participate directly or through electors in the election or, if such other enterprise has only one managing employees council, such managing employees council;

5. not less than one-tenth or one hundred of the employees who participate in the election directly or through electors;

6. the central organisations of labour unions which have the right to nominate representatives of the employees to the supervisory board;

7. labour unions which have the right to nominate the supervisory board representatives of the employees;

[4]If the supervisory board is required to include representatives of the employees pursuant to the Co-determination Act, then in addition to those parties having standing to make motion pursuant to sentence 3, one-tenth of the workers who are entitled to vote or one-tenth of the employees designated in § 3 (1) No. 1 of the Codetermination Act who are entitled to vote or one-tenth of the managerial employees within the meaning of the Codetermination Act, who are entitled to vote, shall also have standing to make such motion. [5]An appeal may be made against such decision.

(2) [1]If for a period of more than three months the number of members of the supervisory board has been less than the number required by law or the articles, the court shall upon motion restore it to the requisite number. [2]In urgent cases the court shall, upon motion, restore the supervisory board to such number even before such period has expired. [3]Standing to make a motion shall be governed by (1). [4]An appeal may be made against such decision.

(3) (2) shall apply to a supervisory board in which the employees are entitled to co-determination pursuant to the provision of the Codetermination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act, provided, however, that:

1. the court may not restore the supervisory board to the requisite number by appointing the additional member who is to be elected pursuant to the Coal and Steel Co-determination Act or the Supplemental Codetermination Act upon nomination by the other members of the supervisory board;

2. if the supervisory board does not have the full number of members that it is required to comprise pursuant to the law or the articles, except for the additional member referred to in No. 1, it shall always constitute an urgent case.

(4) [1]If the supervisory board is required to also include representatives of the employees, the court shall appoint members in such a manner that the numerical ratio required for the composition of the supervisory board is maintained or re-established. [2]If appointments are to be made to the supervisory board to re-establish a quorum, the foregoing shall apply only if the number of members of the supervisory board required for a quorum permits such ratio to prevail. [3]If a member of the supervisory board is to be replaced who must fulfil special personal qualifications pursuant to the law or the articles, the member of the supervisory board appointed by the court shall also fulfil such qualifications. [4]If a member of the supervisory board is to be replaced whom a central organisation of labour unions, a labour union or the labour councils would have the right to nominate, the court shall take into account the nominations of such parties, unless appointment of the nominated person would contravene overriding interests of the company or the general public; in case the member of the supervisory board is to be elected by electors, the foregoing shall apply to joint nominations by the labour councils of the enterprises in which electors are to be elected.

(5) In case of listed companies which are subject to the Co-determination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act, any additional appointment by the court shall be made in accordance with § 96 (2) sentences 1 to 5.

(6) The term of office of the member of the supervisory board appointed by the court shall expire in any event as soon as the deficiency in the composition of the supervisory board has been rectified.

(7) [1]The member of the supervisory board appointed by the court shall be entitled to reimbursement of reasonable cash expenses and, if remuneration is granted to regular members of the supervisory board of the company, to remuneration for his services. [2]Upon motion by such member of the supervisory board, the court shall stipulate the expenses and remuneration. [3]An appeal may be made against such decision; appeals on points of law are not permitted. [4]A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.

§ 105 Incompatibility of Management and Supervisory Board Membership

(1) A member of the supervisory board may not also be a member of the management board, a permanent deputy member of the management board, a registered authorised officer (*Prokurist*) or general manager of the company.

(2) [1]The supervisory board may appoint certain of its members as deputies for absent or incapacitated members of the management board for a predetermined period of time which may not in any event exceed one year. [2]Such appointment may be renewed or the term of office extended, provided, however, that the aggregate term of office may not exceed one year. [3]The members of the supervisory board may not exercise the functions of a member of the supervisory board during their term of office as deputy members of the management board. [4]The prohibition of competition pursuant to § 88 shall not apply to such deputy members.

§ 106 Announcement of Changes in the Supervisory Board

In the event of changes in the membership of the supervisory board, the management board shall promptly submit to the commercial register a list of members of the supervisory

board stating each member's last name, first name, occupation and place of residence; in accordance with § 10 of the Commercial Code the court shall publish a notice on the submission of the list.

§ 107 Internal Organisation of the Supervisory Board

(1) [1]The supervisory board shall elect from among its members a chairman and at least one deputy chairman in accordance with the applicable provisions of the articles. [2]The management board shall file the details of persons elected with the commercial register. [3]The deputy chairman shall have the rights and duties of the chairman only if the latter is incapacitated.

(2) [1]Minutes shall be kept of the meetings of the supervisory board, which shall be signed by the chairman. [2]The minutes shall state the place and date of the meeting, the persons attending, the items on the agenda, the essential contents of the proceedings, and the resolutions of the supervisory board. [3]A violation of the provisions of sentence 1 or 2 shall not make unenforceable a resolution. [4]A copy of the minutes of the meeting shall be provided upon request to each member of the supervisory board.

(3) [1]The supervisory board may appoint from among its members one or more committees, in particular for purposes of preparing its deliberations and resolutions or for supervising the execution of its resolutions. [2]It may in particular appoint an audit committee to deal with the supervision of the accounting process, the efficiency of the internal control system, the risk management system and the internal revision system as well as with the annual auditing, in particular with the selection and the independence of the external auditor and the additional services rendered by the external auditor. [3]The audit committee may make recommendations or proposals to ensure the integrity of the accounting process. [4]The duties pursuant to (1) sentence 1, § 59 (3), § 77 (2) sentence 1, § 84 (1) sentence 1 and 3, (2) and (3) sentence 1, § 87 (1) and (2) sentence 1 and 2, § 111 (3), §§ 171, 314 (2) and (3) as well as resolutions providing that specific types of transactions may be entered into only with the consent of the supervisory board, may not be referred to a committee to decide in lieu of the supervisory board. [5]The supervisory board shall regularly be provided with reports on the activities of the committees.

(4) If the supervisory board of a company which is capital-market oriented within the meaning of § 264d of the Commercial Code, a CRR credit institution within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or an insurance undertaking within the meaning of Article 2 (1) of Council Directive 91/674/EEC establishes an audit committee within the meaning of (3) sentence 2, the conditions set forth in § 100 (5) shall be complied with.

§ 108 Resolutions of the Supervisory Board

(1) The supervisory board shall decide by resolution.

(2) [1]The quorum required for the supervisory board may, to the extent not determined by law, be set by the articles. [2]If the quorum is set neither by law nor the articles, a quorum of the supervisory board shall only be present if not less than one-half of the number of members which it is required to comprise pursuant to law or the articles take part in the passing of the resolution. [3]In any event at least three members shall be required to take part in the passing of a resolution. [4]The presence of a quorum shall not be prejudiced by the fact that the supervisory board shall comprise fewer members than the number required by law or

the articles, even if the numerical ratio required for its composition is not maintained.

(3) [1]Members of the supervisory board who are not present may take part in the passing of a resolution of the supervisory board or of any committee thereof by causing votes in writing to be submitted to the meeting. [2]Such votes may be submitted by other members of the supervisory board. [3]They may also be submitted by persons who are not members of the supervisory board, provided that such persons are entitled to attend the meeting pursuant to § 109 (3).

(4) Subject to more detailed regulation by the articles or the bylaws of the supervisory board, resolutions of the supervisory board or of any committee thereof may be adopted in writing, by telegraph or telephone if no member objects to such procedure.

§ 109 Attendance of Meetings of the Supervisory Board and Its Committees

(1) [1]Persons who are not members of the supervisory board or the management board may not attend meetings of the supervisory board and its committees. [2]Experts and persons needed to give information may be invited for consultation on individual matters.

(2) Members of the supervisory board who are not members of a committee may attend meetings of such committee, unless the chairman of the supervisory board determines otherwise.

(3) The articles may permit persons who are not members of the supervisory board to attend meetings of the supervisory board and its committees in lieu of members of the supervisory board who are unable to attend, provided that such members have authorised such persons to attend in writing.

(4) The foregoing shall not affect statutory provisions that provide otherwise.

§ 110 Convening Supervisory Board Meetings

(1) [1]Each member of the supervisory board or the management board may, upon stating the grounds for this, request that the chairman of the supervisory board promptly call a meeting of the supervisory board. [2]The meeting shall be held within two weeks from the date on which notice thereof has been given.

(2) If any such request made by two or more members of the supervisory board or by the management board should not be complied with, such members may themselves call a meeting of the supervisory board upon stating these facts.

(3) [1]Meetings of the supervisory board should as a rule be called twice in every calendar half year. For unlisted companies, the supervisory board may determine that one meeting per calendar half year has to be held.

§ 111 Duties and Rights of the Supervisory Board

(1) The supervisory board shall supervise the management of the company.

(2) [1]The supervisory board may inspect and examine the books and records of the company

as well as the assets of the company, in particular cash, securities and merchandise. [2]The supervisory board may also commission individual members or, with respect to specific assignments, special experts, to carry out such inspection and examination. [3]It shall instruct the auditor as to the annual financial statements and consolidated financial statements according to § 290 of the Commercial Code.

(3) [1]The supervisory board shall call a shareholder's meeting whenever the interests of the company so require. [2]A simple majority shall suffice for such resolution.

(4) [1]Management responsibilities may not be conferred on the supervisory board. [2]However, the articles or the supervisory board have to determine that specific types of transactions may be entered into only with the consent of the supervisory board. [3]If the supervisory board refuses to grant consent, the management board may request that a shareholders' meeting approve the grant. [4]The shareholders meeting by which the shareholders' approves shall require a majority of not less than three-fourths of the votes cast. [5]The articles may neither provide for any other majority nor prescribe any additional requirements.

(5) [1]The supervisory board of a company which is listed on a stock exchange or subject to co-determination determines target ratios for the percentage of women in the supervisory board and in the management board. [2]If the percentage of women is below 30 per cent upon determination of the target ratios, the target ratios may not be lower than the rate already achieved. [3]Concurrently, time periods for attaining the target ratios shall be set. [4]The periods shall not exceed five years. [5]If there already is a ratio pursuant to § 96 (2) which applies to the supervisory board, the determination shall only be made for the management board.

(6) Members of the supervisory board may not confer their responsibilities on other persons.

§ 112 Representation of the Company as against Members of the Management Board

[1]The supervisory board shall represent the company both in and out of court as against the management board. [2]§ 78(2) sentence 2 shall apply accordingly.

§ 113 Remuneration of the Members of the Supervisory Board

(1) [1]The members of the supervisory board may receive remuneration for their services. [2]Such remuneration may be determined in the articles or set by the shareholders' meeting. [3]Such remuneration shall bear a reasonable relationship to the duties of the members of the supervisory board and to the condition of the company. [4]If the remuneration is determined in the articles, the shareholders' meeting may, by simple majority, resolve on an amendment of the articles by which such remuneration is reduced.

(2) [1]Remuneration of the members of the first supervisory board for their services may be granted only pursuant to resolution of the shareholders' meeting. [2]Such resolution may be adopted only in the shareholders' meeting resolving on ratification of the acts of the members of the first supervisory board.

(3) [1]If the members of the supervisory board are granted a share of the annual profit of the company, such share shall be computed on the basis of distributable profit, reduced by an amount of not less than four per cent of the contributions made minimum issue price of

the shares. [2]Conflicting determinations are void.

§ 114 Contracts with Members of the Supervisory Board

(1) If a member of the supervisory board in addition to his services as a member of the supervisory board, enters into a contract with the company for provision of professional services which does not establish an employment relationship, or into a contract with the company to undertake a special assignment, any such contract shall require the consent of the supervisory board in order to be valid.

(2) [1]If the company pursuant to any such contract grants remuneration to a member of the supervisory board without the consent of the supervisory board, such member of the supervisory board shall repay such remuneration, unless the supervisory board subsequently approves such contract. [2]A claim of the member of the supervisory board against the company for restitution of the enrichment obtained by the services performed shall remain unaffected; such claim may, however, not be set off against the company's entitlement to restitution.

§ 115 Grant of Credit to Members of the Supervisory Board

(1) [1]The company may grant credit to members of the supervisory board only with the consent of the supervisory board. [2]A controlling company may grant credits to members of the supervisory board of a controlled enterprise only with the consent of its supervisory board; a controlled company may grant credits to members of the supervisory board of the controlling enterprise only with the consent of the supervisory board of the controlling enterprise. [3]Such consent may be granted only for specific credit transactions or kinds of credit transactions, and for not more than three months in advance. [4]The resolution on such consent shall make provision as to the payment of interest on, and repayment of, any loan. [5]If the member of the supervisory board carries on a business as a sole proprietor, such consent shall not be required if the credit is granted to finance the payment of goods which the company supplies to his business.

(2) (1) shall also apply to credits to the spouse or a minor child of a member of the supervisory board and to credits to any third party acting on behalf of any such person or on behalf of a member of the supervisory board.

(3) [1]If a member of the supervisory board is also a legal representative of another legal entity or member of a commercial partnership, the company may grant credit to such legal entity or commercial partnership only with the consent of the supervisory board; (1), sentences 3 and 4 shall apply accordingly. [2]The foregoing shall not apply if such legal entity or commercial partnership is affiliated with the company or if the credit is grant to finance the payment of goods that the company supplies to such legal entity or commercial partnership.

(4) Any credit granted in violation of the provisions of (1) to (3), shall be repaid immediately, irrespective of any agreement to the contrary, unless the supervisory board subsequently consents.

(5) If the company is a credit institution or financial services institution to which § 15 of the Banking Act apply, the provisions of the Banking Act shall apply in lieu of (1) to (4).

§ 116 Duty of Care and Responsibility of Members of the Supervisory Board

§ 93 on the duty of care and responsibility of members of the management board shall, with the exception of (2) sentence 3, apply accordingly to the duty of care and responsibility of the members of the supervisory board. [2]The supervisory board members are particularly bound to maintain confidentiality as to confidential reports received or confidential consultations. [3]They are in particular liable for damages if they determine unreasonable remuneration (§ 87 (1)).

Section Three. Exertion of Influence on the Company

§ 117 Liability for Damages

(1) [1]Any person who, by exerting his influence on the company, induces a member of the management board or the supervisory board, a registered authorised officer (*Prokurist*) or an authorised signatory to act to the disadvantage of the company or its shareholders shall be liable to the company for any resulting damage. [2]Such person shall also be liable to the shareholders for any resulting damage insofar as they have suffered damage in addition to any loss incurred as a result of the damage to the company.

(2) [1]In addition to such person, the members of the management board and the supervisory board shall be jointly and severally liable if they have acted in violation of their duties. [2]They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager. [3]The members of the management board and the supervisory board shall not be liable to the company or the shareholders for damage if they acted pursuant to a lawful resolution of the shareholders' meeting. [4]Liability for damages shall not be precluded by the fact that the supervisory board has consented to the act.

(3) In addition to such person, any person who has wilfully caused undue influence to be exerted shall also be jointly and severally liable to the extent that he has obtained an advantage from the detrimental act.

(4) § 93 (4) sentences 3 and 4 shall apply accordingly to the extinguishment of liability for damages to the company.

(5) [1]The claim for damages of the company may also be asserted by the company's creditors if they are unable to obtain satisfaction from the company. [2]Liability for damages with respect to the creditors shall be extinguished neither by a waiver nor by a compromise of the company nor by the fact that the act that has caused the damage was based on a resolution of the shareholder's meeting. [3]If insolvency proceedings have been instituted over the company's assets, the receiver in insolvency shall exercise the rights of the creditors during the course of such proceedings.

(6) Claims under the foregoing provisions shall be time barred after expiration of a period of five years.

(7) The foregoing provisions shall not apply if the member of the management board or the supervisory board, the registered authorised officer (*Prokurist*) or the authorised signatory was induced to engage in the act causing damage by the exercise of:

1. the right to direct under a control agreement; or

2. the right to direct of an acquiring company (§ 319) into which the company has been integrated.

Section Four: Shareholders' Meeting
Subsection One. Rights of the Shareholders' Meeting

§ 118 General Provisions

(1) [1]The shareholders shall exercise their rights with respect to the company at shareholders' meetings unless this Act provides otherwise. [2]The articles may provide, or may authorise the management board to provide, that the shareholders may participate in the shareholders' meeting without being present on site and without having a proxy holder and may exercise all or individual rights in whole or in part by way of electronic communication.

(2) The articles may provide, or may authorise the management board to provide, that shareholders may vote, without participating in the shareholders' meeting, in writing or by way of electronic communication (postal vote).

(3) [1]The members of the management board and the supervisory board shall attend the shareholders' meeting. [2]The articles may provide for certain cases where the attendance of supervisory board members may be by audio-visual transmission.

(4) The articles or the bylaws of the shareholders' meeting according to § 129 (1) may provide, or may authorise the management board or the chairperson of the meeting to provide, that audio-visual transmission of the meeting is admitted.

§ 119 Rights of the Shareholders' Meeting

(1) The shareholders' meeting shall resolve on all matters expressly stated in this Act or the articles, in particular with respect to:

1. The appointment of members of the supervisory board, to the extent they are not to be appointed to the supervisory board or be elected as representatives of employees pursuant to the Codetermination Act, the Supplemental Co-determination act, the One-Third Co-determination Act or the Act on Employee Co-determination within Cross-border Mergers;

2. the appropriation of distributable profits;

3. the ratification of the acts of the members of the management board and the supervisory board;

4. the appointment of the auditor;

5. amendments to the articles;

6. measures to increase or reduce the share capital;

7. the appointment of auditors for the examination of matters in connection with the formation or the management of the company;

8. the dissolution of the company.

(2) The shareholders' meeting may decide on matters concerning the management of the company only if required by the management board.

§ 120 Ratification of the Acts of Management; Vote on the Compensation Scheme

(1) [1]The shareholders' meeting shall annually, during the first eight months of the fiscal year, resolve on ratification of the acts of the members of the management board and the supervisory board. [2]A separate vote shall be taken with regard to the ratification of the acts of an individual member if so resolved by the shareholders' meeting or so requested by a minority, whose aggregate holding equals or exceeds one-tenth of the share capital or represents an amount of the share capital corresponding to 1 million euros.

(2) [1]Such ratification shall constitute approval by the shareholders' meeting of the company's administration by the members of the management board and the supervisory board. [2]Such ratification shall not constitute a waiver of claims for compensation of damage.

(3) The deliberations on ratification shall be combined with the deliberations on the appropriation of distributable profits.

(4) [1]The shareholders' meeting of a listed company may resolve on the approval of the compensation scheme. [2]The resolution shall not give rise to any rights or obligations; in particular, the obligations of the supervisory board pursuant to § 87 shall remain unaffected. [3]The resolution shall not be voidable pursuant to § 243.

Subsection Two. Notice of a Shareholders' Meeting

§ 121 General Provisions

(1) A shareholders' meeting shall be called in all cases provided for in this Act or the articles or whenever required by the interests of the company.

(2) [1]The shareholders' meeting shall be called by the management board, which shall resolve thereon by a simple majority of votes. [2]Persons who are registered in the commercial register as members of the management board shall be deemed to have the requisite authority to call such meeting. [3]The right of any other person based on law or the articles to call a shareholders' meeting shall remain unaffected.

(3) [1]Notice of the shareholders' meeting shall contain the company's business name and domicile as well as the time and place of the shareholders' meeting. [2]Moreover the agenda shall be stated therein. [3]In case of public companies, the management board or, in case the supervisory board calls the meeting, the supervisory board shall state in the notice:

1. the preconditions for participating in the meeting and exercising voting rights as well as, if applicable, the deadline for proofs pursuant to § 123 (4) sentence 2 and its relevance;

2. the procedure for casting votes

   a) by a proxy holder, whereby reference is made to the forms which have to be used for granting a voting proxy and to the manner in which proof of the appointment of a proxy holder may be transmitted electronically to the company; as well as

   b) by postal vote or by way of electronic communication pursuant to § 118 (1) sentence 2, as far as the articles provide for a corresponding form of casting votes;

3. the rights of the shareholders pursuant to § 122 (2), § 126 (1), §§ 127, 131 (1); the statements may be limited to the deadlines for exercising these rights if the notice refers to further explanations on the company's Internet page.

4. the company's Internet page via which the information pursuant to § 124a can be accessed.

(4) [1]The notice of the shareholders' meeting shall be published in the company's journals. [2]If the shareholders of the company are known by name, then the shareholders' meeting may be convened by registered letter; the day of dispatch shall be considered the day of publication.

(4a) In case of listed companies which have not exclusively issued registered shares or such which do not send the notice directly to the shareholders pursuant to (4) sentences 2, the notice shall, at the latest on the date of announcement, be published through media capable of distributing it in the entire European Union.

(5) [1]Unless the articles provide otherwise, the shareholders' meeting shall be held at the company's domicile. [2]If the company's shares are listed on a German stock exchange for trading in the regulated market, the shareholders' meeting may also be held at the domicile of such stock exchange, unless the articles provide otherwise.

(6) If all shareholders have appeared or are represented, then the shareholders' meeting may make resolutions without adhering to the provisions of this subdivision provided no shareholder objects to the making of resolutions.

(7) [1]In case of deadlines and dates which are calculated back from the date of the meeting, the day of the meeting itself shall not be included in the calculation. [2]Adjourning the meeting from a Sunday, Saturday or a holiday to a preceding or following working day shall not be an option. [3]§§ 187 to 193 of the German Civil Code shall not be applied accordingly. [4]In case of unlisted companies, the articles may provide for a different calculation of the deadline.

§ 122 Calling of a Meeting at the Request of a Minority

(1) [1]The shareholders' meeting shall be called if shareholders, whose holding in aggregate equals or exceeds one-twentieth of the share capital, demand such meeting in writing, stating the purpose and the reasons of such meeting; such demand shall be addressed to the management board. [2]The articles may provide that the right to demand a shareholders' meeting shall require another form or the holding of a lower proportion of the share capital. [3]The shareholders who have made the demand shall provide evidence to the effect that they have held the shares for at least 90 days prior to the receipt of the demand and that they will hold the shares until the management board decides upon the demand. [4]§ 121 (7) shall apply accordingly.

(2) [1]In the same manner, shareholders whose shares amount in aggregate to not less than one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros, may demand that items are put on the agenda and published. [2]Each new item shall be accompanied by an explanation or a draft proposal. [3]The demand in the sense of sentence 1 shall be provided to the company at least 24 days, in case of listed companies at least 30 days, prior to the meeting; the day of receipt shall not be included in this calculation.

(3) [1]If any such demand is not complied with, the court may authorise the shareholders, who have made the demand, to call a shareholders' meeting or publish such items. [2]At the same time, the court may appoint the chairman of the meeting. [3]The notice of the meeting or the publication shall refer to such authorisation. [4]An appeal may be made against such decision. [5]The shareholders who have made the demand shall provide evidence to the effect that they will hold the shares until the court has made a decision.

(4) The company shall bear the costs of the shareholders' meeting and, in the case of (3), also the court costs if the court has granted such motion.

§ 123 Notice Period, Giving Notice of Attendance at the Shareholders' Meeting, Proof

(1) [1]Notice of the shareholders' meeting shall be given no later than thirty days prior to the date of the meeting. [2]The day the notice is given shall not be included in this calculation.

(2) [1]The articles may provide that attendance at the meeting or the exercise of voting rights shall require the shareholders giving notice of their attendance prior to the meeting. [2]The notice of attendance must be delivered to the company at least six days prior to the shareholders' meeting at the address specified for this purpose in the notice calling the shareholders' meeting. [3]The articles or the notice if authorised by the articles may provide for a shorter time limit which is to be calculated in days. [4]The day of receipt shall not be included in this calculation. [5]The minimum deadline under (1) shall be prolonged by the number of days of the deadline for giving notice of attendance.

(3) [1]The articles may provide how proof of the right to attend the meeting or of the right to vote is to be given; paragraph (2) sentence 5 shall apply accordingly in this case.

(4) [1]In the case of share certificates in bearer form of companies whose shares are listed on a stock exchange, a certificate issued in textual form by the depository institution confirming the shareholder's share ownership shall constitute sufficient evidence. [2]In the case of companies whose shares are listed on a stock exchange, such certificate shall make reference to the 21st day prior to the shareholders' meeting and must be delivered to the company within, at least, six days prior to the shareholders' meeting at the address specified in the notice calling the shareholders' meeting. [3]The articles or the notice if authorised by the articles may provide for a shorter time limit which is to be calculated in days. [4]The day of receipt shall not be included in this calculation. [5]The only persons who will be treated as shareholders in relation to the company and may therefore attend the meeting or exercise voting rights are those shareholders who have presented a certificate in the manner described above.

(5) In case of registered shares of listed companies, the right to participate in the meeting or exercise a voting right pursuant to § 67 (2) sentence 1 arises from the entry in the share register.

§ 124 Publication of Requests for Supplements; Proposals for Resolutions

(1) [1]If the minority has requested pursuant to § 122 (2) that items be added to the agenda,

these items shall be published either upon calling the meeting or immediately following receipt of the request. [3]§ 121 (4) shall apply accordingly; moreover, § 121 (4a) shall apply accordingly to listed companies. [4]Publication and submission shall be made in the same way as applicable for calling the meeting.

(2) [1]If the agenda includes the election of members of the supervisory board, the publication shall designate the statutory provisions governing the composition of the supervisory board; if the shareholders' meeting is bound by nominations then such facts shall also be stated. [2]Moreover, in case of an election of supervisory board members of listed companies which are subject to the Co-determination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act, the publication shall contain:

1. an indication of whether an objection against overall compliance pursuant to § 96 (2) sentence 3 was raised; and

2. information about the number of seats in the supervisory board which have to be held by women and men, respectively, for the minimum participation requirement pursuant to § 96 (2) sentence 1 to be complied with.

[3]If the shareholders' meeting is required to resolve on an amendment of the articles or on an agreement which becomes effective only with the consent of the shareholders' meeting, the text of the proposed amendment of the articles or the essential contents of the agreement shall be published.

(3) [1]With respect to each item on the agenda that is to be decided by the shareholders' meeting, the management board and the supervisory board, but in the case of the election of members of the supervisory board and auditors, only the supervisory board, shall in the publication make a proposal for the respective resolutions. [2]In case of companies which are capital-market oriented within the meaning of § 264d of the Commercial Code, CRR credit institutions within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or insurance undertakings within the meaning of Article 2 (1) of Council Directive 91/674/EEC, the supervisory board's proposal regarding the election of the auditor is to be based on the recommendation of the audit committee. [3]Sentence 1 shall not apply if the shareholders' meeting is bound by nominations for the election of members of the supervisory board pursuant to § 6 of the Coal and Steel Co-determination Act, or if the subject matter of the resolution has been put on the agenda upon request by a minority. [4]The proposal for the election of members of the supervisory board or auditors shall state their name, profession and place of residence. [5]If the supervisory board is to comprise representatives of employees, any resolution of the supervisory board regarding proposals for the election of members of the supervisory board shall require only the majority of the votes of the representatives of the shareholders in the supervisory board; § 8 of the Coal and Steel Co-determination Act shall remain unaffected.

(4) [1]No resolution may be adopted in respect of items on the agenda that have not been duly published. [2]However, no such publication shall be required for the adoption of a resolution on a motion made to call a shareholders' meeting that is made in the meeting, for motions made in respect of items on the agenda, and for deliberations without resolution.

§ 124a Publications on the Company's Internet page

[1]In the case of listed companies, the following shall be made available on the company's Internet page immediately after the convocation of the shareholders' meeting:

1. the content of the convocation;

2. an explanation if there is an item on the agenda which shall not be resolved upon;

3. the documents to be made available to the meeting;

4. the total amount of shares and of the voting rights at the point in time of the convocation, including separate information on the total amount with regard to each class of shares;

5. as the case may be, the forms to be used if the voting right is exercised by proxy or by postal vote unless such forms are provided to the shareholders directly.

[2]A demand of the shareholders within the meaning of § 122 (2) received by the company after the convocation of the meeting shall be made available in the same way immediately after it was received by the company.

§ 125 Communications to Shareholders and Members of the Supervisory Board

(1) [1]The management board shall, at least 21 days before the meeting, communicate to those credit institutions and shareholders' associations which have exercised voting rights on behalf of shareholders in the preceding shareholders' meeting or which have requested such communication and the notice of the meeting. [2]The date of notice shall not be taken into account. [3]If the agenda is to be amended pursuant to § 122 (2), such amended agenda shall be communicated in the case of listed companies. [4]Such communication shall point out that voting right may be exercised by a proxy holder or a shareholders' association. [5]In case of listed companies details on the membership in other supervisory boards to be established pursuant to statutory provisions must be added to any nomination for the election of supervisory board members; details on their membership in comparable domestic and foreign controlling bodies of enterprises should be added.

(2) [1]The management board shall provide the same information to shareholders who make such request or are registered as shareholders in the company's share register at the beginning of the 14th day before the meeting. [2]The articles may limit transmission to electronic communication.

(3) Each member of the supervisory board may request that the management board send the same communication to him.

(4) Each shareholder and each member of the supervisory board may request that the management board advise him in writing of the resolutions adopted at a shareholders' meeting.

(5) Financial services institutions and enterprises operating under § 53 (1) sentence 1 or § 53b (1) sentence 1 or (7) of the Banking Act are to be treated as credit institutions.

§ 126 Motions by Shareholders

(1) [1]Motions by shareholders together with the shareholder's name, the grounds and any position taken by the management shall be made available to the persons entitled pursuant to § 125 (1)–(3) under the conditions stated therein if at least 14 days before the meeting the shareholder sends to the address indicated in the notice convening the meeting a motion counter to a proposal of the management board and supervisory board as to an item on the agenda. [2]The date of receipt shall not be taken into account. [3]In the case of listed companies, access shall be provided via the company's Internet page. [4]§ 125 (3) shall apply accordingly.

(2) [1]A counter-motion and the grounds for this need not be made available, if:

1. the management board would by reason of such communication become criminally liable;
2. the counter-motion would result in a resolution of the shareholders' meeting which would be illegal or would violate the articles;
3. the grounds contain statements which are manifestly false or misleading in material respects or which are libellous;
4. a counter-motion of such shareholder based on the same facts has already been communicated with respect to a shareholders' meeting of the company pursuant to § 125;
5. the same counter-motion of such shareholder on essentially identical grounds has already been communicated pursuant to § 125 to at least two shareholders' meetings of the company within the past five years and at such shareholders' meetings less than one-twentieth of the share capital represented has voted in favour of such counter-motion;
6. the shareholder indicates that he will neither attend nor be represented at the shareholders' meeting; or
7. within the past two years at two shareholders' meeting the shareholder has failed to make or cause to be made on his behalf a counter-motion communicated by him.

[2]The statement of the grounds need not be communicated if it exceeds one hundred words.

(3) If several shareholders make counter-motions for resolution in respect to the same subject matter, the management board may combine such counter-motions and the respective statements of the grounds.

§ 127 Nominations by Shareholders

[1]§ 126 shall apply accordingly to a nomination by a shareholder for the election of a member of the supervisory board or external auditors. [2]Such nomination need not be supported by a statement of the grounds for this. [3]The management board also need not communicate such nomination if it fails to contain the particulars required by § 124 (3) sentence 4 and § 125 (1) sentence 5. [4]The management board shall supplement the proposal of a shareholder

for the election of supervisory board members of listed companies which are subject to the Co-determination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act by adding the following information:

1. reference to the requirements pursuant to § 96 (2);

2. an indication of whether an objection against overall compliance pursuant to § 96 (2) sentence 3 was raised; and

3. information about the number of seats in the supervisory board which have to be held by women and men, respectively, for the minimum participation requirement pursuant to § 96 (2) sentence 1 to be complied with.

§ 127a Shareholders' Forum

(1) Shareholders or shareholders' associations may invite other shareholders in the shareholders' forum of the Federal Gazette to act jointly or by proxy for the purpose of filing a motion or request in accordance with the provisions of this Act or for the purpose of exercising their voting rights at a shareholders' meeting.

(2) Such invitation shall contain the following information:

1. the shareholder's name and address, or the name and address of the shareholders' association;

2. the company name;

3. the motion, request, or proposal for the exercise of voting rights concerning an item on the agenda;

4. the date of the shareholders' meeting concerned.

(3) The invitation may refer to a statement of reasons on the internet page of the person making the invitation, as well as that person's electronic address.

(4) In the Federal Gazette the company may refer to its internet page where comments on the invitation can be found.

(5) The Federal Ministry of Justice and Consumer Protection is authorised to prescribe by regulation the presentation of the shareholders' forum as well as further details concerning the invitation, the references mentioned in paragraphs (3) and (4), fees, cancellation periods, the right of cancellation, cases of abuse and the right of inspection.

§ 128 Transmission of Communications

(1) [1]A credit institution that has custody of bearer shares on behalf of shareholders of the company at the beginning of the 21st day the meeting or that is entered in the share register for shares that it does not own shall promptly transmit to such shareholders any communications received pursuant to § 125 (1). [2]The company's articles may limit

transmission to electronic communication; in such case the credit institution shall not be obliged otherwise for other reasons.

(2) The credit institution's liability for any damages resulting from a violation of (1) may neither be waived nor limited in advance.

(3) [1]The Federal Ministry of Justice and Consumer Protection shall be authorised in agreement with the Federal Ministry of Economics and Energy and the Federal Ministry of Finance to prescribe by regulation that the company shall reimburse the credit institutions for:

1. the communication of the information according to § 67 (4); and

2. copying communications and transmitting them to shareholders.

[2]A lump-sum amount may be set to cover the expenses. [3]The regulation does not require the approval of the Federal Council.

(4) § 125 (5) shall apply accordingly.

Subsection Three. Minutes of the Meeting, Right to Information

§ 129 Bylaws of Shareholders' Meeting, List of Participants

(1) [1]The shareholders' meeting may resolve by a three quarters majority of the share capital represented at the meeting to establish bylaws for the shareholders' meeting with rules for the preparation and conduct of the shareholders' meeting. [2]At the shareholders' meeting a list of shareholders present or represented and of the representatives of shareholders shall be prepared stating their name and place of residence, in the case of par shares, the amount, in the case of non-par shares the number, and the class of shares represented by each person.

(2) [1]If proxies to exercise voting rights have been granted to a credit institution or a person designated in § 135 (8) and if the holder of the proxy shall exercise voting rights on behalf of an undisclosed principal, the amount and class of the shares for which the proxies were granted shall be specified separately in the list. [2]The names of the shareholders who have granted the proxies need not be mentioned.

(3) [1]A person who has been authorised by a shareholder to exercise voting rights in his own name in respect of shares that are not held by him, shall specify the amount and class of such shares separately for inclusion in the list. [2]The foregoing shall apply also in respect of registered shares for which such authorised person is registered in the share register as shareholder.

(4) [1]The list shall be made available for inspection by all participants prior to the first vote. [2]Each shareholder shall, upon request, be granted access to the list for review until up to two years after the shareholders' meeting.

(5) § 125 (5) shall apply accordingly.

§ 130 Minutes

(1) [1]Each resolution of the shareholders' meeting shall be recorded in minutes of the

proceedings, which shall be in the form of a notarial deed. [2]The same shall apply to any request by a minority pursuant to § 120 (1) sentence 2, § 137. [3]If the shares are not admitted to trade on an exchange, the minutes signed by the chairman of the supervisory board will suffice provided no resolutions are passed where the law requires three-quarters are larger majorities.

(2) [1]The minutes shall state the place and date of the meeting, the name of the notary, the form and result of the voting and any determinations of the chairman regarding resolutions. [2]In case of listed companies, the determinations regarding resolutions shall also include for each resolution:

1. the number of shares for which valid votes have been cast

2. the proportion of the nominal capital represented by the valid votes in the registered capital;

3. the number of votes cast for a resolution, the votes against such resolution and any abstentions.

[3]Contrary to sentence 2, the chairman of the meeting may limit the determinations regarding resolutions for each resolution on stating that the necessary majority has been reached if no shareholder requests full determination pursuant to sentence 2.

(3) The list of participants and the documents regarding notice of the meeting shall be appended to the minutes. The documents regarding notice of the meeting need not be appended if their contents are recorded in the minutes.

(4) [1]The minutes shall be signed by a notary. [2]The presence of witnesses shall not be required.

(5) The management board shall, promptly upon adjournment of the meeting, submit an officially certified copy of the minutes and the appendices, and in the case of (1) sentence 3 signed by the chairperson of the supervisory board, to the commercial register.

(6) Listed companies shall, within seven days following the meeting, publish the determined results of the voting including the details pursuant to (2) sentence 2 on their Internet page.

§ 131 Right of Shareholders to Information

(1) [1]Each shareholder shall upon request be provided with information at the shareholders' meeting by the management board regarding the company's affairs, to the extent that such information is necessary to permit a proper evaluation of the relevant item on the agenda. [2]The duty to provide information shall also extend to the company's legal and business relations with any affiliated enterprise. [3]If a company makes use of the simplified procedure pursuant to § 266 (1) sentence 3, § 276 or § 288 of the Commercial Code, each shareholder may request that the annual financial statements be presented to him at the shareholders' meeting on such annual financial statements in the form which would have been used if such simplifications were not applied. [4]A parent enterprise's (§ 290 (1) and (2) of the Commercial Code) management board's duty to inform in the shareholders' meeting that considers the consolidated financial statement and consolidated management report shall extend to the outlook of the group and the enterprises included in the consolidated financial statement.

(2) [1]The information provided shall comply with the principles of conscientious and accurate accounting. [2]The articles or the rules of procedure pursuant to § 129 may authorise the chairperson of the meeting to limit the number of questions and speaking time of shareholders as appropriate and to lay dawn general rules thereon.

(3) [1]The management board may refuse to provide information:

1. to the extent that providing such information is, according to sound business judgment, likely to cause material damage to the company or an affiliated enterprise;

2. to the extent that such information relates to tax valuations or the amount of certain taxes;

3. with regard to the difference between the value at which items are shown in the annual balance sheet and the higher market value of such items, unless the shareholders' meeting is to approve the annual financial statements;

4. with regard to the methods of classification and valuation, if disclosure of such methods in the notes suffices to provide a clear view of the actual condition of the company's assets, financial position and profitability within the meaning of § 264 (2) of the Commercial Code; the foregoing shall not apply if the shareholders' meeting is to approve the annual financial statements;

5. if provision thereof would render the management board criminally liable;

6. if in the case of a credit institution or financial services institution information about the applied balance sheet and valuation methods or calculations made in the annual financial statements, the management report, the consolidated annual financial statement or the group's management report need not be given;

7. if the information is continuously available on the company's internet page seven or more days prior to the shareholders' meeting as well as during the meeting.

[2]The provision of information may not be denied for other reasons.

(4) [1]If information has been provided outside a shareholders' meeting to a shareholder by reason of his status as a shareholder, such information shall upon request be provided to any other shareholder at the shareholders' meeting, even if such information is not necessary to permit a proper evaluation of an item on the agenda. [2]The management board may not refuse to provide such information on the grounds of (3) sentence 1 Nos. 1 to 4. [3]Sentences 1 and 2 shall not apply if a subsidiary (§ 290 (1), (2) of the Commercial Code), a cooperative enterprise (§ 310 (1) of the Commercial Code) or an affiliate (§ 311 (1) of the Commercial Code) provides the information to a parent company (§ 290 (1), (2) of the Commercial Code) for the purpose of inclusion in the consolidated annual financial statement of the parent company and the information is required for this purpose.

(5) A shareholder who has been denied information may request that his question and the reason for which the information was denied be recorded in the minutes of the meeting.

§ 132 Judicial Decision on the Right to Information

(1) The regional court of the district of the company's domicile shall have exclusive jurisdiction to decide upon motion whether or not the management board is required to

provide information.

(2) [1]Each shareholder who has been denied information requested and, if a resolution has been adopted on an item on the agenda for which information was requested, each shareholder who was present at the shareholders' meeting and who has recorded his objection in the minutes at the shareholders' meeting, shall have standing to make such motion. [2]Such motion may be made within two weeks from the date of the shareholders' meeting in which the information was refused.

(3) [1]§ 99 (1), (3) sentences 1, 2 and 4 to 6 as well as (5) sentences 1 and 3 shall apply accordingly. [2]An appeal may be made against the decision only if the district court has granted leave to appeal in its decision. [3]§ 70 (2) of the Act on Court Procedure in Family Matters and Non-litigious Matters shall apply accordingly.

(4) [1]If the motion is granted, the information shall be provided even outside a shareholders' meeting. [2]Such decision may be enforced in accordance with the provisions of the Code of Civil Procedure.

(5) The court concerned with the proceedings shall determine at its reasonable discretion which party is to bear the costs of proceedings.

Subsection Four. Voting Rights

§ 133 Principle of Simple Majority of Votes

(1) Resolutions of the shareholders' meeting shall require a majority of the votes cast (simple majority) unless the law or the articles provide for a larger majority or additional requirements.

(2) The articles may provide for different rules in respect of elections.

§ 134 Voting Rights.

(1) [1]Voting rights shall be exercised in proportion to the par value of shares. [2]In case of a company not listed at a stock exchange, the articles may limit voting rights with respect to shareholders holding more than one share by setting a maximum par value or a sliding scale. [3]The articles may also provide that shares held by any other person on behalf of a shareholder shall be deemed to be shares held by such shareholder. [4]If a shareholder constitutes a business enterprise, the articles may further provide that those shares which are held by an enterprise which is controlled or controlling or affiliated in a group or which are held by a third party on behalf of any such enterprises, shall also be deemed to be shares of such shareholder. [5]It may not be provided that any such limitation apply to specific shareholders only. [6]Any limitation shall not be taken into account in the computation of a capital majority required by law or the articles.

(2) [1]Voting rights shall arise as from the date on which contributions have been made in full. [2]If the value of a contribution in kind does not correspond to the value stated in § 36a (2) sentence 3, this does not conflict the arising of the voting right; this does not apply if the difference in value is apparent. [2]The articles may provide, however, that voting rights shall arise as from the date on which the minimum contribution provided by law, or a higher minimum contribution provided in the articles, has been paid. [5]If the articles so provide, payment of the minimum contribution shall give rise to one vote, and, if payments exceed the minimum contribution, the voting rights shall be determined in accordance with the

amounts of contributions paid. [5]If the articles do not provide that voting rights arise prior to contributions having been paid in full and if contributions have not been paid in full in respect of any share, the voting rights shall be determined in relation to the amounts paid; in such event payment of the minimum contribution shall give rise to one vote. [6]In such cases, fractions of votes shall be taken into account only to the extent they result in full votes for the shareholder entitled to vote. [7]The articles may not make provisions pursuant to this that apply only to specific shareholders or to specific classes of shares.

(3) [1]Voting rights may be exercised by a proxy holder. [2]If the shareholder authorises more than one person, the company may reject on or more of such persons. [3]The granting of proxy, its revocation and proof towards the company shall be made in written form and duly signed, unless the articles or the convocation notice based on an authorisation under the articles provides otherwise or, in the case of listed companies, facilitation is provided. [4]The listed company at least has to offer to transmit such proof by electronic communication. [5]If proxy holders are authorised by the company, the authorisations are to be kept by the company for review for three years; § 135 (5) shall apply accordingly.

(4) The method of exercising the voting rights shall be determined by the articles.

§ 135 Exercise of Voting Rights by Credit Institutions and Professional Agents

(1) [1]A credit institution may only exercise or cause to be exercised, voting rights arising under bearer shares that it does not hold if it has been authorised to exercise such voting rights by proxy. [2]A proxy may only be issued to a specified credit institution and shall be kept by such credit institution for review. [3]The form of proxy shall be completed in full at the time the proxy is issued and may only contain statements related to the exercise of voting rights. [4]If the shareholder does not give express instructions, a general proxy may only provide for the credit institution's entitlement to exercise the voting right

1. according to own proposals for voting ((2) and (3)) or

2. according to the proposals of the management board or the supervisory board or, in case such proposals deviate from each other, the proposals of the supervisory board (4).

[5]If the credit institution offers the exercise of the voting right pursuant to sentence 4 No. 1 or No. 2, it shall to a reasonable extent and until revoked also offer to provide the documents necessary for the exercise of the voting right to a shareholders' association or another representative to be chosen by the shareholder. [6]Annually, the credit institution must clearly stress to the shareholder the possibility of revocation and alternative representation. [7]The issue of instructions on individual items on the agenda, the issuance and revocation of a general proxy pursuant to sentence 4 and of an order pursuant to sentence 5 including any amendment shall be facilitated for the shareholder by using a form or online form.

(2) [1]A credit institution which wishes to exercise the voting right on the basis of a proxy pursuant to (1) sentence 4 No. 1 shall provide the shareholder in time with its proposals for the execution of the voting right on the individual items of the agenda. [2]With respect to these proposals, the credit institution shall bear in mind the shareholder's interests and shall ensure, at an organisational level, that the interests of its own operations do not interfere; it shall appoint a member of the management who shall supervise the observance of these duties as well as the due execution of the voting right and its

documentation. [3]Together with its proposals, the credit institution shall point out that it will exercise the voting right in accordance with its own interests, if the shareholder does not issue instructions to the contrary in time. [4]If a member of the management board or an employee of the credit institution is a member of the supervisory board of the company or if a member of the management board or an employee of the company is a member of the supervisory board of the credit institution, the credit institution shall point out this circumstance. [5]The same shall apply if the credit institution holds a stake in the company which must be notified according to § 21 of the Securities Trade Act, or if it belongs to a consortium that has taken up within the last five years securities issued by the company.

(3) [1]If the shareholder has not given the bank instructions on the exercise of voting rights, the bank shall, in case of (1) sentence 4 No. 1, be required to exercise such voting rights in accordance with its own proposals, unless the bank may assume in view of the circumstances prevailing that the shareholder would, if he had knowledge of the facts, approve a different exercise of the voting rights. [2]If the bank in exercising voting rights has not complied with the shareholders' instructions or, in case the shareholder has not given instructions, the bank has not complied with its own proposal, the bank shall inform the shareholder thereof and state the reasons for this. [3]A bank may exercise voting rights at its own shareholders' meeting by virtue of such proxy only to the extent that a shareholder has given express instructions in respect of the various items on the agenda. [4]The same shall apply in meetings of a company in which it holds a direct or indirect stake of more than 20 per cent of the nominal capital.

(4) [1]A credit institution that wants to exercise the voting right in the shareholders' meeting based on a proxy pursuant to (1) sentence 4 No. 2, shall make available the management board's and the supervisory board's proposals to the shareholders, unless this is not done another way. [2](2) sentence 3 as well as (3) sentence 1 to 3 shall apply accordingly.

(5) [1]If the proxy permits it, the credit institution may grant delegated authority to persons who are not employees of the credit institution. [2]If the proxy does not provide otherwise, the credit institution exercises the voting rights on behalf of an undisclosed principal. [3]If postal votes are permitted at the company, the authorised credit institution may use postal votes. [4]In the case of listed companies, the presentation of a certificate pursuant to § 123 (3) shall suffice to prove the credit institution's right to vote to the company; for the rest, the requirements stipulated in the articles with regard to the exercise of voting rights shall be complied with.

(6) [1]A credit institution may exercise voting rights arising under registered shares which it does not hold, but with respect to which the credit institution is registered in the share register as shareholder, only pursuant to a written authorisation. [2](1) to (5) shall apply accordingly to such authorisation or proxy.

(7) The validity of votes cast shall not be impaired by a violation of (1) sentence 2 to 7 and (2) to (5).

(8) (1) to (7) shall apply accordingly for shareholders' associations and for persons who professionally offer shareholders their services in exercising voting rights at shareholders' meetings; the foregoing shall not apply if the person exercising the voting right is the legal representative or spouse of the shareholder or related by blood or marriage or in the fourth degree of kinship.

(9) The liability of a credit institution for damages resulting from a violation of (1) to (6) may neither be waived nor limited in advance.

(10) § 125 (5) shall apply accordingly.

§ 136 Exclusion of Voting Rights

(1) [1]No person may exercise voting rights on his own behalf or on behalf of any other person in respect of a resolution concerning ratification of his acts, his discharge from a liability, or enforcement by the company of a claim against him. [2]Voting rights arising from shares that may not be exercised by the shareholder himself pursuant to sentence 1 may also not be exercised by any other person.

(2) [1]An agreement whereby a shareholder undertakes to exercise voting rights in accordance with the instructions of the company, the management board or the supervisory board of the company or a controlled enterprise shall be null and void. [2]An agreement whereby a shareholder undertakes to vote for the respective proposals of the management board or supervisory board of the company shall likewise be null and void.

§ 137 Voting on Nomination Made by Shareholders

If a shareholder has made a nomination for the election of members of the supervisory board pursuant to § 127 and moves at the shareholders' meeting for the election of the person nominated by him, such motions shall be resolved prior to acting on the proposal of the supervisory board, provided that a minority of shareholders whose holding in aggregate equals or exceeds one-tenth of the share capital represented at the meeting so requests.

Subsection Five. Separate Resolution

§ 138 Separate Meeting; Separate Voting

[1]Where this Act or the articles provide for separate resolutions of certain shareholders, such resolutions shall be adopted either at a separate meeting of such shareholders or by a separate vote, unless the law provides otherwise. [2]The provisions governing shareholders' meetings shall apply accordingly to the calling of a separate meeting, attendance of such meeting, and the right to information; the provisions governing resolutions of shareholders' meetings shall apply accordingly to such separate resolutions. [3]If shareholders who are entitled to take part in the voting on a separate resolution request a separate meeting or announcement of a proposal to be voted on separately, it shall suffice if the shares with which they may take part in the voting on the separate resolution in aggregate equal or exceed one-tenth of the shares entitled to vote on such separate resolutions.

Subsection Six. Non-Voting Preferred Shares

§ 139 Nature

(1) [1]Shares that carry the benefit of a preference right with respect to the distribution of profits may be issued without voting rights (non-voting preferred shares). [2]The granted preference may, in particular, consist of a share in the profits allocated to the respective share in advance (advance dividend) or an increased share in the profits (additional dividend). [3]Unless otherwise provided for in the articles, an advance dividend shall be paid subsequently.

(2) Non-voting preferred shares may be issued only up to an amount corresponding to half of the share capital.

§ 140 Rights of Preferred Shareholders

(1) Except for the right to vote, non-voting preferred shares shall convey the same rights as those enjoyed by the other shareholders.

(2) [1]If the preference is payable subsequently and the preference amount is not paid or not paid in full in any given year and not paid subsequently in the following year together with the full preference for such year, the shareholders shall have voting rights until the amounts in arrear have been paid. [2]If the preference is not payable subsequently and if the preference amount in any given year is not paid or not paid in full, the holders of preferred shares shall have voting rights until the preference in any given year has been paid in full. [3]As long as the voting right exists, the preferred shares shall also be taken into account in computing any capital majority required by law or the articles.

(3) The fact that the preference amount is payable subsequently and not paid or not paid in full in any given year shall not give rise to a claim for any preference amount in arrear which is subject to later resolutions on distribution of profits, unless the articles provide otherwise.

§ 141 Cancellation or Restriction of Preference Rights

(1) Any resolution cancelling or restricting a preference right shall require the consent of the holders of preferred shares in order to be effective.

(2) [1]Any resolution to issue preferred shares that are to enjoy priority over or the same rights as non-voting preferred shares in respect of the distribution of profits or assets, shall also require the consent of the holders of preferred shares. [2]Such consent shall not be required if such issue was expressly reserved when the preference right was granted or, if the voting rights were later excluded, when such exclusion was made, provided, in any such case, that the subscription rights of the holders of preferred shares are not excluded.

(3) [1]The holders of preferred shares shall, at a separate meeting, resolve on whether or not to grant such consent by separate resolution. [2]Such resolution shall require a majority of not less than three-fourths of the votes cast. [3]The articles may neither provide for any other majority nor prescribe any additional requirements. [4]If the resolution to issue preferred shares which are to enjoy priority over or the same rights as non-voting preferred shares in respect of the distribution of profits or assets excludes the subscription rights of the holders of preferred shares to subscribe to such shares in whole or in part, § 186 (3) to (5) shall apply accordingly to such resolution.

(4) The shares shall carry voting rights if the preference is cancelled.

Subsection Seven. Special Audit; Damage Claims

§ 142 Appointment of Special Auditors

(1) [1]The shareholders' meeting may, by simple majority, appoint auditors (special auditors) for the examination of matters relating to the formation of the company or the management of the company's business, and also, in particular, in connection with capital increases or capital reductions. [2]No member of the management board or the supervisory board may vote on any such resolution either on his own behalf or on behalf of another person, if the audit concerns matters related to ratification of the acts of a member of the management board or the supervisory board or to the initiation of

litigation proceedings between the company and a member of the management board or the supervisory board. [3]If a member of the management board or the supervisory board shall not be entitled to vote pursuant to sentence 2, such person's voting rights may not be exercised by another person on his behalf.

(2) [1]If the shareholders' meeting rejects a motion to appoint special auditors to audit any matter relating to the formation of the company or the management of the company's business affairs within the last five years, upon petition by shareholders whose aggregate holdings at the time of filing the petition equal or exceed one per cent of the share capital or amount to at least 100,000 euro, the court shall appoint special auditors, provided that facts exist which give reason to suspect that improprieties or gross breaches of the law or the articles have occurred in connection with such matter; the foregoing shall also apply to matters within the last ten years for companies that were listed on a stock exchange at the point in time the matter occurred. [2]The petitioners must furnish evidence that they have been the holders of the shares for at least three months prior to the date of the shareholders' meeting and will continue to hold the shares until a decision on the petition is rendered. [3]§ 149 shall apply accordingly to agreements that are concluded in order to avoid such special audit.

(3) (1) and (2) shall not apply to matters which may be the subject of special audit pursuant to § 258.

(4) [1]If the shareholders' meeting has appointed special auditors, upon petition by shareholders whose aggregate holdings at the time of filing the petition equal or exceed one per cent of the share capital or amount to at least 100,000 euros, the court shall appoint another special auditor if this appears necessary for reasons relating to the individual special auditor appointed, namely if such auditor lacks the expertise required for this subject matter of the special audit or if concerns as to his impartiality or doubts as to his reliability exist. [2]Such motion shall be made within a period of two weeks from the date of the shareholders' meeting.

(5) [1]The court shall hear, in addition to the parties concerned, the supervisory board and, in the case of (4), the special auditor appointed by the shareholders' meeting. [2]An appeal may be made against such decision. [3]The regional court of the company's registered seat shall decide on any petitions pursuant to paragraphs (2) and (4).

(6) [1]Special auditors appointed by the court shall be entitled to reimbursement of reasonable cash expenses and remuneration for their services. [2]The court shall set such expenses and remuneration. [3]An appeal may be made against such decision; appeals on points of law shall be precluded. [4]A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.

(7) If the company has issued securities within the meaning of § 2(1) of the Securities Trading Act that are admitted to trading on a German stock exchange in the regulated market, then in the case of paragraph (1) sentence 1, the management board or, in the case of paragraph (2) sentence 1, the court shall inform the Federal Financial Supervisory Authority of the appointment of a special auditor and his audit report; furthermore, the court shall inform the Federal Financial Supervisory Authority of the receipt of a petition for the appointment of a special auditor.

(8) The judicial proceedings pursuant to paragraphs (2) through (6) shall be governed by the provisions of the Act on Court Procedure in Family Matters and Non-litigious Matters unless this Act provides otherwise.

§ 143 Selection of Special Auditors

(1) Unless the subject matter of the special audit requires additional expertise, special auditors shall be:

1. persons who are sufficiently trained and experienced in accounting;

2. auditing firms at least one of whose legal representatives is sufficiently trained and experienced in accounting.

(2) [1]No special auditor may be appointed who does not qualify to serve, or would not have qualified to serve at the time when the matter subject to the audit occurred, as external auditor pursuant to § 319 (2), (3), § 319a (1), § 319b of the Commercial Code. [2]An auditing firm may not serve as special auditor if it does not qualify to serve, or would not have qualified to serve at the time when the matter subject to the audit occurred, as external auditor pursuant to § 319 (2), (3), § 319a (1), § 319b of the Commercial Code.

§ 144 Responsibility of Special Auditors

§ 323 of the Commercial Code concerning the responsibility of external auditors shall apply accordingly.

§ 145 Rights of Special Auditors; Audit Report

(1) The management board shall permit the special auditors to audit the company's books, records, and its assets, in particular cash, securities and merchandise.

(2) The special auditors may require from the members of the management board and the supervisory board all information and evidence required for a diligent audit of the relevant matters.

(3) The special auditors shall have the rights pursuant to (2) also with respect to any member of the group and any controlled or controlling enterprises.

(4) Upon petition of the management board the court shall permit that certain facts be omitted in the report provided that overriding interests of the company make their omission necessary and the disclosure of such facts is not required in order to prove the occurrence of improprieties or gross breaches pursuant to § 142 (2).

(5) [1]The regional court of the company's registered seat shall decide on petitions pursuant to paragraph (4). [2]§ 142 (5) sentence 2 and (8) shall apply accordingly.

(6) [1]The special auditors shall render a written report on the result of the audit. [2]The audit report shall include facts whose disclosure is apt to cause material damage to the company or an affiliated enterprise, provided that if knowledge of such facts required for the shareholders' meeting to form an opinion as to the matter subject to audit. [3]The special auditors shall sign the report and promptly submit such report to the management board and the commercial register of the company's domicile. [4]The management board upon request shall provide a copy of the audit report to each shareholder. [5]The management board shall present the report to the supervisory board and, when the next shareholders' meeting is called, announce that such report will be an item on the agenda.

§ 146 Costs

[1]If the court appoints special auditors, the company shall bear the court costs and the expenses of the audit. [2]If the petitioner has achieved the appointment of the special auditors by making false statements either intentionally or by gross negligence, he shall be required to reimburse the company for such costs.

§ 147 Assertion of Damage Claims

(1) [1]Claims of the company for damages against persons liable pursuant to §§ 46 to 48 and § 53 that have arisen in connection with the formation of the company, against members of the management board or supervisory board with respect to the management of the company or pursuant to § 117, shall be asserted if the shareholders' meeting so resolves by a simple majority of votes. [2]Any damage claims must be brought within six months from the date of the shareholders' meeting.

(2) [1]The shareholders' meeting may appoint special representatives to assert a claim for damages. [2]The court (§ 14) shall, upon petition by shareholders whose aggregate holdings amount to at least one-tenth of the share capital or one million Euro, appoint persons other than those appointed to represent the company pursuant to § 78, § 112 or sentence 1 as the company's representatives to assert the claim for damages if, in the opinion of the court, such appointment is appropriate for the proper assertion of such claim. [3]If the court grants the motion, the company shall bear the court costs. [4]An appeal may be made against such decision. [5]The court-appointed representatives may request from the company reimbursement of reasonable cash expenses and remuneration for their services. [6]The expenses and the remuneration shall be set by the court. [7]An appeal may be made against such decision; appeals on point of law shall be precluded. [8]A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.

§ 148 Court Procedure for Petitions Seeking Leave to File an Action for Damages

(1) [1]Shareholders whose aggregate holdings at the time of filing the petition equal or exceed one per cent of the share capital or amount to at least 100,000 euros, may file a petition for the right to assert the claims of the company for damages mentioned in § 147(1) sentence 1 in their own name. [2]The court shall give them leave to file such action for damages if

1. the shareholders furnish evidence that they or, in the case of universal succession, their predecessors in title have acquired the shares before learning about the alleged breaches of duty or alleged damage from a publication;

2. the shareholders demonstrate that they in vain filed a petition to the company requesting to institute the necessary legal proceedings itself within an appropriate period of time;

3. facts exist which give reason to suspect that the company has suffered a loss as a result of improprieties or gross breaches of the law or articles; and

4. no overriding interests of the company exist which would prevent the assertion of such damage claim.

(2) [1]The regional court of the company's registered seat shall decide on the petition seeking leave to file such action. [2]If the regional court maintains a chamber for commercial matters, such chamber shall have jurisdiction in lieu of the chamber for civil matters. [3]The state government may by regulation transfer jurisdiction for several regional courts to one regional court if such transfer is required to ensure uniformity of decisions. [4]The state government may transfer such power to the state ministry of justice. [5]The statute of limitation for the claim at issue is stayed by the filing of such petition until the petition has been dismissed by a final and binding decision or the period allowed for bringing an action has expired. [6]Before rendering its decision, the court shall provide the other party with an opportunity to comment on the matter. [7]Such decision may be appealed immediately. [8]Appeals on points of law are not permitted. [9]The company shall be made a party in the judicial proceedings deciding on the petition pursuant to paragraph (1) as well as in such action for damages.

(3) [1]The company may assert its claims for damages itself at any time; as soon as the company files such action, all pending proceedings instituted by the shareholders concerning that particular damage claim become inadmissible. [2]The company may decide to take over a pending action in which its own damage claims are being asserted by another party in its current state at the time when the action is taken over. [3]In the event of sentences 1 and 2, all former petitioners or claimants shall be joined as parties.

(4) [1]If the petition is granted, the action may only be brought before the court with jurisdiction pursuant to paragraph (2) within three months from the date on which the decision has become final and binding, provided that the shareholders have one more time to no avail requested the company to institute the necessary legal proceedings itself within an appropriate period of time. [2]The action shall be brought against the persons specified in § 147(1) sentence 1 with the aim of obtaining compensation for the company. [3]Interventions by shareholders are not permitted after the petition has been granted. [4]If more than one such action is brought, they shall be consolidated in order to be heard and decided together.

(5) [1]Such judgement shall be binding on the company and all other shareholders even if the action is dismissed in the judgement. [2]The same shall apply to a settlement to be made pursuant § 149; however, such settlement shall only be effective in favour of or against the company after the permission to file an action has been granted.

(6) [1]The person filing the petition shall bear the costs of the judicial proceedings if and to the extent that the petition is dismissed. [2]If the petition is dismissed for reasons of opposing interests of the company, of which the company could have informed the petitioner prior to filing the petition but failed to do so, then the company shall reimburse the petitioner for the costs. [3]In all other respects, a decision on the allocation on costs will be rendered in the final judgement. [4]If the company files an action itself or takes over a pending action brought by shareholders, it shall bear all costs incurred by the petitioner until such time and may, except for the three-year waiting period, withdraw its action on the conditions set forth in § 93 (4) sentences 3 and 4 only. [5]If the action is dismissed in whole or in part, the company shall reimburse the claimant for the costs to be borne by them unless the claimant obtained the court's permission to file an action by making false statements intentionally or by gross negligence. [6]Shareholders acting jointly as petitioners or party shall only be reimbursed for the costs of one attorney unless the engagement of another attorney was necessary to prosecute the action.

§ 149 Notices on Actions for Damages

(1) As soon as the decision granting judicial leave to file an action for damages in accordance with § 148 has become final and binding, the company whose shares are listed on a stock exchange shall immediately publish notice of the petition as well as the termination of the proceedings in the company's journals.

(2) [1]The notice of termination of the proceedings must contain the kind of settlement reached, the full wording of all agreements and ancillary restraints related thereto, as well as the names of the parties involved. [2]Payments made by the company as well as payments by third parties which are attributable to the company shall be clearly pointed out and described separately. [3]All payment obligations become effective only upon complete publication. [4]The validity of any legal action terminating the proceedings is not affected by the publication of the notice. [5]Payments may be reclaimed if they were made although the payment obligations were unenforceable.

(3) The foregoing provisions apply accordingly to agreements entered into for the purpose of avoiding litigation.

Division Five. Statement of Accounts. Appropriation of Profits
Section One. Annual Accounts and Annual Report Declaration of Conformity

§ 150 Legal Reserve; Capital Reserve

(1) A legal reserve shall be created in the balance sheet of the annual financial statements to be prepared pursuant to §§ 242 and 264 of the Commercial Code.

(2) The amount to be transferred to such reserve shall be one-twentieth of annual net profit, after deducting any loss carried forward from the previous year, until the legal reserve and the capital reserves pursuant to § 272 (2) sentences 1 to 3 of the Commercial Code in aggregate amount to one-tenth of the share capital or any higher per centage set by the articles.

(3) If the legal reserve and the capital reserves pursuant to § 272 (2) sentence 1 to 3 of the Commercial Code in aggregate do not exceed one-tenth or the share capital or any higher per centage set by the articles, such reserves may be used only:

1. to offset an annual net loss to the extent such loss is not covered by profits carried forward from the previous year and cannot be offset by a transfer from other profit reserves;

2. to offset a loss carried forward from the previous year to the extent such loss is not covered by an annual net profit and cannot be offset by a transfer from other profit reserves.

(4) [1]If the legal reserve and the capital reserves pursuant to § 272 (2) sentence 1 to 3 of the Commercial Code in aggregate exceed one-tenth of the share capital or any higher per centage set by the articles, such excess may be used:

1. to cover an annual net loss to the extent such loss is not covered by profits carried forward from the previous year;

2. to cover a loss carried forward from the previous year to the extent such loss is not covered by annual net profit;

3. for an increase of the share capital from the corporation's reserves under §§ 207 to 220.

[2]Such excess may not be used pursuant to Nos. 1 and 2 if at the same time transfers are made form profit reserves for the purpose of payment of dividends.

§§ 150a, 151 [repealed]

§ 150a [repealed]

§ 151 [repealed]

§ 150a [repealed]

§ 151 [repealed]

§ 152 Provisions regarding the Balance Sheet

(1) [1]The share capital shall be shown in the balance sheet as subscribed capital. [2]The portion of the share capital allocated to each class of shares shall be stated separately. [3]Conditional capital shall be indicated at par value. [4]If shares with multiple voting rights exist, the item subscribed capital shall indicate the aggregate number of votes of shares with multiple voting rights and other shares.

(2) The item 'capital reserve' shall specify in the balance sheet or in the notes

1. the amount that was transferred to such reserve during the fiscal year;

2. the amount which was withdrawn during the fiscal year

(3) The individual items for profit reserves shall specify in the balance sheet or in the notes:

1. the amounts which the shareholders' meeting has transferred to such reserves from the distributable profits of the previous year;

2. the amounts which are transferred to such reserves from the annual net profit for the fiscal year;

3. the amounts which were withdrawn for the fiscal year.

(4) (1) to (3) do not apply to corporations that are small corporations within the meaning of § 267a of the Commercial Code if they use the facilitation within the meaning of § 266 (1) sentence 4 of the Commercial Code. [2](2) and (3) shall be applied by small corporations within the meaning of § 267 (1) of the Commercial Code subject to the proviso that the information has to be provided in the balance sheet.

§ 153 [repealed]

§ 154 [repealed]

§ 155 [repealed]

§ 156 [repealed]

§ 157 [repealed]

§ 158 Provisions regarding the Profit and Loss Statement

(1) [1]The profit and loss statement shall after the item Annual net profit/annual net loss in consecutive numeration include the following items:

1. profit carried forward/loss carried forward from the previous year;
2. withdrawals from the capital reserve;
3. withdrawals from profit reserves
   a) from the legal reserve
   b) from the reserves for participations in a controlling enterprise or parent company
   c) from reserves pursuant to the articles
   d) from other profit reserves
4. transfer to profit reserves
   a) to the legal reserve
   b) to the reserves for participations in a controlling enterprise or parent company
   c) to reserve pursuant to the articles
   d) to other profit reserves
5. distributable profits/accumulated loss.

[2]The items in sentence 1 may also be stated in the notes.

(2) [1]The compensation to be paid under a profit transfer agreement or agreement to transfer a portion of profits to outside shareholders shall be deducted from the income out of such agreement; if such compensation exceeds the income, the amount in excess shall be shown under expenses from losses. [2]Other amounts may not be deducted.

(3) (1) and (2) do not apply to corporations that are small corporations within the meaning of § 267a of the Commercial Code if they use the facilitation within the meaning of § 275 (5) of the Commercial Code.

§ 159 [repealed]

§ 160 Provisions regarding the Notes

(1) The notes shall also include:

1. the shares previously held and acquired by a shareholder on behalf of the company or a controlled enterprise or subsidiary or by a controlled enterprise or subsidiary, as founder or subscriber or by exercise of a conversion or subscription right granted in connection with a conditional capital increase; if such shares were sold during the fiscal year, the sale shall also be reported stating the amount of the proceeds and the use thereof;

2. the own shares which the company or a controlled enterprise or subsidiary or another person on behalf of the company or a controlled enterprise or a subsidiary has acquired or taken as a pledge; the number of such shares and the portion of the share capital allocated to them as well as the portion of share capital represented by such shares, and in the case of shares acquired the date of acquisition and reasons for the acquisition shall be stated. If such shares were acquired or sold during the fiscal year, such acquisition or sale shall also be reported stating the number of such shares, the portion of share capital allocated to them, the portion of the share capital represented by such shares, the acquisition or sales price and the use of the proceeds;

3. the number of such shares of each class, whereas in case of par-value shares the par value and in case of no-par value shares the notional value of each share shall be stated, to the extent such information may not be derived from the balance sheet; shares which were subscribed during the fiscal year in connection with a conditional capital increase or an authorised issue of capital, shall be stated separately;

4. the authorised capital;

5. the number of warrant bonds according to § 192 (2) No. 3;

6. [repealed]

7. the existence of a cross-shareholding stating the enterprise concerned;

8. the existence of a shareholding in the company which has been communicated to it pursuant to § 20 (1) or (4) of this Act or § 21 (1) or (1a) of the Securities Trade Act; in doing so, the published content according to § 20 (6) of this Act or § 26 (1) of the Securities Trade Act shall be stated in the communication.

(2) Such information shall be omitted to the extent the public interest of the Federal Republic of Germany or one of the states thereof so requires.

(3) [1](1) Nos. 1 and 3 to 8 shall not be applicable to corporations which are small corporations within the meaning of § 267 (1) of the Commercial Code. [2](1) No. 2 shall be applicable to such corporations, provided that the company is required to provide information only about own shares acquired and held by it or by another person for the account of the company and is not required to report on the use of proceeds realised from the sale of own shares.

§ 161 Corporate Governance Codex Declaration

(1) [1]The management board and supervisory board of the listed company shall declare annually that the recommendations of the 'Government Commission German Corporate Governance Codex' published by the Federal Ministry of Justice and Consumer Protection in the official part of the Federal Gazette has been and will be complied with or which recommendations have not been or will not be applied and why. [2]The same shall apply to the management board and the supervisory board of a company which has exclusively issued other securities than shares for trading on an organised market within the sense of § 2 (5) of the Securities Trading Act and the issued shares of which shall, on the company's own initiative, only be traded via a multilateral trading system within the sense § 2 (3) sentence 1 No. 8 of the Securities Trading Act.

(2) The declaration shall be continuously available to the public on the company's Internet page.

Section Two. Examination of Annual Financial Statements

Subsection One. Audit by External Auditors

§ 162 [repealed]

§ 163 [repealed]

§ 164 [repealed]

§ 165 [repealed]

§ 166 [repealed]

§ 167 [repealed]

§ 168 [repealed]

§ 169 [repealed]

Subsection Two. Examination by the Supervisory Board

§ 170 Submission to the Supervisory Board

(1) [1]The management board shall promptly submit the annual financial statements and the annual report to the supervisory board upon completion. [2]Sentence 1 shall apply accordingly to individual accounts pursuant to § 325 (2a) of the Commercial Code, as well as to the annual financial statements and the group management report of parent companies (§ 290 (1) and (2) of the Commercial Code).

(2) [1]The management board shall at the same time submit to the supervisory board the proposal for appropriation of distributable profits that is intended to be presented to the shareholders' meeting. [2]The proposal shall, unless circumstances require otherwise, be

set out as follows:

1. dividends .....

2. transfer to profit reserves .....

3. profit carried forward .....

4. distributable profits .....

(3) [1]Every member of the supervisory board shall be entitled to take cognisance of the documents submitted. [2]Such documents shall also be delivered to every member of the supervisory board or, to the extent the supervisory board has made such decision, to the members of a committee.

§ 171 Examination by the Supervisory Board

(1) [1]The supervisory board shall examine the annual financial statements, the annual report and the proposal for appropriation of distributable profits, in the case of parent companies (section 290 (1), (2) of the Commercial Code) also the consolidated financial statement and consolidated annual report. [2]If the financial statements are required to be audited by external auditors, the external auditors shall be present at the supervisory board's or the audit committee's deliberations regarding such statements and shall report on material results of their audit, in particular on major weaknesses in the internal control and risk management system with regard to the accounting process. [3]The external auditor shall inform on circumstances which might give rise to concerns as to his impartiality and on services he provided in addition to those provided in connection with the audit.

(2) [1]The supervisory board shall report on the results of its examination in writing to the shareholders' meeting. [2]The supervisory board shall in such report state in which manner and to what extent it has examined the management of the company during the fiscal year; in case of listed companies it shall state, in particular, which committees have been set up and how many meetings the supervisory board or such committees have been held. [3]If the annual financial statements are required to be audited by an external auditor, the supervisory board shall in addition state its opinion on the result of the audit of the annual financial statements by the external auditor. [4]The supervisory board shall at the end of its report state whether or not objections are to be raised as a result of the definitive findings of its examination and whether it approves the annual financial statements as prepared by the management board. [5]In the case of parent companies (section 290 (1), (2) of the Commercial Code), sentences 3 and 4 shall apply accordingly to the consolidated financial statement.

(3) [1]The supervisory board shall submit its report to the management board within one month after receipt of such statements. [2]If the report has not been submitted to the management board within such period, the management board shall promptly set an additional period not exceeding one month for the supervisory board. [3]If the report has not been submitted to the management board within such further period, the annual financial statements shall be deemed not approved by the supervisory board; in the case of parent companies (section 290 (1), (2) of the Commercial Code), the same shall apply to the consolidated financial statement.

(4) [1]Paragraphs (1) through (3) shall also apply to the individual accounts pursuant to

§ 325 (2a) of the Commercial Code. [2]The management board may disclose the individual accounts referred to in sentence 1 only after they have been approved by the supervisory board.

Section Three: Approval of the Annual Financial Statements Appropriation of Profits

Subsection One: Approval of the Annual Financial Statements

§ 172 Approval by Management Board and Supervisory Board

[1]The annual financial statements shall be deemed to have been approved, upon approval thereof by the supervisory board, unless the management board and the supervisory board resolve that the annual financial statements are to be approved by the shareholders' meeting. [2]Such resolution by the management board and supervisory board shall be included in the report of the supervisory board to the shareholders' meeting.

§ 173 Approval by the Shareholders' Meeting

(1) [1]The annual financial statements shall be approved by the shareholders' meeting if the management board and the supervisory board have resolved that the annual financial statements are to be approved by the shareholders' meeting or if the supervisory board has not approved the annual financial statements. [2]If the supervisory board of a parent enterprise (§ 290 (1), (2) of the Commercial Code) does not approve the consolidated financial statements, the shareholders' meeting may decide on the approval.

(2) [1]The provisions governing the preparation of the annual financial statements shall apply to their approval. [2]In connection with the approval of the annual financial statements, the shareholders' meeting may transfer to profit reserves only those amounts that are required to be transferred to such reserves pursuant to law or the articles.

(3) [1]If the shareholders' meeting amends annual financial statements which have been audited by an external auditor in accordance with statutory requirements, resolutions on the approval of the annual financial statements and the appropriation of profits which have been adopted by the shareholders' meeting prior to the new audit pursuant to § 316 (3) Commercial Code, shall become effective only if, as a result of such new audit, an unqualified auditors' certificate has been given with respect to such amendments. [2]Such resolutions shall become null and void if an unqualified auditors' certificate has not been provided with respect to such amendments within two weeks after the passing of such resolutions.

Subsection Two: Appropriation of Profits

§ 174 [Resolution on the Appropriation of Profits]

(1) [1]The shareholders' meeting shall resolve on the appropriation of distributable profits. [2]In such connection the annual financial statements as approved shall be binding on the shareholders' meeting.

(2) Such resolution shall specify in detail the appropriation of distributable profits, including in particular the following:

1. the amount of distributable profits;

2. the amount to be distributed to shareholders;

3. the amounts to be transferred to profit reserves;

4. any profit carried forward;

5. any additional expense resulting from such resolution.

(3) Such resolution shall not be deemed to constitute an amendment to the annual financial statements as approved.

Subsection Three. Ordinary Shareholders' Meeting

§ 175 Notice

(1) [1]The management board shall, promptly upon receipt of the report of the supervisory board, give notice of a shareholders' meeting to receive the approved annual financial statements and the annual report, the individual accounts pursuant to § 325(2a) of the Commercial Code which have been approved by the supervisory board and to resolve the appropriation of distributable profits, in the case of a parent company (Section 290 (1), (2) Commercial Code) also to receive the approved consolidated annual financial statements and the consolidated annual report. [2]Such shareholders' meeting shall be held during the first eight months of the fiscal year.

(2) [1]The annual financial statements, the individual accounts pursuant to § 325(2a) of the Commercial Code which have been approved by the supervisory board, the annual report, the report of the supervisory board and the proposal of the management board regarding the appropriation of distributable profits shall be displayed for inspection by shareholders at the company's offices as from the date of notice of the meeting. [2]Each shareholder shall upon request be provided with a copy of such documents. [3]In the case of a parent company (Section 290 (1), (2) Commercial Code), sentences 1 and 2 shall also apply to consolidated annual financial statement and the consolidated annual report, and the report of the supervisory board thereon. [4]The duties in sentences 1 to 3 shall not arise if the documents referred to therein are accessible on the stock corporation's Internet page for the same period of time.

(3) [1]If the shareholders' meeting is to approve the annual financial statements or the consolidated financial statements, (1) and (2) shall apply accordingly to the notice of the shareholders' meeting for the approval of the annual financial statements or the consolidated financial statements and to making available the relevant documents and the provision of copies thereof. [2]The deliberations on the approval of the annual financial statements and the appropriation of distributable profits should be combined.

(4) [1]The management board and the supervisory board shall be bound by the statements regarding the annual financial statements contained in the report of the supervisory board (§§ 172, 173 (1)) as from the date of notice of the shareholders' meeting for receipt of the approved annual financial statements or, if the shareholders' meeting is to approve the annual financial statements, as from the date of the shareholders' meeting for approval of the annual financial statements. [2]In the case of a parent company (Section 290 (1), (2) Commercial Code), sentence 1 shall apply to the supervisory board's declaration on the approval of the consolidated financial statement.

§ 176 Documents to be Presented, Presence of the External Auditor

(1) [1]The management board shall make available to the shareholders' meeting the documents specified in § 175 (2) and, in the case of listed companies, an explanatory report on the statements pursuant to § 289 (4), § 315 (4) of the Commercial Code. [2]At the beginning of the meeting, the management board shall comment on the documents that have been presented by it and the chairman of the supervisory board shall comment on the report of the supervisory board. [3]The management board shall in such connection also comment on any annual net loss or any loss that has materially adversely affected the annual result. [4]Sentence 3 shall not apply to credit institution.

(2) [1]If the annual financial statements are required to be audited by an external auditor, the external auditor shall be present at the deliberations on the approval of the annual financial statements. [2]Sentence 1 shall apply accordingly to the deliberations on the approval of the consolidated financial statements. [3]The external auditor shall not be obligated to provide information to any shareholder.

Section Four: Announcement of Annual Financial Statements

§ 177 [repealed]

§ 178 [repealed]

Division Six. Amendment of Articles, Measures to Increase or Reduce the Share Capital
Section One. Amendment of Articles

§ 179 Resolution of Shareholders' Meeting

(1) [1]Any amendment of the articles shall require a resolution of the shareholders' meeting. [2]The shareholders' meeting may confer upon the supervisory board the authority to make amendments that relate solely to the wording of the articles.

(2) [1]The resolution of the shareholders' meeting shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [2]The articles may provide for a different capital majority, however, in the case of an amendment of the purpose of the enterprise, only for a larger capital majority. [3]The articles may provide for additional requirements.

(3) [1]If the existing relationship of more than one class of shares is to be amended to the disadvantage of any class, the resolution of the shareholders' meeting shall require the consent of the shareholders adversely affected in order to be effective. [2]The shareholders adversely affected shall decide on such consent by adopting a separate resolution. [3](2) shall apply to such separate resolution.

§ 179a Duty to Transfer the Entire Assets of the Company

(1) [1]A contract by which a company binds itself to transfer the entirety of its assets and whereby the transfer does not fall under the provisions of the Transformation Act requires a resolution of the shareholders' meeting according to § 179 even if it does not involve a

change in the company objects. [2]The articles may only provide for a larger majority.

(2) [1]The contract shall be presented for the review of the shareholders in the business premises of the company from the convocation of the shareholders' meeting that is to resolve its approval. [2]On request, every shareholder is to be given a copy. [3]The duties pursuant to sentences 1 and 2 shall not apply if the agreement is made available on the company's Internet page for the same period of time. [4]The agreement shall be made available for inspection at the shareholders' meeting. [5]The management board shall explain it at the beginning of the proceedings. [6]The agreement shall be appended to the minutes.

(3) If on the occasion of the transfer of the corporate assets the company is dissolved, then a publicly certified copy of the contract shall be attached to the notification of the dissolution.

§ 180 Consent of Shareholders Concerned

(1) Any resolution imposing ancillary obligations on shareholders shall require the consent of all shareholders concerned in order to be effective.

(2) The foregoing shall apply to any resolution that makes the transfer of registered or interim share certificates subject to the company's consent.

§ 181 Registration of Amendment of Articles

(1) [1]The management board shall file the amendment of the articles for registration in the commercial register. [2]The full text of the articles shall be appended to such filing; such text shall be provided with the certificate of a notary that the provisions of the articles which have been amended conform to the resolution to amend the articles and that the provisions which have not been amended conform to the full text of the articles last submitted to the commercial register.

(2) Unless the amendment relates to the matters set out in § 39, a reference to the documents submitted to the court shall suffice for purposes of registration.

(3) An amendment shall become effective only upon registration thereof in the commercial register of the company's domicile.

Section Two. Measures to Increase the Capital
Subsection One. Capital Increase against Contributions

§ 182 Requirements

(1) [1]A resolution to increase the share capital against contributions shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [2]The articles may provide for a different capital majority, however, in the case of the issue of non-voting preferred shares, only for a larger capital majority. [3]The articles may provide for additional requirements. [4]The capital increase may only be carried out by issuance of new shares. [5]In the case of companies with non-par shares, the number of shares must be increased proportionately to the share capital.

(2) [1]If there is more than one class of shares, resolutions of the shareholders' meeting shall require the consent of the shareholders of each class in order to be effective. [2]Such consent shall require a separate resolution by the shareholders of each class. [3](1) shall

apply to such separate resolution.

(3) If the new shares are to be issued for an amount exceeding the minimum issue price, the minimum price they shall be issued for shall be stipulated in the resolution on the share capital increase.

(4) [1]The share capital shall not be increased for as long as contributions to share capital are still outstanding and collectible. [2]In the case of insurance companies, the articles may provide otherwise. [3]A share capital increase shall not be precluded if immaterial amounts of contributions are outstanding.

§ 183 Capital Increase against Contributions in kind; Repayment of Contributions

(1) [1]In the case of a contribution in kind (§ 27 (1) and (2)), the resolution on the share capital increase shall stipulate the object, the person from whom the company is to acquire such object and the par value or, in case of non-par shares the number, of shares to be granted for the contribution in kind. [2]Such resolution may only be adopted if the contribution in kind and the stipulations pursuant to sentence 1 have been explicitly and duly announced.

(2) § 27 (3) and (4) shall apply accordingly.

(3) [1]In the case of a capital increase against Contributions in kind, an audit shall be made by one or more auditors. [2]§ 33 (3) to (5), §§ 34, 35 shall apply accordingly.

§ 183a Capital Increase against Contributions in kind without Audit

(1) [1]If the requirements pursuant to § 33a are met, an audit of the contribution in kind (§ 183 (3)) may be refrained from. [2]If this is the case, the following paragraphs shall apply.

(2) [1]The management board shall announce the date of the resolution on the capital increase as well as the statements pursuant to § 37a (1) and (2) in the company's journals. [2]The implementation of the capital increase may not be registered with the commercial register before the expiration of four weeks since the announcement.

(3) [1]If the requirements pursuant to § 33a (2) are met, the local court shall appoint one or more auditors upon application of shareholders who held a total of five per cent of the share capital on the date of the resolution and are still holding a total of five per cent of the share capital on the date of application. [2]The application may be filed up until the date of the registration of the implementation of the share capital increase (§ 189). [3]The court shall hear the management board before deciding on the application. [4]Such decision may be appealed against.

(4) § 33 (4) and (5), §§ 34, 35 shall apply accordingly to the further procedure.

§ 184 Filing for Registration of the Resolution

(1) [1]The management board and the chairman of the supervisory board shall file the resolution on the share capital increase for registration in the commercial register. [2]Such filing for registration purposes shall state which contributions to existing share capital are still outstanding and why they are not collectible. [2]If the capital contribution is not to

be audited and if the date of the resolution on the capital increase has been announced in advance (§ 183a (2)), the persons filing for registration only need to assert in the filing for registration that they have not become aware of any circumstances within the meaning of § 37a (2) since the announcement.

(2) The audit report on the Contributions in kind (§ 183 (3)) or the attachments specified in § 37a (3) shall be appended to such filing.

(3) [1]The court may reject registration if the value of the contribution in kind is not insignificantly lower than the minimum issue price of the shares to be granted for the contribution in kind. [2]If the contribution in kind is not audited pursuant to § 183a (1), § 38 (3) shall apply accordingly.

§ 185 Subscription to New Shares

(1) [1]Subscription to new shares shall be effected by means of a written note (subscription form) specifying the number, par value and, if more than one class is being issued, class of shares to be subscribed. [2]The subscription notice shall be executed in duplicate. [3]It shall specify:

1. the date on which the resolution on the share capital increase was adopted;
2. the share issue price, the amount of payments to be made and the scope of any ancillary obligations;
3. the stipulations required in the case of a capital increase against Contributions in kind and, if more than one class is being issued, the portion of the share capital allocated to each class of shares;
4. the date on which the subscription shall cease to be effective, if the completion of the share capital increase has not been registered prior thereto.

(2) Any subscription notice which does not contain all such particulars or which contains limitations in respect of the obligation of the subscriber, other than the limitation pursuant to (1) No. 4, shall be null and void.

(3) A subscriber may not assert the invalidity or non-binding nature of the subscription notice once the completion of the share capital increase has been registered if he has by virtue of the subscription notice exercised rights or performed obligations as a shareholder.

(4) Any limitation not contained in the subscription notice shall be unenforceable with respect to the company.

§ 186 Subscription Rights

(1) [1]Each shareholder shall be entitled, upon demand, to subscribe to new shares in proportion to his holdings in the existing share capital. [2]A period of not less than two weeks shall be set for exercising such subscription rights.

(2) [1]The management board shall announce the issue price or the basis for setting it and the subscription period set in accordance with (1) in the company's journals. [2]If only the basis

is announced, then no later than three days before the end of the subscription period, the management board shall announce the price in the company's journals and through an electronic information service.

(3) [1]Subscription rights may be excluded in whole or in part, however, only in the resolution on the share capital increase. [2]In such an event the resolution shall require in addition to the requirements provided by law or the articles for such capital increase, a majority of not less than three fourths of the share capital represented at the passing of the resolution. [3]The articles may provide for a larger capital majority and for additional requirements. [4]An exclusion of subscription rights is permitted in particular if the capital increase against cash contributions does not exceed 10 per cent of the initial share capital and the issue price is not significantly below the stock exchange price.

(4) [1]A resolution by which subscription rights are excluded in whole or in part may be adopted only if the proposed exclusion has been explicitly and duly announced. [2]The management board shall make available to the shareholders' meeting a written report stating the grounds for the proposed exclusion, in whole or in part, of subscription rights; such report shall provide an explanation of the proposed issue price.

(5) [1]A resolution providing that the new shares are to be acquired by a credit institution or an enterprise operating under § 53 (1) sentence 1 or § 53b (1) sentence 1 or (7) of the Banking Act with the obligation to offer such shares to the shareholders for subscription shall not be deemed to constitute an exclusion of subscription rights. [2]The management board shall announce the subscription offer with the statements according to (2) sentence 1 and a final issue value according to (2) sentence 2; the foregoing shall apply if the new shares are to be acquired by a person other than a credit institution with the obligation to offer such shares to the shareholders for subscription.

§ 187 Offer of Rights to Subscribe to New Shares

(1) Any offer of rights to subscribe to new shares may only be made subject to the subscription rights of the shareholders.

(2) Any such offer made prior to the resolution on the share capital increase shall be unenforceable with respect to the company.

§ 188 Filing and Registration of Implementation of Share Capital Increase

(1) The management board and the chairman of the supervisory board shall file the implementation of the share capital increase for registration in the commercial register.

(2) [1]§ 36 (2), § 36a and § 37 (1) shall apply accordingly to such filing. [2]Subscription payments may not be made by credit to an account in the name of the management board.

(3) The following shall be appended to the filing:

1. the duplicates of the subscription forms and a list of the subscribers signed by the management board and stating the shares issued to each subscriber and the payments made in respect thereof;

2. in the case of a capital increase by Contributions in kind, the agreements on which

the stipulations pursuant to § 183 were based or which have been entered into in execution thereof;

3. a computation of the expenses which the company will incur through the issue of new shares;

(4) The filing and registration of the completion of the share capital increase may be made together with the filing and registration of the resolution on such increase.

§ 189 Effectiveness of the Capital Increase

The increase of share capital shall become effective upon registration of the implementation of the share capital increase.

§ 190 [repealed]

§ 191 Prohibited issue of Share Certificates and Interim Certificates

[1]The new shares may not be transferred and new share certificates and interim certificates may not be issued prior to registration of the completion of the share capital increase. [2]New share certificates and interim certificates issued prior to such registration shall be null and void. [3]The issuers shall be jointly and severally liable to the shareholders for any damage resulting from such Issue.

Subsection Two. Conditional Capital Increase

§ 192 Requirements

(1) The shareholders' meeting may resolve upon an increase of share capital which shall be carried out only to the extent that conversion rights or stock warrants which obligate the company to issue new shares (new shares) are exercised (contingent capital increase).

(2) A resolution on a conditional capital increase may be adopted only for any of the following purposes:

1. to grant conversion rights or stock warrants on the basis of convertible bonds or warrant bonds;

2. to prepare a merger of enterprises;

3. to grant rights to employees of the company to subscribe to new shares against the contribution of amounts due to such employees under a profit sharing plan established by the company.

(3) [1]The par value of conditional capital may not exceed one half and the par value of the capital resolved according to (2) sentence 3 may not exceed one-tenth of the share capital as at the date of the adoption of the resolution on the conditional capital increase. [2]§ 182 (1) sentence 5 shall apply accordingly. [3]Sentence 1 does not apply to a conditional capital increase pursuant to (2) No. 1 which is resolved solely for the purpose of enabling the company to carry out a conversion it is entitled to carry out in case of its imminent

insolvency or to avoid over-indebtedness. [4]If the company is an institution within the meaning of § 1 (1b) of the Banking Act, sentence 1 shall also not apply to a conditional capital increase pursuant to (2) No. 1 which is resolved for the purpose of enabling the company to carry out a conversion to fulfil banking regulatory requirements or requirements imposed for restructuring or liquidation purposes. [5]Conditional capital which is subject to sentence 3 or 4 shall not be set-off against other conditional capital.

(4) A resolution of the shareholders' meeting which contravenes the resolution on the conditional capital increase shall be null and void.

(5) The following provisions regarding share warrants shall apply accordingly to conversion rights.

§ 193 Requirements for the Resolution

(1) [1]The resolution on the conditional capital increase shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [2]The articles may provide for a larger capital majority and additional requirements. [3]§ 182 (2) and § 187 (2) shall apply.

(2) The resolution shall also stipulate:

1. the purpose of the conditional capital increase;

2. the persons entitled to subscribe;

3. the issue price or the basis on which such price is to be computed; in case of a conditional capital increase for the purposes of § 192 (2) No. 1 it shall be sufficient if the resolution or the associated resolution pursuant to § 221 determines the minimum issue price or the basis for the determination of the issue price or the minimum issue price; and

4. in the case of resolutions according to § 192 (2) No. 3 also to the allocation of subscription rights to members of the management board and employees, performance targets, acquisition and exercise periods and the waiting period for first exercise (at least four years).

§ 194 Conditional Capital Increase against Contributions in kind; Repayment of Contributions

(1) [1]In the case of a contribution in kind, the resolution on the conditional capital increase shall stipulate the object, the person from whom the company shall acquire the object and the par value of the shares to be granted for the contribution in kind. [2]The conversion of bonds into new shares shall not be deemed to constitute a contribution in kind. [3]The resolution may only be adopted if the proposed Contributions in kind have been explicitly and duly announced.

(2) § 27 (3) and (4) shall apply accordingly; the date of the filing for registration pursuant to § 27 (3) sentence 3 and the registration pursuant to § 27 (3) sentence 4 shall each be replaced by the date of issue of the new shares.

(3) (1) and (2) shall not apply to the contribution of amounts due to employees of the company

under a profit-sharing plan established by the company.

(4) [1]In the case of a capital increase against Contributions in kind, an audit shall be made by one or more auditors. [2]§ 33 (3) to (5), §§ 34, 35 shall apply accordingly.

(5) § 183a shall apply accordingly.

§ 195 Registration of the Resolution

(1) [1]The management board and the chairman of the supervisory board shall file the resolution on the conditional capital increase for registration in the commercial register. [2]§ 184 (1) sentence 3 shall apply accordingly.

(2) The following shall be appended to the filing:

1. in the case of a conditional capital increase against Contributions in kind, the articles on which the stipulations pursuant to § 194 were based or which have been entered into in execution thereof and the report on the audit of Contributions in kind (§ 194 (4)) or the attachments specified in § 37a (3);

2. a computation of the expenses which the company will incur through the issue of new shares.

(3) [1]The court may reject registration if the value of the contribution in kind is not insignificantly lower than the minimum issue price of the shares to be granted for the contribution in kind. [2]If the contribution in kind is not audited pursuant to § 183a (1), § 38 (3) shall apply accordingly.

§ 196 [repealed]

§ 197 Prohibited Issue of Shares

[1]The new shares may not be issued prior to registration of the resolution on the conditional capital increase. [2]A right to subscribe shall not arise prior to such date. [3]New shares issued prior to such registration shall be null and void. [4]The issuers shall be jointly and severally liable to the shareholders for any damage resulting from such Issue.

§ 198 Exercise Notice

(1) [1]Rights to subscribe shall be exercised by means of a written notice. [2]Such notice (exercise notice) shall be executed in duplicate. [3]The exercise notice shall state the number, in case of par-value shares the par value and, if more than one class is being issued, the class of shares, the stipulations required pursuant to § 193 (2), the stipulations required pursuant to § 194 in respect of Contributions in kind, and the date on which the resolution on the conditional capital increase was adopted.

(2) [1]The exercise note shall have the same effect as a subscription notice. [2]Any exercise notice whose contents does not comply with (1) or which contain limitations in respect of the obligation of the person giving such notice shall be null and void.

(3) If new shares are issued despite the exercise notice being null and void, the person who has given such notice may not assert the invalidity of the exercise notice if he has by virtue of such notice exercised rights or performed obligations as a shareholder.

(4) Any limitation not contained in the exercise notice shall be unenforceable with respect to the company.

§ 199 Issue of New Shares

(1) The management board may issue new shares only in fulfilment of the purpose stipulated in the resolution on the conditional capital increase and in no event prior to full performance of the price resulting from such resolution.

(2) [1]The management board may issue new shares in exchange for convertible bonds or warrant bonds only if the difference between the issue price of the bonds surrendered for conversion and the higher minimum issue price of the new shares is offset by profit reserves which may be used for such purpose or by an additional payment from the person entitled to conversion. [2]The foregoing shall not apply if the aggregate amount for which the bonds were issued equals or exceeds the minimum issue price of the new shares.

§ 200 Effectiveness of the Conditional Capital Increase

The increase of the share capital shall become effective upon issue of the new shares.

§ 201 Registration of the Issue of New Shares

(1) At least once a year by the end of the calendar month following the expiration of the fiscal year, the management board shall file for registration of any new shares which have been issued with the commercial register.

(2) [1]Duplicates of the exercise notice and a list, signed by the management board, of the persons who have exercised the subscription rights, shall be appended to the report for filing. [2]Such list shall state the shares granted to each shareholder and the contribution made in respect thereof.

(3) The management board shall certify in filing that the new shares were issued solely in fulfilment of the purpose stipulated in the resolution on the conditional capital increase and in no event prior to full performance of the price resulting from such resolution.

Subsection Three. Authorised Capital

§ 202 Requirements

(1) The articles may authorise the management board, for a period not exceeding five years after registration of the company, to increase the share capital up to a specified par value (authorised capital) by issuing new shares against contributions.

(2) [1]Such authorisation may also be granted by amendment of the articles for a period not exceeding five years as from the date or registration of such amendment of the articles.

[2]The resolution of the shareholders' meeting shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [3]The articles may provide for a larger capital majority and for additional requirements. [4]§ 182 (2) shall apply.

(3) [1]The par value of the authorised capital may not exceed one half of the share capital as the date of such authorisation. [2]The new shares may be issued only with the consent of the supervisory board. [3]§ 182 (1) sentence 5 shall apply accordingly.

(4) The articles may also provide that the new shares are to be issued to employees of the company.

§ 203 Issue of New Shares

(1) [1]§§ 185 to 191 relating to a capital increase against contributions shall apply accordingly to the issue of new shares, unless the following provisions provide otherwise. [2]In respect of §§ 185 to 191, the authorisation in the articles to issue new shares shall be substituted for the resolution on the share capital increase.

(2) [1]The authorisation may provide that the management board shall have the authority to exclude subscription rights. [2]§ 186 (4) shall apply accordingly if such authorisation is contained in an amendment of the articles.

(3) [1]The new shares shall not be issued as long as contributions to the previously existing share capital are still outstanding and collectible. [2]In the case of insurance companies, the articles may provide otherwise. [3]The issue of new shares shall not be precluded if immaterial amounts of contributions are outstanding. [4]The first filing for registration of the completion of the share capital increase shall state which contributions to the previously existing share capital are still outstanding and why they are not collectible.

(4) (3) sentences 1 and 4 shall not apply if the shares are issued to employees of the company.

§ 204 Conditions of Share Issues

(1) [1]The management board shall, to the extent that the authorisation does not contain provisions thereon, decide as to the rights arising under shares and the conditions of the share issue. [2]The decision of the management board shall require the consent of the supervisory board; the foregoing shall apply to the decision of the management board pursuant to § 203 (2) regarding the exclusion of the subscription rights.

(2) If there are non-voting preferred shares, preferred shares that have priority to or equal standing with respect to the distribution of profits or assets may be issued only if the authorisation so provides.

(3) [1]If the annual financial statements, which are provided with an unqualified auditors' certificate, show an annual net profit, shares may also be issued to employees of the company in such manner that the contribution to be made thereupon is covered by that portion of the annual net profit which the management board and the supervisory board may transfer to other profit reserves pursuant to § 58 (2). [2]The provisions regarding a capital increase against contributions in cash shall, with the exception of § 188 (2),

apply to the issue of new shares. [3]The approved annual financial statements that are provided with an auditors' certificate shall be appended to the filing for registration of the completion of the share capital increase. [4]The persons making such filing shall further certify as provided by § 210 (1) sentence 2.

§ 205 Issue against Contributions in kind; Repayment of Contributions

(1) Shares may be issued against Contributions in kind only if the authorisation so provides.

(2) [1]Unless stipulated in the authorisation, the object of the contribution in kind, the person from whom the company is to acquire such object and the par value of the shares to be granted for contribution in kind shall be stipulated by the management board and stated in the subscription notice. [2]The management board shall make such stipulations only with the consent of the supervisory board.

(3) § 27 (3) and (4) shall apply accordingly.

(4) (2) and (3) shall not apply to the contribution of amounts due to employees of the company under a profit-sharing plan established by the company.

(5) [1]In the case of an issue of shares against Contributions in kind, an audit shall be made by one or more auditors; § 33 (3) to (5), §§ 34, 35 shall apply accordingly. [2]§ 183a shall be applied accordingly. [3]Instead of the date of the resolution of the capital increase, the management board shall announce its decision on issuing new shares against Contributions in kind as well as the statements pursuant to § 37a (1) and (2) in the company's journals.

(6) As far as the contribution in kind is not audited, § 184 (1) sentence 3 and (2) shall also apply accordingly to the filing of the implementation of the capital increase for registration with the commercial register (§ 203 (1) sentence 1, § 188).

(7) [1]The court may reject registration if the value of the contribution in kind is not insignificantly lower than the minimum issue price of the shares to be granted for the contribution in kind. [2]If the contribution in kind is not audited pursuant to § 183a (1), § 38 (3) shall apply accordingly.

§ 206 Agreements on Contributions in kind before Company's Registration

[1]If prior to registration of the company, agreements have been entered into which provide for a contribution in kind to be made on the authorised capital, the articles must contain the stipulations which are required for an issue against Contributions in kind. [2]§ 27 (3) and (5), §§ 32 to 35, § 37 (4) sentences 2, 4 and 5, §§ 37a, 38 (2) and (3) and § 49 regarding formation of the company shall apply accordingly. [3]In respect of such provisions the management board shall be substituted for the founders and the registration of the completion of the share capital increase shall be substituted for the registration of the company.

Subsection Four. Capital Increase from the Company's Reserves

§ 207 Requirements

(1) The shareholders' meeting may resolve on an increase of the share capital by means of conversion of the capital reserve or profit reserves into share capital.

(2) [1]§ 182 (1) and § 184 (1) shall apply accordingly to the respective resolution and the registration of such resolution. [2]Companies with non-par shares may increase their share capital without issuing new shares; the resolution on the increase must specify the type of increase.

(3) The resolution shall be based on a balance sheet.

§ 208 Capital and Profit Reserves Qualifying for Conversion

(1) [1]The capital reserve and the profit reserves which are to be converted into share capital must have been shown in the latest annual balance sheet and, if the resolution is based on a balance sheet other than the latest balance sheet, also in such balance sheet as capital reserve or profit reserves or, in the last resolution on the appropriation of the annual net profit or distributable profits, as transfer to such reserves. [2]Subject to (2) other profit reserves and transfers thereto may be converted in full into share capital, however, the capital reserve and the legal reserve including transfers thereto only to the extent that in aggregate such items exceed one-tenth or a higher proportion of the previously existing share capital which has been determined by the articles.

(2) [1]The capital reserve and the profit reserves as well as transfers thereto may not be converted to the extent that the relevant balance sheet shows a loss, including a loss carried forward. [2]Profit reserves and transfers thereto which are designated for a specific purpose may only be converted to the extent that such conversion is compatible with such designated purpose.

§ 209 Balance Sheet to be based on

(1) The resolution concerning conversion may be based on the latest balance sheet if such annual balance sheet has been audited and the approved annual balance sheet is provided with an unqualified auditors' certificate and if the balance sheet closing date is not more than eight months prior to the registrations of the resolution in the commercial register.

(2) [1]If the resolution is not based on the latest annual balance sheet, the balance sheet shall comply with §§ 150 and 152 of this Act and §§ 242 to 256a, 264 to 274a of the Commercial Code. [2]The balance sheet closing date may be not more than eight months prior to the registration of the resolution in the commercial register.

(3) [1]The balance sheet must be audited by an external auditor as to whether it complies with §§ 150 and 152 of this Act and §§ 242 to 256a, 264 to 274a of the Commercial Code. [2]Such balance sheet must be provided with an unqualified auditors' certificate.

(4) [1]Unless the shareholders' meeting elects another auditor, the auditor who was elected by the shareholders' meeting to audit the latest annual financial statements or who was appointed by the court for such purpose shall be deemed to have been elected. [2]Unless the special nature of the audit requires otherwise, § 318 (1) sentence 3 and 4, § 319 (1) to (4), §319a (1), §319b (1), §320 (1) and (2), §§ 321, 322 (7) and § 323 of the Commercial Code shall apply accordingly to the audit.

(5) [1]In the case of insurance companies, the auditor shall be appointed by the supervisory board; (4) sentence 1 shall apply accordingly. [2]Unless the special nature of the audit requires otherwise, § 341k of the Commercial Code shall apply to the audit.

(6) In the case of (2) to (5), § 175 (2) shall apply accordingly to making the balance sheet accessible for inspection and the distribution of copies.

§ 210 Filing and Registration of the Resolution

(1) [1]The filing of the resolution for registration in the commercial register shall include the relevant balance sheet for the capital increase together with the auditors' certificate and, in the case of § 209 (2) to (6), in addition the latest annual balance sheet, if not already submitted pursuant to § 325 (1) of the Commercial Code. [2]The persons filing shall declare to the court that, to their knowledge, no reduction in value of assets has occurred between the closing date of the relevant balance sheet and the date of filing which would preclude a capital increase if such resolution were to be adopted on the date of the filing.

(2) The court may register the resolution only if the record date of the balance sheet on which the capital increase was no later than eight months prior to the filing and a declaration in accordance with (1) sentence 2 has been given.

(3) The court need not examine whether the balance sheets comply with statutory provisions.

(4) The registration entry of the resolution shall state that the capital increase was made from the company's reserves.

§ 211 Effectiveness of the Capital Increase

(1) The increase of share capital shall become effective upon registration of the resolution on the share capital increase.

(2) [repealed]

§ 212 Persons Entitled to New Shares

[1]The new shares shall be allocated to the shareholders in proportion to their holdings of the previously existing share capital. [2]Any resolution of the shareholders' meeting to the contrary shall be null and void.

§ 213 Fractional Shares

(1) If the capital increase shall result in only a fraction of a new share being allocated to a holding of the previously existing share capital, such fractional share may be separately disposed of or inherited.

(2) The rights arising under a new share, including the right to receive a share certificate, may be exercised only if fractional shares that in aggregate comprise a full share are held by one person or if several persons, whose fractional shares comprise a full share, exercise such rights jointly.

§ 214 Request to Shareholders

(1) [1]After registration of the resolution on the share capital increase, the management board shall promptly request the shareholders to take delivery of the new share certificates. [2]Such notice shall be published in the company's journals. [3]Such publication shall state:

1. the amount by which the share capital has been increased.

2. the proportion in which new shares have been allocated for previously existing shares.

[4]Such announcement shall further state that the company may, after three warnings, sell any shares on behalf of the persons entitled thereto which have not been collected within one year after publication of the notice.

(2) [1]Upon expiration of one year from the date of the notice, the company shall warn that any shares not collected may be sold. [2]Such warning shall be published three times in intervals of not less than one month in the company's journals. [3]The last publication must be made prior to the expiration of eighteen months from the date of publication of the notice.

(3) [1]Upon expiration of one year from the date of the last publication of the warning, the company shall sell on behalf of the persons entitled thereto any shares not collected at the official stock exchange quotation through the intermediation of a stock broker and in the absence of a stock exchange quotation by public auction. [2]§ 226 (3) sentences 2 to 6 shall apply accordingly.

(4) [1](1) to (3) shall apply accordingly to companies that have not issued share certificates. [2]Such companies shall request the shareholders to accept the allocation of new shares.

§ 215 Own Shares. Partially Paid Shares

(1) Own shares shall participate in any increase of share capital.

(2) [1]Partially paid shares shall participate in any increase of share capital in proportion to their share in the share capital. [2]In such cases, the capital increase may not be carried out by issuing new shares, in case of par-value shares, the par value shall be increased. [3]If shares paid in full exist in addition of partially paid shares, the capital increase in respect to such shares paid in full may be carried out by increasing the par value of the shares and issuing new shares; the resolution on the share capital increase shall specify the manner of the increase. [4]If the capital increase is carried out by increasing the par value of the shares, the amount of such capital increase shall be so computed that the amount allocated to each share is fully covered by the increase in the par value.

§ 216 Preservation of the Rights of Shareholders and Third Parties

(1) The proportion of rights arising from shares shall not be affected by the capital increase.

(2) [1]To the extent that specific rights arising from partially paid shares, in particular the right to participate in the distributions of profit or the right to vote, are determined by the contribution made in respect of each share, the shareholders shall have such rights, until performance of the contributions still outstanding, only in proportion to the amount of the respective contributions made increased by the per centage increase in the share capital which was computed for the par value of the share capital. [2]If further contributions are made, such rights shall increase proportionately. [3]In the case of § 271 (3), the amounts of the increase shall be deemed to be paid in full.

(3) [1]The financial terms of agreements between the company and third parties that are related to the distribution of the company's profits or the par value or market value of its share capital or the previously existing capital or profitability, shall not be affected by the capital increase. [2]The foregoing shall apply to the ancillary obligations of the shareholders.

§ 217 Commencement of Participation in Profits

(1) Unless otherwise provided, the new shares shall participate in profits of the entire fiscal year in which the resolution on the share capital increase was adopted.

(2) [1]The resolution on the share capital increase may provide that the new shares also participate in the profits of the latest fiscal year ended prior to adoption of the resolution on the capital increase. [2]In such case the resolution on the share capital increase shall be adopted prior to adoption of the resolution on the appropriation of distributable profits of the last fiscal year ended prior to adoption of such resolution on the capital increase. [3]The resolution on the appropriation of the distributable profits of the last fiscal year ended prior to adoption of the resolution on the capital increase shall become effective only after the share capital has been increased. [4]The resolution on the share capital increase and the resolution on the appropriation of the distributable profits of the last fiscal year ended prior to adoption of the resolution on the capital increase shall be null and void if the resolution on the capital increase has not been registered in the commercial register within three months after adoption of the resolution. [5]The running of such period shall be tolled for as long as a contesting or invalidity action against the resolution is pending.

§ 218 Conditional Capital

[1]Conditional capital shall increase in the same proportion as share capital. [2]If the purpose of the conditional capital is to grant conversion rights to holders of convertible or warrant bonds, a special reserve shall be created in an amount equal to the difference between the issue price of bonds of the higher minimum issue price of the new shares to be issued for these to the extent that additional payments by the persons entitled to conversion have not been agreed upon.

§ 219 Prohibited Issue of Share Certificates and Interim Certificates

New share certificates and interim certificates may not be issued prior to registration of the resolution on the share capital increase in the commercial register.

§ 220 Valuation Rates

[1]The costs of acquisition of the shares acquired prior to the share capital increase and the new shares issued for these shall be deemed to be the amounts attributable to the individual shares after allocation of the costs of acquisition of the shares acquired to the share capital increase between such shares and the new shares issued for these in proportion to the respective share in the share capital. [2]The additional shares may not be shown as newly acquired shares.

Subsection Five. Convertible or Warrant Bonds, Dividend Bonds

§ 221 [Convertible or Warrant Bonds, Dividend Bonds]

(1) [1]Bonds which provide holders or the company with a conversion right or share warrant (convertible or warrant bonds) and bonds in which the rights of the holders are related to dividends paid to shareholders (dividend bonds) may only be issued on the basis of a resolution of the shareholders' meeting. [2]The resolution shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [3]The articles may provide for a different capital majority and additional requirements. [4]§ 182 (2) shall apply.

(2) [1]The management board may be authorised for a period of not more than five years to issue convertible or warrant bonds. [2]The management board and the chairman of the supervisory board shall submit to the commercial register the resolution on the issue of convertible or warrant bonds and a confirmation of their issue. [3]An announcement as to the resolution and the confirmation of issue shall be published in the company's journals.

(3) (1) shall apply accordingly to the issue of participation rights.

(4) [1]Shareholders shall have subscription rights with respect to convertible or warrant bonds, dividend bonds and participation rights. [2]§§ 186 and 193 (2) number 4 shall apply accordingly.

Section Three. Measures to Reduce the Share Capital
Subsection One. Ordinary Capital Reduction

§ 222 Requirements

(1) [1]A reduction of the share capital shall require a resolution that has been adopted by a majority or not less than three fourths of the share capital represented at the passing of the resolution. [2]The articles may provide for a larger capital majority and additional requirements.

(2) [1]If there is more than one class of share, resolutions of the shareholders' meeting shall require the consent of the shareholders of each class in order to be effective. [2]Such consent shall require a separate resolution by the shareholders of each class. [3](1) shall apply to such separate resolution.

(3) The resolution shall stipulate the purpose of the capital reduction, in particular whether part of the share capital is to be repaid.

(4) [1]The reduction of the share capital of a company with par shares requires the reduction of the par value of the shares. [2]To the extent that the corresponding proportion of the reduced share falls below the minimum value according to § 8(2) sentence 1 or (3) sentence 3, the reduction shall occur through consolidation of shares. [3]The resolution must stipulate in which manner the capital reduction is to be made.

§ 223 Filing for Registration of the Resolution

The management board and the chairman of the supervisory board shall file the resolution on the reduction of the share capital for registration in the commercial register.

§ 224 Effectiveness of the Capital Reduction

The reduction of the share capital shall become effective upon registration of the resolution on the share capital reduction.

§ 225 Protection of Creditors

(1) [1]Creditors whose claims arose prior to the date of the announcement of the registration of the resolution shall, upon request within six months of the date of such announcement be granted security to the extent that they may not demand satisfaction. [2]In the announcement of registration, the creditors shall be advised of such right. [3]Creditors who in the case of insolvency have a right to preferential satisfaction from a fund that has been established based on statutory provisions for their protection and is subject to governmental supervision shall not have the right to demand security.

(2) [1]Payments to shareholders in connection with the reduction of share capital may only be made upon the expiration of six months from the date of the announcement of registration and after those creditors who have made a timely request have been satisfied or granted security. [2]A release of shareholders from the obligation to make contributions shall not be effective prior to the aforementioned date and before the creditors who have made a timely request have been satisfied or granted security.

(3) The right of creditors to demand security shall not be conditional on payments having been made to shareholders in connection with the reduction of share capital.

§ 226 Cancellation of Shares

(1) [1]If share certificates are to be consolidated in connection with the reduction of share capital by exchanging or stamping share certificates or a similar procedure, the company may declare the share certificates that despite notice have been surrendered to have been cancelled. [2]The foregoing shall apply to share certificates surrendered which are insufficient in number for replacement by new share certificates and which have not been submitted to the company for sale on behalf of the persons concerned.

(2) [1]The notice to surrender share certificates shall give warning of cancellation. [2]Cancellation may be made only after such request has been announced in the manner prescribed

for the grace period pursuant to § 64 (2). [3]Cancellation shall become effective upon publication in the company's journals. [4]Such announcement shall designate the share certificates which have been cancelled in such a manner that it may be ascertained from the announcement itself whether a share certificate has been cancelled.

(3) [1]The new share certificates that are to be issued in place of the cancelled share certificates shall be promptly sold by the company on behalf of the persons concerned at the official stock exchange quotation in the absence of a stock exchange quotation by public auction. [2]If adequate results cannot be expected from an auction at the company's domicile, the shares shall be sold at an appropriate location. [3]The time, location and object of the auction shall be announced publicly. [4]The persons concerned shall be notified separately; such notification may be omitted if not feasible. [5]Such announcement and notification shall be made not less than two weeks prior to the auction. [6]The proceeds shall be paid to the persons concerned or, if a right to deposit exists, be deposited.

§ 227 Filing of the Implementation of Share Capital Reduction

(1) The management board shall file the completion of the share capital reduction for registration in the commercial register.

(2) The filing and registration of the completion of the share capital reduction may be made together with the filing and registration of the resolution on the reduction.

§ 228 Reduction to Less than the Minimum Par Value

(1) The share capital may be reduced to less than the minimum par value prescribed in § 7 if the minimum par value is restored by means of a capital increase which has been resolved upon at the same time as the capital reduction and for which Contributions in kind have not been stipulated.

(2) [1]Such resolution shall be null and void if the resolutions and the completion of the increase have not been registered in the commercial register within six months after the date of adoption of the resolutions. [2]The running of such period shall be tolled for as long as a contesting or invalidity action against the resolution is pending. [3]The resolutions and the completion of the share capital increase may only be registered at the same time in the commercial register.

Subsection Two. Simplified Procedure for Capital Reduction

§ 229 Requirements

(1) [1]A simplified procedure may be employed for a share capital reduction for the purpose of compensation for a decline in the value of assets, offsetting other losses or transferring amounts to the capital reserve. [2]The resolution shall stipulate that the reduction is made for such purposes.

(2) [1]The simplified procedure for capital reduction may only be employed after any amount by which the sum of the legal reserve and the capital reserve exceeds 10 per cent of the share capital remaining after such reduction and any amounts in the profit reserves have been released. [2]Such simplified procedure may not be employed for as long as profit carried forward is shown.

(3) § 222 (1), (2) and (4), §§ 223, 224 and 226 to 228 regarding the ordinary capital reduction shall apply accordingly.

§ 230 Prohibition of Payments to Shareholders

[1]The amounts that are obtained from the release of the capital and profit reserves and the capital reduction may not be utilised for payments to shareholders or to exempt shareholders from their obligation to make contributions. [2]Such amount may be utilised only to compensate for declines in the value of assets, to offset other losses and to transfer amounts to the capital reserve or the legal reserve. [3]Such amounts may be utilised for such purpose only to the extent that the resolution states that such utilization is the purpose of the reduction.

§ 231 Limited Transfer to the Capital Reserve and the Legal Reserve

[1]The transfer to the legal reserve of amounts obtained from the release of other profit reserves and to the capital reserve of amounts obtained from the capital reduction may be made only to the extent that the sum of the capital reserve and the legal reserve does not exceed 10 per cent of the share capital. [2]In such case, the share capital shall be deemed to be the par value that results from the reduction but not less than the minimum par value prescribed in § 7. [3]In comparing the amounts that may be transferred, amounts that are to be transferred to the capital reserve after the adoption of the resolution on the capital reduction shall not be taken into account even if such transfer is based on a resolution, which is adopted at the same time as the resolution on the capital reduction.

§ 232 Transfer of Amounts to the Capital Reserve in the case of Overestimated Losses

If it becomes apparent in connection with the preparation of the annual balance sheet for the fiscal year in which the resolution on the capital reduction was adopted or for one of the two following fiscal years that declines in the value of assets or other losses have not in fact occurred in the amount estimated when the resolution was adopted or have been offset, the amount of the differences shall be transferred to the capital reserve.

§ 233 Payments of Dividends. Creditor Protection

(1) [1]Dividends may not be paid for as long as the legal reserve and the capital reserve in aggregate do not amount to 10 per cent of the share capital. [2]In such case, the share capital shall be deemed to be the par value that results from the reduction but not less than the minimum par value prescribed in § 7.

(2) [1]A dividend exceeding four per cent may not be paid for a fiscal year beginning earlier than two years after the resolution on the capital reduction has been adopted. [2]The foregoing shall not apply if creditors whose claims arose prior to announcement of the registration of such resolution have been satisfied or provided with security, if they have applied for this purpose within six months after publication of the annual financial statements which formed the basis for the resolution on the dividend. [3]It is not necessary to secure creditors who in the case of insolvency have a right to preferential satisfaction from a fund that has been established pursuant to statutory provisions for their protection

and is subject to governmental supervision. [4]In the announcement pursuant to § 325 (1) sentence 2 of the Commercial Code the creditors shall be advised of such satisfaction or provision of security.

(3) The foregoing provisions do not permit the payment of dividends from amounts released from the capital and legal reserves or obtained in connection with the capital reduction.

§ 234 Retroactive Effect of the Capital Reduction

(1) In the annual financial statements for the latest fiscal year ended prior to adoption of the resolution on the capital reduction the subscribed capital and the capital and legal reserves may be shown in the respective amounts that will prevail upon completion of the capital reduction.

(2) [1]In such case, the shareholders' meeting shall resolve on approval of the annual financial statements. [2]Such resolution should be adopted together with the resolution on the capital reduction.

(3) [1]The resolution shall be null and void if the resolution on the capital reduction has not been registered in the commercial register within three months of adoption of the resolution. [2]The running of such period shall be tolled for as long as a contesting or invalidity action against the resolution is pending.

§ 235 Retroactive Effect of a Simultaneous Capital Increase

(1) [1]If in the case of § 234 a capital reduction and a share capital increase have been resolved upon at the same time, the capital increase may also be treated in the annual financial statements as having been completed. [2]Such a resolution may only be adopted if the new shares have been subscribed, no Contributions in kind have been stipulated and the payment that is required to be made pursuant to § 188 (2) at the time of the filing for registration of the completion of the capital increase has been made with respect to each share. [3]Proof of the subscription and such payment shall be submitted to the notary who records the resolution on the share capital increase.

(2) [1]All resolutions shall be null and void if the resolutions on the capital reduction and the capital increase and the completion of the increase have not been registered in the commercial register within three months of the adoption of such resolutions. [2]The running of such period shall be tolled for as long as a contesting or invalidity action against the resolution is pending. [3]The resolutions and the completion of the share capital increase may only be registered at the same time in the commercial register.

§ 236 Disclosure

Disclosure of the annual financial statements pursuant to § 325 of the Commercial Code may only be made in the case of § 234 after registration of the resolution on the capital reduction, in the case of § 235 after the resolutions on the capital reduction and capital increase and the completion of the capital increase have been registered.

Subsection Three. Capital Reduction through Redemption of Shares – Exception for non-par shares

§ 237 Requirements

(1) [1]Shares may be cancelled by means of mandatory redemption or acquisition by the company. [2]A mandatory redemption may only be made if prescribed or permitted in the original articles or an amendment of the articles prior to acquisition or subscription of the shares.

(2) [1]The provisions regarding an ordinary capital reduction shall govern such cancellation. [2]The conditions governing a mandatory redemption and the respective procedure shall be stipulated in the articles or the resolution of the shareholders' meeting. [3]§ 225 (2) shall apply accordingly to the payment of the consideration that is to be granted to shareholders in the case of a mandatory redemption or an acquisition of shares for the purpose of cancellation and to the release of such shareholders from the obligation to make contributions.

(3) The provisions regarding an ordinary capital reduction need not be observed if shares with respect to which the issue price has been paid in full

1. are surrendered to the company free of charge; or

2. are cancelled by a charge to distributable profits or another profit reserve, to the extent a charge against such items may be made for such purpose; or

3. are non-par shares and the resolution of the shareholders meeting provides that through the cancellation the share of the remaining shares in the share capital increases according to § 8 (3); if the management board is authorised to cancel shares, it may also be authorised to adjust the number indicated in the articles.

(4) [1]In the cases of (3) also, a capital reduction by means of cancellation of shares shall require a resolution of the shareholders' meeting. [2]A simple majority of votes shall suffice for such resolution. [3]The articles may provide for a larger capital majority and additional requirements. [4]The resolution shall stipulate the purpose of the capital reduction. [5]The management board and the chairman of the supervisory board shall file the resolution for registration in the commercial register.

(5) In the cases of (3) No. 1 and 2, an amount shall be transferred to the capital reserve that is equal to the portion of the share capital allocated to the shares cancelled.

(6) [1]If a mandatory redemption is prescribed by the articles, a resolution of the shareholders' meeting shall not be required. [2]In such case, with respect to applicability of the provisions regarding an ordinary capital reduction, the decision of the management board regarding cancellation shall be substituted for the resolution of the shareholders' meeting.

§ 238 Effectiveness of the Capital Reduction

[1]The reduction of the share capital by the amount allocated to the shares cancelled shall become effective upon registration of the resolution or, in the case of subsequent cancellation, upon cancellation. [2]In the case of a mandatory redemption prescribed by the articles, the reduction of the share capital shall become effective upon such mandatory redemption, unless the shareholders' meeting resolves on such capital reduction. [3]The

cancellation shall require an act of the company that has the purpose of nullifying the rights arising with respect to specific shares.

§ 239 Filing of the Implementation of Share Capital Reduction

(1) [1]The management board shall file the completion of the share capital reduction for registration in the commercial register. [2]The foregoing shall also apply in the case of a mandatory redemption prescribed by the articles.

(2) The filing and registration of the completion of the reduction may be combined with the filing and registration of the resolution on the reduction.

Subsection Four. Presentation of Capital Reduction

§ 240 [Separate Presentation]

[1]The amount obtained in connection with the capital reduction shall be shown separately in the profit and loss statement as 'Income from capital reduction' after the item 'Releases from profit reserves.' [2]A transfer to the capital reserve pursuant to § 229 (1) and § 232 shall be shown separately as 'Transfer to the capital reserve pursuant to the provisions governing simplified procedure for capital reduction'. [3]The notes shall explain whether and to what extent the amounts received in connection with the capital reduction and the release of profit reserves have been utilised:

1. to offset a decline in the value of assets;
2. to offset other losses; or
3. for transfer to the capital reserve.

[4]If the company is a small corporation (§ 267 (1) of the Commercial Code), it is not required to apply sentence 3.

Division Seven. Annulment of Resolution of the Shareholders' Meeting and the Approved Annual Financial Statements Special Audit due to Inadmissible Undervaluation

Section One. Annulment of Resolutions of the Shareholders' Meeting

Subsection One. General Provisions

§ 241 Grounds for Invalidity

Except in the case of § 192 (4), §§ 212, 217 (2), § 228(2), § 234 (3) and § 235 (2) a resolution of the shareholders' meeting shall be null and void only if it:

1. was adopted in a shareholders' meeting which was not called pursuant to § 121 (2)

and (3) sentence 1 or (4);

2. has not been recorded pursuant to § 130 (1) and (2) sentence 1 and (4);

3. is not compatible with the nature of the company or by its terms violates provisions which exist exclusively or primarily for the protection of the company's creditors or otherwise in the public interest;

4. by its terms is unethical;

5. has been declared null and void by a judgment upon a contesting action which is final and not subject to appeal;

6. has been cancelled as null and void pursuant to § 398 of the Act on Court Procedure in Family Matters and Non-litigious Matters by virtue of a decision which is final and not subject to appeal.

§ 242 Curing of Invalidity

(1) The invalidity of a resolution of the shareholders' meeting which contrary to § 130 (1) and (2) sentence 1 and (4) has not been recorded or has not been duly recorded, may no longer be asserted if the resolution has been registered in the commercial register.

(2) [1]If a resolution of the shareholders' meeting is null and void pursuant to § 241 numbers 1, 3 or 4, such invalidity may no longer be asserted if the resolution has been registered in the commercial register and three years have since lapsed. [2]If upon expiration of such period an invalidity action against the resolution of the shareholders' meeting is pending, such period shall be extended until a decision on the action has been issued which is final and not subject to appeal or the action has been otherwise finally disposed of. [3]A cancellation of the resolution as null and void without application pursuant to § 398 of the Act on Court Procedure in Family Matters and Non-litigious Matters shall not be precluded by the expiration of such period. [4]If a shareholders resolution is null due to a violation of § 121 (4) sentence 2 according to § 241 No. 1, then the invalidity can no longer be asserted if the shareholder who did not receive notice approves the resolution. [5]If a resolution of the shareholders' meeting is void pursuant to § 241 number 5 or § 249, the judgement may not be registered pursuant to § 248 (1) sentence 3 if in accordance with § 246a (1) it has been established in a final and binding manner that the deficiencies of the resolution do not affect the validity of the registration; § 398 of the Act on Court Procedure in Family Matters and Non-litigious Matters shall not apply.

(3) (2) shall apply accordingly if in the case of § 217 (2), § 228(2), § 234(3) and § 235(2) the necessary registration entries have not been made within the periods prescribed.

§ 243 Grounds for Contesting Action

(1) A resolution of the shareholders' meeting may be set aside upon an action based on violation of law or the articles.

(2) [1]A contesting action aside may also be based on the grounds that a shareholder has attempted by exercising voting rights to attain special benefits for himself or another person to the detriment of the company or other shareholders and that the resolution is

apt to serve such purpose. [2]The foregoing shall not apply if the resolution grants to other shareholders adequate compensation for their losses.

(3) A contesting action cannot be based:

1. on a violation of rights exercised electronically pursuant to § 118 (1) sentence 2, (2) and § 134 (3) where the violation was caused by a technical malfunction, unless the company can be accused of gross negligence or intent; the articles may provide for a stricter standard of fault;

2. on a violation of § 121 (4a), § 124a or § 128;

3. on grounds which would justify proceedings pursuant to § 318(3) of the Commercial Code.

(4) [1]A contesting action may only be based on the grounds of incorrect, incomplete or refused information if a shareholder of rational and sound reasoning would have regarded the provision of the information as essential for its ability to exercise its participation and membership rights duly. [2]A contesting action may not be based on the provision of incorrect, incomplete or insufficient information in the shareholders' meeting with respect to the determination, amount or appropriateness of compensation payments, additional payments or other payments if the law provides for a corporate appraisal procedure for complaints concerning such assessment matters.

§ 244 Ratification of Voidable Resolutions of the Shareholders' Meeting

[1]A contesting action may no longer be brought if the shareholders' meeting has ratified a voidable resolution by a new resolution and a contesting action against such resolution has not been instituted within the period of limitation for such action or such contesting action has been denied in a decision which is final and not subject to appeal. [2]If the claimant has a legal interest in having the voidable resolution declared null and void for the period of the resolution on ratification, he may continue to pursue such action for the purpose of having such voidable resolution declared null and void for such period.

§ 245 Standing to contest

The following persons shall have standing to institute a contesting action:

1. each shareholder who acquired the shares prior to the publication of the agenda and was present at the shareholders' meeting if he has objected to the resolution in the minutes;

2. each shareholder who was not present at the shareholders' meeting if he was wrongfully refused admission to the shareholders' meeting or if the meeting was not duly called or the object of the resolution was not duly announced;

3. in case § 243 (2) each shareholder, provided that he acquired the shares prior to publication of the agenda;

4. the management board;

5. each member of the management board and supervisory board if by executing the resolution members of the management board or supervisory board would commit a criminal act or administrative offence or would be liable for damages.

§ 246 Contesting Action

(1) Any contesting action must be instituted within one month after adoption of the resolution.

(2) [1]The action shall be brought against the company. [2]The company shall be represented by the management board and the supervisory board. [3]If the action is brought by the management board or a member of the management board, the company shall be represented by the supervisory board; if the action is brought by a member of the supervisory board the company shall be represented by the management board.

(3) [1]The regional court in the district of which the dependent company has its seat shall have exclusive jurisdiction regarding the action. [2]if the district court maintains a chamber for commercial matters, such chamber shall have jurisdiction in lieu of the chamber for civil matters. [3]§ 148 (2) sentences 3 and 4 shall apply accordingly. [4]No hearing shall be held prior to expiration of the one-month period in (1). Immediately after the expiration of the one-month period in (1), the company may ask to receive the statement of case filed even before the action is served and ask the court to provide extracts and copies. [5]If more than one such action is brought such actions shall be consolidated in order to be heard and decided together.

(4) [1]The management board shall promptly announce the institution of any such action in the company's journals. [2]A shareholder may only join the action as party within one month of the publication of the notice.

§ 246a Procedure Governing Petitions for Registration of Contested Resolutions of the Shareholders' Meeting

(1) [1]If an action is brought against a resolution of the shareholders' meeting for a capital increase, a capital reduction (§§ 182 through 240) or an inter-company agreement (§§ 291 through 307), the court may find, upon petition by the company, that the bringing of the action does not prohibit the registration of the resolution and that its deficiencies do not affect the validity of the registration. [2]As far not stipulated otherwise, § 247, §§ 82, 83 (1) and § 84 of the Code of Civil Procedure as well as the provisions of the Code of Civil Procedure applying to the proceedings of first instance at the regional courts shall apply to the proceedings on such action accordingly. [3]The senate of the higher regional court of

the company's registered seat shall decide on such petition.

(2) A resolution pursuant to (1) is valid if

1. the action is deficient or manifestly unfounded;

2. the claimant has not documented proof within one week after serving of the petition that he has been holding shares representing an amount of at 1.000 euros since the publication of the convocation; or

3. the immediate effectiveness of the resolution of the shareholders' meeting should be given priority as, according to the court's opinion, the material disadvantages to the company and its shareholders as set forth by the claimant outweigh the disadvantages for the respondent, unless the infringement is particularly severe.

(3) [1]A transfer to a single judge shall be excluded; conciliatory hearings shall not be required. [2]In urgent cases the proceedings may be conducted without an oral hearing. [3]The facts that are submitted and are the basis on which the decision may be made, shall be supported by evidence. [4]Such decision is incontestable. [5]It is binding on the registration court; the validity of the registration thus established shall be binding on everyone. [6]The decision of the court should be rendered no later than three months following the petition; delays in rendering the decision must be explained in a non-appealable judgement.

(4) [1]If the action proves to be founded, the company that has obtained the resolution shall compensate the opponent for any damages it has incurred due to the fact that the resolution of the shareholders' meeting has been registered as a result of the court decision. [2]Any deficiencies concerning the resolution shall not affect its implementation after registration; it is not possible to demand as compensation that this effect of the registration be eliminated.

§ 247 Value in Dispute

(1) [1]The court shall use equitable discretion in determining the value in dispute by taking into consideration all circumstances of the individual case, in particular the importance of the matter for the parties. [2]Such value in dispute shall, however, only exceed one-tenth of the share capital or, if such one-tenth exceeds 500,000 euros, exceed 500,000 euros if the importance of the matter for the claimant requires a higher valuation.

(2) [1]If a party presents evidence that the assessment of court costs on the basis of the value in dispute pursuant to (1) would materially impair its financial condition, the court may upon motion order that the party's obligation to pay court costs shall be determined on the basis of a value which has been adjusted to reflect such financial condition. [2]As a consequence of such order, the benefiting party shall only be required to pay attorney fees that have been determined on the basis of such adjusted value. [3]If costs of litigation are imposed on or assumed by such party, such party shall be required only to reimburse the court costs and attorney fees which have been paid by the other party on the basis of such adjusted value. [4]If costs other than court fees are imposed on or assumed by the other party, the attorney of the benefiting party may collect his fees from the other party on the basis of the value applicable to such other party.

(3) [1]The motion pursuant to (2) may be made to the record of the court clerk. [2]Such motion shall be made prior to the hearing of the subject matter. [3]A subsequent motion may only

be made if the amount in controversy that has been assumed or set is increased by the court. [4]The other party shall be heard prior to any decision on such motion.

§ 248 Effect of Judgment

(1) [1]If the resolution has been declared null and void by a judgment that is final and not subject to appeal, such judgment shall be binding on all shareholders and the members of the management board and the supervisory board, even if such persons were not parties to the action. [2]The management board shall promptly submit the judgment to the commercial register. [3]If the resolution has been registered in the commercial register, the judgment shall likewise be registered. [4]The registration of the judgment shall be announced in the same manner as the registration of the resolution.

(2) If the resolution contained an amendment of the articles, the judgment shall be submitted to the commercial register together with the full text of the articles resulting from the judgment and all previous amendments to the articles together with a certification of a notary on such fact.

§ 248a Notices on the Contesting Action

[1]If the contesting action is terminated, the listed company shall without undue delay publish a notice regarding the termination of the action in the company's journals. [2]§ 149 (2) and (3) shall apply accordingly.

§ 249 Invalidity Action

(1) [1]If a shareholder, the management board or a member of the management board or supervisory board brings an action against the company to annul a resolution of the shareholders' meeting, § 246(2), § 246(3) sentences 1 through 5, § 246(4), §§ 246a, 247, 248 and 248a shall apply accordingly. [2]The invalidity of such resolution may be asserted by means other than by bringing an action. [3]If a resolution of the shareholders' meeting lays the foundation for a transformation pursuant to § 1 of the Transformation Act and the resolution for the transformation is registered, § 20(2) of the Transformation Act shall apply accordingly to the resolution of the shareholders' meeting.

(2) [1]If more than one invalidity action has been instituted, such actions shall be consolidated in order to be heard and decided together. [2]Actions to set aside and actions to annul may be consolidated.

Subsection Two. Invalidity of Certain Resolutions of the Shareholders' Meeting

§ 250 Invalidity of the Election of Members of the Supervisory Board

(1) The election of a member of the supervisory board by the shareholders' meeting shall, except in the case of § 241 numbers 1, 2 and 5, only be null and void if:

1. the supervisory board is composed in violation of § 96 (4), § 97 (2) sentence 1 or § 98 (4);

2. the shareholders' meeting, although bound by nominations (§§ 6 and 8 of the Coal

and Steel Co-determination Act), has elected a person that has not been nominated;

3. as a result of the election, the maximum number of members of the supervisory board set by law has been exceeded (§ 95);

4. the person elected may not serve as a member of the supervisory board pursuant to § 100(1) and (2) at the commencement of his term of office;

5. the election violates § 96 (2).

(2) The following shall have standing to bring an action to declare the election of a member of the supervisory board to be null and void:

1. the company's general labour council or, if only one labour council exists in the company, such labour council, and, if the company is the controlling enterprise of a group, the group labour council,

2. the general or the company's central managing employees labour council or, if only one managing employees council exists in the company, such managing employees council, and, if the company is the controlling enterprise of a group, the group managing employees council,

3. the general labour council of another enterprise whose employees participate in the election of members of the supervisory board of the company directly or through electors or, if only one labour council exists in the other enterprise, such labour council,

4. the general or the company's managing employees council of another enterprise whose employees participate in the election of members of the supervisory board of the company directly or through electors or, if only one managing employees council exists in the other enterprise, such managing employees council,

5. each labour union represented in the company or in an enterprise whose employees participate directly or through electors in the election of members of the supervisory board of the company and the central organisation of the labour union.

(3) [1]If a shareholder, the management board, or a member of the management board or the supervisory board or an organisation or representatives of the employees designated in (2) bring an action against the company to declare that the election of a member of the supervisory board is null and void, § 246 (2), (3) sentence 1 to 4, (4), §§ 247, 248 (1) sentence 2, §§248a and § 249 (2) shall apply accordingly. [2]The invalidity of such resolution may be asserted by means other than by bringing of an action.

§ 251 Contestation of the Election of Members of the Supervisory Board

(1) [1]The election of a member of the supervisory board by the shareholders' meeting may be contested by bringing an action on the basis of a violation of law or the articles. [2]Such contestation may also be based, where the shareholders' meeting is bound by nominations, on the nominations being made illegally. [3]§ 243(4) and § 244 shall apply.

(2) [1]§ 245 numbers 1, 2 and 4 shall apply to the standing to bring an action. [2]The election of a member of the supervisory board, who has been elected on the basis of a nomination by the labour councils pursuant to the Coal and Steel Codetermination Act, may also

be contested by any labour council of an business of the company, any labour union represented in the operations of the company or its central organisation. [3]The election of an additional member, who has been elected on the basis of a nomination by the other members of the supervisory board pursuant to the Coal and Steel Codetermination Act or the Supplemental Codetermination Act may also be contested by any member of the supervisory board.

(3) §§ 246, 247, 248 (1) sentence 2 and § 248a shall apply to the contesting.

§ 252 Effect of Judgment

(1) If a shareholder, the management board or a member of the management board or of the supervisory board or an organisation or representatives of the employees designated in § 250(2) bring an action against the company to declare the election of a member of the supervisory board by the shareholders' meeting to be null and void, a judgment which is final and not subject to appeal and which declares the election to be null and void shall be binding on all shareholders and employees of the company, all employees of other enterprises whose employees participate in the election of members of the supervisory board of the company directly or by electors, the members of the management board and the supervisory board and the organisations and the representatives of the employees designated in § 250(2), even if they were not parties to the proceedings.

(2) [1]If the election of a member of the supervisory board by the shareholders' meeting has been declared null and void by a judgment which is final and not subject to appeal, such judgment shall be binding on all shareholders and members of the management board and the supervisory board, even if they were not parties to the proceedings. [2]In the case of § 251(2) sentence 2 the judgment shall also be binding on the labour councils, labour unions and central organisations that pursuant to these provisions have standing to bring an action even if they were not parties to the proceedings.

§ 253 Invalidity of a Resolution on the Appropriation of Distributable Profits

(1) [1]A resolution on the appropriation of distributable profits shall except in the case of § 173(3), § 217(2) and § 241 only be null and void if the approval of the annual financial statements on which such resolution is based is null and void. [2]The invalidity of such resolution for this reason may no longer be asserted if the invalidity of the approval of the annual financial statements may no longer be asserted.

(2) § 249 shall apply to an action against the company to declare such resolution to be null and void.

§ 254 Contesting a Resolution on the Appropriation of Distributable Profits

(1) A resolution on the appropriation of distributable profits may, in addition to § 243, also be contested if the shareholders' meeting transfers amounts from distributable profits to profit reserves or carries such amounts forward as profit, and the payment of such amounts as dividends to the shareholders is not precluded by law or the articles, even though the transfer to reserves or carrying forward of profit is not necessary according to reasonable business judgment in order to secure the viability of the company for a period

which is foreseeable with respect to economic and financial circumstances and therefore no dividend may be paid to shareholders in excess of four per cent of the share capital less any contributions not yet called.

(2) [1]§§ 244 to 246, 247 to 248a shall apply to the contestation. [2]The period for such contestation shall commence on the date of adoption of the resolution even if the annual financial statements are to be reaudited pursuant to § 316(3) of the Commercial Code. [3]Shareholders shall have standing to contest pursuant to (1) only if their aggregate shareholdings amount to one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros.

§ 255 Contestation of a Capital Increase against Contributions

(1) A resolution on a capital increase against contributions may be contested pursuant to § 243.

(2) [1]A contestation may, if the pre-emptive rights of the shareholders have been excluded in whole or in part, also be based on the ground that the issue price resulting from the resolution on the increase or the minimum price for the issuance of new shares are unreasonably low. [2]The foregoing shall not apply if the new shares are to be acquired by a third party subject to the obligation to offer the shares to the shareholders for subscription.

(3) §§ 244 to 248a shall apply to the contestation.

Section Two. Invalidity of the Approved Annual Financial Statements

§ 256 Invalidity

(1) Except in the case of § 173 (3), § 234 (3) and § 235 (2), the approved annual financial statements shall be null and void if:

1. by their terms, they violate provisions which exist exclusively or primarily for the protection of the company's creditors;

2. in case of a statutory audit requirement, they have not been audited in accordance with § 316 (1) and (3) of the Commercial Code;

3. in the event of a statutory audit requirement, they have been audited by persons who are not auditors pursuant to § 319 (1) of the Commercial Code or Article 25 of the Introductory Act to the Commercial Code or who were not appointed as auditors on other grounds than the following:

   a) violation of § 319 (2), (3) or (4) of the Commercial Code;

   b) violation of § 319a (1) or (3) of the Commercial Code;

   c) violation of § 319b (1) of the Commercial Code;

   d) violation of Regulation (EU) No. 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (Official Journal L 158 of 27 May 2014, p. 77, L 170 of 11 June 2014, p. 66);

4. in connection with their approval, the provisions of law or the articles regarding

the transfer of amounts to the capital or profit reserves or regarding the release of amounts from the capital or profit reserves have been violated.

(2) In cases other than (1), annual financial statements which have been approved by the management board and supervisory board shall only be null and void if the management board or the supervisory board has not duly taken part in the approval.

(3) In cases other than (1), annual financial statements which have been approved by the shareholders' meeting shall only be null and void if the approval:

1. was resolved in a shareholders' meeting which was called in violation of § 121 (2) and (3) sentence 1 or (4);

2. has not been recorded pursuant to § 130 (1) and (2) sentence 1 and (4);

3. has been declared null and void by a judgment upon a contesting action which is final and not subject to appeal;

(4) The annual financial statements shall only be null and void on the ground of a violation of the provisions on the structure of the annual financial statements or failure to observe forms for the structure of the annual financial statements if its clearness and clarity has been materially impaired thereby.

(5) [1]The annual financial statements shall only be null and void for violation of the provisions of valuation if:

1. items have been overvalued; or

2. items have been undervalued and the financial condition and profitability of the company has been intentionally misrepresented or distorted thereby.

[2]Asset items shall be deemed to be overvalued if they are shown at a higher value and liability items shall be deemed to be overvalued if they are shown at a lower value than permitted pursuant to § 253 to 256a of the Commercial Code. [3]Asset items shall be deemed to be undervalued if they are shown at a lower value and liability items shall be deemed to be undervalued if they are shown at a higher value than permitted pursuant to § 253 to 256a of the Commercial Code. [4]In the case of credit institution and financial services institutions as well as in the case of investment management companies in the sense of § 17 of the Capital Investment Act, the valuation regulations shall not be violated to the extent that deviations are permissible according to the provisions applicable to such credit institutions and financial services institutions, in particular §§ 340e to 340g of the Commercial Code; the same shall apply to insurance companies according to the provisions applicable to such insurance companies, in particular §§ 341b to 341h of the Commercial Code.

(6) [1]An invalidity action pursuant to (1) numbers 1, 3 and 4, (2), (3) No. 1 and 2, (4) and (5) may no longer be brought if, in the case of (1) numbers 3 and 4, (2) and (3) numbers 1 and 2, six months have lapsed since publication pursuant to § 325 (2) of the Commercial Code or, in other cases, three years have lapsed. [2]If, upon expiration of such period, an action to declare the annual financial statements null and void is pending, such period shall be extended until a decision on the action had been issued which is final and not subject to appeal or until the action has been otherwise finally disposed of.

(7) [1]§ 249 shall apply accordingly to an action against the company to declare the financial statements null and void. [2]If the company has issued securities within the meaning of § 2 (1) of the Securities Trading Act that are admitted to trading on a German stock exchange in the regulated market, the court shall inform the Federal Financial Supervisory Authority of the receipt of an invalidity action as well as of all final and binding decisions regarding such action.

§ 257 Contesting the Approval of the Annual Financial Statements by the Shareholders' Meeting

(1) [1]The approval of the annual financial statements by the shareholders' meeting may be contested pursuant to § 243. [2]Such contestation may, however, not be based on the ground that the contents of the annual financial statements violate law or the articles.

(2) [1]§§ 244 to 246, 247 to 248a shall apply to the contestation. [2]The limitation period for such contestation shall commence on the date of adoption of the resolution even if the annual financial statements are to be reaudited pursuant to § 316 (3) of the Commercial Code.

Section Three. Special Audit due to Inadmissible Undervaluation

§ 258 Appointment of Special Auditors

(1) [1]The court shall, upon motion, appoint special auditors if there is reason to assume that:

1. certain items in the approved financial statements have been materially undervalued (§ 256 (5) sentence 3); or

2. the notes do not or do not fully contain the required information and the management board has not furnished such missing information at the shareholders' meeting even though such information has been requested and the inclusion of the respective question in the minutes has been demanded.

[2]The special auditors shall examine the contested items as to whether they have been materially undervalued. [3]Such auditors shall examine the notes as to whether the required information has not been or has not been fully furnished and whether the management board has not furnished the missing information even though such information has been requested and the inclusion of the respective question in the minutes has been demanded.

(1a) In the case of credit institution or financial services institutions as well as in the case of investment management companies in the sense of § 17 of the Capital Investment Act, a special auditor cannot be appointed under (1) to the extent that the overvaluation or the missing information in the notes is due to the application of § 340f of the Commercial Code.

(2) [1]The motion must be made within one month after the shareholders' meeting on the annual financial statements. [2]The foregoing shall also apply if the annual financial statements are to be reaudited pursuant to § 316 (3) of the Commercial Code. [3]Such motion may only be made by shareholders whose aggregate holdings reach the threshold

set forth in § 142 (2). [4]The parties making motion shall deposit their shares until a decision on the motion has been rendered or submit a statement of the depositary institution affirming that the shares will not be sold until such time, and furnish evidence that they have been holders of such shares for not less than three months prior to the date of the shareholders' meeting. [5]An affidavit made before a notary shall constitute sufficient evidence.

(3) [1]Prior to such appointment, the court shall hear the management board, the supervisory board and the external auditors. [2]An appeal may be made against such decision. [3]The regional court of the company's registered seat shall decide on any motion pursuant to paragraph (1).

(4) [1]Special auditors pursuant to (1) may only be certified public accountants and certified public accounting firms. [2]§ 319 (2) to (4), § 319a (1) and § 319b (1) of the Commercial Code shall apply accordingly to their selection. [3]The company's external auditors and persons who have served as external auditors of the company during the last three years prior to such appointment may not serve as special auditors pursuant to (1).

(5) [1]§ 142 (6) regarding the reimbursement of reasonable cash expenses and remuneration of court-appointed special auditors, § 145 (1) to (3) regarding the rights of special auditors, § 146 regarding the expenses of the special audit and § 323 of the Commercial Code regarding the responsibility of the external auditor shall apply accordingly. [2]The special auditors pursuant to (1) shall have the rights pursuant to § 145 (2) also against the company's external auditor.

§ 259 Audit Report. Conclusive Findings

(1) [1]The special auditors shall render a written report on the result of the audit. [2]If the special auditors in carrying out their duties determine that items have been overvalued (§ 256 (5) sentence 2) or that the provisions governing the structure of the annual financial statements have been violated or the required forms have not been observed, they shall also include such findings in their report. [3]§ 145 (4) to (6) shall apply accordingly to the report.

(2) [1]If the special auditors determine that the contested items have not been materially undervalued (§ 256 (5) sentence 3), they shall declare in the findings set out at the end of their report:

1. the minimum value at which the individual asset items should be shown and the maximum amount at which the individual liability items should be shown;

2. the amount by which the annual net profit would have increased or the annual net loss would have decreased if such amounts had been applied.

[2]The special auditors shall base their opinion on the circumstances prevailing at the closing date of the annual financial statements. [3]In determining the values and amounts in number 1, they shall apply the same valuation and depreciation methods that the company used in its last proper valuation of the items to be valued or similar items.

(3) If the special auditors determine that the contested items have not been or have only been immaterially undervalued (§ 256 (5) sentence 3), the special auditors shall declare in the findings set out at the end of their report that, in their opinion and in accordance with the audit carried out with due professional diligence, the contested items have not been improperly undervalued.

(4) [1]If the special auditors determine that the notes do not or do not fully contain the required information and the management board has not furnished the missing information at the shareholders' meeting, even though such information has been requested and the inclusion of the respective question in the minutes has been demanded, the special auditors shall furnish the missing information in their findings set out at the end of their report. [2]If information regarding inconsistencies in valuation or depreciation methods has been omitted, the findings shall state the amount by which the annual net profit or annual net loss would have been higher or lower without the inconsistencies that were omitted to be mentioned. [3]If the special auditors determine that no information pursuant to sentence 1 has been omitted, the special auditors shall declare in their findings that, in their opinion and in accordance with the audit carried out with due professional diligence, no information required to be given has been omitted in the notes.

(5) The management board shall promptly publish the findings of the special auditors pursuant to (2) to (4) in the company's journals.

§ 260 Judicial Decision on the Conclusive Findings of the Special Auditors

(1) [1]The company or shareholders whose shares in aggregate amount to one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros may make motion to the court with jurisdiction pursuant to § 132 (1) for a decision against the conclusive findings of the special auditors pursuant to § 259 (2) and (3) within one month after publication in the Federal Gazette. [2]§ 258 (2) sentences 4 and 5 shall apply accordingly. [3]The motion shall seek determination of the minimum amount at which the asset items specified in the motion should have been be shown or the maximum amount at which liability items specified in the motion should be have been shown. [4]The company's motion may also seek determination that the annual financial statements did not contain the undervaluations stated in the conclusive findings of the special auditors.

(2) [1]The court shall at its discretion decide on the motion with due regard to all circumstances. [2]§ 259 (2) sentence 2 and 3 shall apply. [3]To the extent that a full investigation of all relevant circumstances would entail considerable difficulties, the court shall estimate the values or amounts to be shown.

(3) [1]§ 99 (1), (2) sentence 1, (3) and (5) shall apply accordingly. [2]The court shall serve its decision on the company and, if shareholders have made motion pursuant to (1), also on such shareholders. [3]Furthermore, the court shall announce the decision in the company's journals without setting out the grounds on which the decision is based. [4]An appeal may be made by the company and shareholders whose shares in aggregate amount to one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros. [5]§ 258 (2) sentence 4 and 5 shall apply accordingly. [6]The period for appeal shall commence on the date of publication of the decision in the Federal Gazette but, in the case of the company and shareholders who have made motion pursuant to (1), not prior to service of the decision.

(4) [1]The company shall be liable for the costs if the motion is granted, otherwise the party making motion shall be liable. [2]§ 247 shall apply accordingly.

§ 261 Decision on Income Based on Higher Valuation

(1) [1]If the special auditors have determined in their conclusive findings that items have been undervalued, and no motion for judicial decision against such determination has been made within the period provided in § 260 (1), such items shall, in the first annual financial statements which are prepared after such period has lapsed, be shown at the amounts determined by the special auditors. [2]The foregoing shall not apply to the extent that, by reason of changed circumstances, in particular, in the case of assets which are subject to wear and tear, by reason of such wear and tear in accordance with §§ 253 to 256a of the Commercial Code or generally accepted accounting principles, a lower amount should be shown for an asset item or a higher amount should be shown for a liability item. [3]In such case, the grounds for this shall be specified in the notes and the means by which the amount pursuant to sentence 2 was computed from the amount determined by the special auditors shall be shown separately. [4]If such assets no longer exist, the notes shall report such fact and the appropriation of the income from the disposal of such assets. [5]Reference shall be made under the respective items in the annual balance sheet to the amounts by which asset items have been shown at an increased value or liability items have been shown at a decreased amount pursuant to sentences 1 and 2. [6]The sum of such increases and decreases shall be shown separately on the liability side of the balance sheet and in the profit and loss statement as 'Income Based on Higher Valuation in accordance with the Results of the Special Audit.' [7]If the company is a small corporation (§ 267 (1) of the Commercial Code), it is required to apply sentences 3 and 4 only if the prerequisites of § 264 (2) sentence 2 of the Commercial Code have been met, taking into account the special audit carried out in accordance with this section.

(2) [1]If the court to which motion has been made pursuant to § 260 determines that items have been undervalued, (1) shall apply accordingly to the valuation of items shown in the first annual financial statements prepared after the judicial decision has become final and not subject to appeal. [2]The sum of such increases and decreases shall be shown separately as 'Income Based on Higher Valuation in accordance with Judicial Decision.'

(3) [1]The income based on higher valuation pursuant to (1) and (2) shall not be considered part of the annual net profit for the purpose of § 58. [2]The shareholders' meeting shall decide on the appropriation of such income less the taxes payable thereon, to the extent that the annual financial statements do not show a balance sheet loss which is not offset by capital or profit reserves.

§ 261a Notifications to the Federal Financial Supervisory Authority

The court shall inform the Federal Financial Supervisory Authority of the receipt of a petition for the appointment of a special auditor, all final and binding decisions on the appointment of special auditors, the audit report as well as a final and binding court decision pursuant to § 260 on the special auditors' conclusive findings if the company has issued securities within the meaning of § 2 (1) of the Securities Trading Act that are admitted to trading on a German stock exchange in the regulated market.

Division Eight. Dissolution and Declaration of Annulment of the Company
Section One. Dissolution
Subsection One. Grounds for Dissolution and Filing

§ 262 Grounds for Dissolution

(1) The stock corporation is dissolved:

1. upon expiration of the period set in the articles;

2. upon resolution of the shareholders' meeting; such resolution shall require a majority of not less than three-fourths of the share capital represented at the passing of the resolution; the articles may provide for a larger capital majority and additional requirements;

3. upon institution of insolvency proceedings over the company's assets;

4. upon a decision which is final and not subject to appeal denying the institution of insolvency proceedings for lack of assets sufficient to cover the costs of the proceedings;

5. upon an order of the court for registration, which is final and not subject to appeal, by which a deficiency in the articles pursuant to § 399 of the Act on Court Procedure in Family Matters and Non-Litigious Matters is determined;

6. through cancellation of the company for lack of assets according to § 394 of the Act on Court Procedure in Family Matters and Non-Litigious Matters.

(2) The provisions of this section shall also apply if the company is dissolved for other grounds.

§ 263 Filing and Registration of the Dissolution

[1]The management board shall file the dissolution of the company for registration in the commercial register. [2]The foregoing shall not apply in the case of institution or denial of institution of insolvency proceedings (§ 262 (1) Nos. 3 and 4) or in the case of judicial determination of a deficiency in the articles (§ 262 (1) No. 5). [3]In such cases, the court shall register the dissolution and the grounds therefor ex officio. [4]In the case of a cancellation of the company (§ 262 (1) No. 6), entry of the dissolution shall be omitted.

Subsection Two. Liquidation

§ 264 Requirement of Liquidation

(1) Upon dissolution of the company, liquidation shall take place unless insolvency proceedings have been instituted over the company's assets.

(2) [1]If the company has been dissolved by cancellation due to lack of assets, liquidation shall only take place if it becomes apparent after the cancellation that there are assets subject to distribution. [2]Liquidators shall be appointed by the court upon application by a party involved.

(3) To the extent that this sub-paragraph or the purpose of the liquidation does not otherwise

require, the provisions for undissolved companies shall apply to the company until completion of the liquidation.

§ 265 Liquidators

(1) The members of the management board shall carry out the liquidation as liquidators.

(2) [1]The articles or a resolution of the shareholders' meeting may appoint other persons as liquidators. [2]§ 76 (3) sentence 2 and 3 shall apply accordingly to the selection of the liquidators. [3]A legal entity may also act as liquidator.

(3) [1]The court shall appoint or remove liquidators for cause upon motion by the supervisory board or a minority of shareholders whose shares in aggregate amount to one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros. [2]The shareholders shall provide evidence that they have been holders of the shares for not less than three months. [3]An affidavit made before a court or a notary shall constitute sufficient evidence. [4]An appeal may be made against such decision.

(4) [1]The liquidators appointed by the court shall be entitled to reimbursement of reasonable cash expenses and remuneration for their services. [2]If the liquidator appointed by the court and the company do not agree, the court shall stipulate the expenses and the remuneration. [3]An appeal may be made against such decision; appeals on points of law shall be precluded. [4]A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.

(5) [1]Liquidators who have not been appointed by the court may be removed by the shareholders' meeting at any time. [2]Claims arising under the contract of employment shall be governed by general provisions of law.

(6) (2) to (5) shall not apply to the labour director to the extent that his appointment and removal are governed by the provisions of the Coal and Steel Co-determination Act.

§ 266 Filing of the Liquidators for Registration

(1) The management board shall file the first liquidators and their representative authorities, and the liquidators shall file every change in the liquidators and in their representative authorities for registration in the commercial register.

(2) The records regarding the appointment or removal and the representative authority shall be appended to the filing in original or officially certified copy.

(3) [1]In such filing, the liquidators shall affirm that no circumstances exist which preclude their appointment pursuant to § 265 (2) sentence 2 and that they have been informed of their obligation to make full disclosure to the court. [2]§ 37 (2) sentence 2 shall apply.

(4) The appointment or removal of liquidators by the court shall be registered by the court ex officio.

§ 267 Notice to Creditors

[1]The liquidators shall give notice to the company's creditors to file their claims, referring in such notice to the dissolution of the company. [2]Such notice shall be published in the company's journals.

§ 268 Duties of the Liquidators

(1) [1]The liquidators shall wind up all current transactions, collect claims, convert the remaining assets to cash and provide satisfaction to the creditors. [2]To the extent required to carry out the liquidation, the liquidators may also enter into new transactions.

(2) [1]The liquidators shall otherwise have the same rights and duties as the management board within the scope of their assigned functions. [2]The liquidators shall, in the same manner as the management board, be subject to the supervision of the supervisory board.

(3) The prohibition on competition of § 88 shall not apply to the liquidators.

(4) [1]All business letters which are addressed to a specific recipient shall state the company's legal form and domicile, the fact that the company is in liquidation, the court of registration of the company's domicile, the number under which the company has been registered in the commercial register, and the surname and at least one forename of all liquidators and the chairman of the supervisory board. [2]If information is provided regarding the company's capital, the amount of the share capital shall be stated in any event and, if the issue price has not been paid in full, the aggregate amount of the contributions outstanding. [3]The information pursuant to sentence 1 needs not be given in communications or reports which are made in the course of an existing business relationship and for which forms are customarily used in which only the details of the specific transaction need be added. [4]Order forms shall be deemed to be business letters in the meaning of sentence 1; sentence 3 shall not apply thereto.

§ 269 Representation by the Liquidators

(1) The liquidators shall represent the company in and out of court.

(2) [1]If more than one liquidator has been appointed, all liquidators shall only be authorised to represent the company jointly, unless the articles or the body with authority to make such appointment provide otherwise. [2]If a statement with legally binding effect is to be made to the company, it shall suffice if such statement is made to one liquidator.

(3) [1]The articles or the body with authority to make such appointment may also provide that individual liquidators are authorised to represent the company by acting solely or jointly with a registered authorised officer (*Prokurist*). [2]The supervisory board may so provide if authorised to do so by the articles or a resolution of the shareholders' meeting. [3] (2) sentence 2 shall apply accordingly in such cases.

(4) [1]Liquidators authorised to represent the company by acting jointly may authorise individual liquidators to engage in certain transactions or kinds of transactions. [2]The foregoing shall apply accordingly if an individual liquidator is authorised to represent the company by acting jointly with a registered authorised officer (*Prokurist*).

(5) The authority of the liquidators to represent the company may not be restricted.

(6) Liquidators shall sign on behalf of the company by adding to the company's business name a reference to the liquidation and their signature.

§ 270 Opening Balance Sheet, Annual Financial Statement and Annual Report

(1) The liquidators shall prepare a balance sheet as at the commencement of liquidation (opening balance sheet) and an explanatory report regarding the opening balance sheet, and, as at the end of each year, annual financial statements and an annual report.

(2) [1]The shareholders' meeting shall resolve on the approval of the opening balance sheet and the annual financial statements and on the ratification of the acts of the liquidators and the members of the supervisory board. [2]The provisions governing the annual financial statements shall apply accordingly to the opening balance sheet and the explanatory report. [3]Fixed assets shall, however, be shown in accordance with the valuation methods applicable to current assets to the extent that their sale is intended within a foreseeable period of time or such assets no longer serve the operation of the business; the foregoing shall also apply to the annual financial statements.

(3) [1]The court may exempt the company from the requirement of an audit of the annual financial statements and the annual report by external auditors if the condition of the company is so readily apparent that an audit does not appear to be necessary in the interest of the creditors and the shareholders. [2]An appeal may be made against such decision.

§ 271 Distribution of the Assets

(1) The assets of the company remaining after fulfilment of all liabilities shall be distributed among the shareholders.

(2) The assets shall be distributed in proportion to the shares in the share capital unless shares exist which grant different rights with respect to the distribution of the company's assets.

(3) [1]If the contributions to share capital have not been made in the same proportion with respect to all shares, the contributions made shall be refunded and any surplus remaining distributed in proportion to the shares in the share capital. [2]If the assets do not suffice to refund the contributions, the shareholders shall bear the loss in proportion to the shares in the share capital; the contributions still outstanding shall, to the extent necessary, be collected.

§ 272 Protection of Creditors

(1) The assets may only be distributed if one year has elapsed from the date on which the notice to creditors has been published.

(2) If a known creditor does not answer, the amount owed shall be placed on deposit for him, if a right to such deposit exists.

(3) If a liability cannot be fulfilled for the time being or is disputed, the assets may only be distributed if security has been provided to the creditor.

§ 273 Completion of the Liquidation

(1) [1]If the liquidation has been completed and the final statement of accounts rendered, the liquidators shall file the completion of the liquidation for registration in the commercial register. [2]The entry of the company in the commercial register shall be cancelled.

(2) The company's books and records shall be deposited for safekeeping for ten years at a safe place to be designated by the court.

(3) The court may permit shareholders and creditors to inspect the books and records.

(4) [1]If it subsequently becomes apparent that further liquidation measures are necessary, the court shall upon motion by a party concerned reappoint the previous liquidators or appoint other liquidators. [2]§ 265 (4) shall apply.

(5) An appeal against the decisions pursuant to (2), (3) and (4) sentence 1 may be made.

§ 274 Continuation of a Dissolved Company

(1) [1]If a stock corporation has been dissolved by lapse of time or a resolution of the shareholders' meeting, the shareholders' meeting may resolve the continuation of the company if the distribution of assets among shareholders has not commenced. [2]The resolution shall require a majority of at least three fourths of the share capital represented at the passing of the resolution. [3]The articles may provide for a larger capital majority and for additional requirements.

(2) The foregoing shall apply if the company:

1. has been dissolved by the institution of insolvency proceedings, but such insolvency proceedings were terminated upon motion by the debtor or cancelled following a confirmation of the insolvency plan providing for the continuation of the company;

2. has been dissolved by a judicial finding of a deficiency in the articles pursuant to § 262 (1) No. 5, but an amendment to the articles which cures such deficiency has been resolved not later than the resolution for continuation of the company.

(3) [1]The liquidators shall file the continuation of the company for registration in the commercial register. [2]They shall furnish proof in connection with such filing that the distribution of the assets of the company among the shareholders has not yet commenced.

(4) [1]The resolution on continuation shall only become effective upon registration in the commercial register of the company's domicile. [2]In the case of (2) sentence 2, the resolution on continuation shall not be effective until it has been registered in the commercial register of the company's domicile together with the resolution on amendment of the articles; both resolutions shall only be registered in the commercial register together.

Section Two. Declaration of Annulment of the Company

§ 275 Action for Declaration of Annulment

(1) [1]If the articles do not contain provisions regarding the amount of the share capital or the

company's purpose or if the provisions of the articles regarding the company's purpose are null and void, each shareholder and each member of the management board and the supervisory board may bring an action for declaration of annulment of the company. [2]Such action may not be based on any other grounds.

(2) If the deficiency is capable of being cured pursuant to § 276, the action may only be instituted after a party with standing to bring such action has demanded that the company cure such deficiency and the company has failed to comply with such demand within three months.

(3) [1]Such action must be brought within three years after registration of the company. [2]A cancellation of the registration of the company upon the court's own motion pursuant to § 397 (1) of the Act on Court Procedure in Family Matters and Non-litigious Matters shall not be precluded by the expiration of such period.

(4) [1]§ 246 (2) to (4), §§ 247, 248 (1) sentence 1, §§ 248a, 249 (2) shall apply accordingly to a contesting action. [2]The management board shall submit a certified copy of the complaint and a decision that is final and not subject to appeal to the commercial register. [3]The annulment of the company by virtue of such judgment shall be registered.

§ 276 Curing of Deficiencies

Any deficiency that relates to the provisions governing the company's purpose may be cured in accordance with the provisions of law and the articles regarding amendments of the articles.

§ 277 Effectiveness of Registration of Annulment

(1) If the annulment of the company by virtue of a judgment which is final and not subject to appeal or a decision by the court of registration has been registered in the commercial register, liquidation shall be carried out in accordance with the provisions regarding liquidation in the case of dissolution.

(2) The validity of transactions entered into in the name of the company shall not be affected by the annulment.

(3) The shareholders shall make contributions to the extent necessary to fulfil the liabilities incurred.

Book Two. Partnership Limited by Shares

§ 278 Nature of the Partnership Limited by Shares

(1) The partnership limited by shares is a company which constitutes a separate legal entity, in which at least one partner has unlimited liability with regard to the creditors of the company (general partner) and the other shareholders are not personally liable for the obligations of the company (limited shareholders) participate in the share capital.

(2) The legal relations of the general partners among themselves and with respect to the body of limited shareholders and to third parties, in particular the authority of the general partners to manage the business and represent the company, shall be governed by the provisions of the Commercial Code regarding limited partnerships.

(3) For the rest, the provisions of Book One regarding the stock corporation shall apply accordingly to the partnership limited by shares unless the following provisions or the absence of a management board necessitate otherwise.

§ 279 Business Name

(1) The business name of the partnership limited by shares, even if it is continued according to § 22 of the Commercial Code or similar legal provisions, shall contain the designation '*Kommanditgesellschaft auf Aktien*' or a generally understood abbreviation of this designation.

(2) If in the partnership no natural person is general partner, the business name shall contain a designation indicating the limitation of liability, even if it is continued according to § 22 of the Commercial Code or similar legal provisions.

§ 280 Establishment of the Articles. Founders

(1) [1]The articles shall be established in the form of a notarial deed. [2]The deed shall specify the par value in case of par-value shares, the number of shares in case of no-par value shares, the issue price and, if there is more than one class of shares, the class of shares acquired by each party. [3]Attorneys-in-fact shall require a power of attorney certified by a notary.

(2) [1]All general partners shall participate in the establishment of the articles. [2]In addition to the general partners, the persons who as limited shareholders subscribe to shares against contributions shall participate in the establishment of the articles.

(3) The general partners and limited shareholders who have established the articles are the founders of the company.

§ 281 Contents of the Articles

(1) The articles shall contain, in addition to the stipulations pursuant to § 23 (3) and (4), the surname, forename and place of residence of each general partner.

(2) The articles shall stipulate the amount and kind of any contributions of assets by general partners that are not made against the issuance of share capital.

§ 282 Registration of the General Partners

1The registration of the company in the commercial register shall, in lieu of the members of the management board, designate the general partners. [2]In addition, the authority of the general partners to represent the company shall be registered.

§ 283 General Partners

The provisions governing the management board of the stock corporation with regard to the

following subjects shall apply accordingly to the general partners:

1. filings, submissions, declarations, and proof to be furnished to the commercial register and announcements;
2. the formation audit;
3. duty of diligence and responsibility;
4. duties in relation to the supervisory board;
5. permission to grant credit;
6. notice of a shareholders' meeting;
7. special audits;
8. assertion of claims for damages in connection with the management of the business;
9. preparation, submission and audit of the annual financial statements and the proposals for the appropriation of the net retained profits;
10. submission and audit of the annual report as well as the consolidated financial statements and group annual report;
11. submission, audit and disclosure of the individual accounts pursuant to § 325 (2a) of the Commercial Code;
12. issuance of shares in the case of a conditional capital increase, authorised capital or a capital increase from the company's reserves;
13. annulment and setting aside of a resolution of the shareholders' meeting;
14. petition for institution of insolvency proceedings.

§ 284 Prohibition of Competition

(1) [1]A general partner may not without the express consent of the other general partners and of the supervisory board enter into transactions on his own behalf or on behalf of another person in the company's field of business or become member of the management board, manager or general partner of a similar commercial enterprise. [2]The consent may only be granted for specific kinds of business or specific commercial enterprises.

(2) [1]If a general partner violates such prohibition, the company may claim damages. [2]In lieu thereof, the company may require that the partner treat the transactions made for his own account as having been made on behalf of the company and remit any remuneration obtained for transactions made on behalf of another person or assign his claim to such remuneration.

(3) [1]The Partnership has three months from the date on which the other general partners and the members of the supervisory board obtained knowledge, or without gross negligence should have obtained knowledge of the act giving rise to the damage claim, to make any claims. [2]Irrespective of such knowledge or lack of knowledge as a result of gross

negligence, the statute of limitation for such claims shall be five years from the time when they arose.

§ 285 Shareholders' Meeting

(1) [1]In the shareholders' meeting, the general partners shall only have voting rights in respect of the shares held by them. [2]They may not exercise voting rights on behalf of themselves or other persons in the case of resolutions regarding:

1. election or removal of the supervisory board;
2. ratification of the acts of the general partners and members of the supervisory board;
3. appointment of special auditors;
4. assertion of claims for damages;
5. waiver of claims for damages;
6. appointment of external auditors.

[3]In the case of resolutions regarding such matters, their voting rights may also not be exercised by any other person.

(2) [1]The resolutions of the shareholders' meeting shall require the consent of the general partners to the extent that they relate to matters which in the case of a limited partnership require the consent of the general partners and the limited partners. [2]Consent of the general partners shall not be required for the exercise of the authority of the shareholders' meeting or of a minority of limited shareholders to appoint auditors or assert claims of the company arising from the formation or management of the company.

(3) [1]Resolutions of the shareholders' meeting that require the consent of the general partners may be submitted to the commercial register only after such consent has been granted. [2]Such consent shall, in the case of resolutions that are required to be registered in the commercial register, be recorded in the minutes of the meeting or in an appendix to the minutes.

§ 286 Annual Accounts, Annual Report

(1) [1]The shareholders' meeting shall resolve upon approval of the annual financial statements. [2]Such resolution shall require the consent of the general partners.

(2) [1]The capital participations of the general partners shall be shown separately in the annual balance sheet following the item Subscribed Capital. [2]The share of a general partner in any loss for the fiscal year shall be deducted from such capital participation. [3]If the amount of the loss exceeds such capital participation, such excess shall be shown separately on the asset side as on accounts receivable, designated Payment Obligation of General Partner, to the extent that a payment obligation exists; if no payment obligation exists, such excess shall be designated as Share of General Partners in Losses which are not Offset by Contributions of Assets and shown in accordance with § 268 (3) of the Commercial Code. [4]Credits falling under § 89 that the company has granted to general partners, to their spouses or minor children or to third parties that are acting on behalf

of such persons, shall be shown on the asset side under the appropriate items with the designation, of which credits granted to general partners and their relatives.

(3) The profit or loss attributable to the capital participations of the general partners need not be shown separately in the profit and loss statement.

(4) § 285 No. 9 lit. a and b of the Commercial Code shall apply to general partners, provided, however, that the profit attributable to the capital participation of a general partner need not be indicated separately.

§ 287 Supervisory Board

(1) The supervisory board shall carry out the resolutions of the limited shareholders unless the articles provide otherwise.

(2) [1]The supervisory board shall represent the limited shareholders, unless the shareholders' meeting has elected special representatives, in the case of litigation by the limited shareholders as a body against the general partners or in the case of litigation by the general partners against the limited shareholders as a body. [2]The company shall be liable for the costs of the litigation that are incurred by the limited shareholders irrespective of the company's right to recourse against the limited shareholders.

(3) General partners may not also be members of the supervisory board.

§ 288 Withdrawals by General Partners; Granting of Credits

(1) [1]A general partner may not withdraw any profit with respect to his capital participation if his share of a loss exceeds his capital participation. [2]He also may not withdraw any share of profits or cash for his capital participation as long as the sum of any balance sheet loss, any payment obligations, the share of general partners in any losses and any amounts owed under credits granted to general partners and their relatives exceeds the sum of any profit carried forward, the capital and profit reserves and the capital participations of the general partners.

(2) [1]The company may not grant any credit falling under § 286 (2) sentence 4 as long as the conditions set forth in (1) sentence 2 apply. [2]Any such credit that has been granted in violation of the foregoing shall be repaid immediately irrespective of any agreements to the contrary.

(3) [1]The foregoing provisions shall not affect the claims of general partners for remuneration for services that are not related to profits. [2]§ 87 (2) sentence 1 and 2 shall apply accordingly to any reduction of such remuneration.

§ 289 Dissolution

(1) The grounds for dissolution of a partnership limited by shares and for the resignation of one or several general partners from the company shall be governed by the provisions of the Commercial Code regarding limited partnerships, unless (2) to (6) provide otherwise.

(2) The partnership limited by shares shall also be dissolved:

1. upon a decision which is final and not subject to appeal denying the institution of insolvency proceedings for lack of assets sufficient to cover the costs of the proceedings;

2. upon an order of the court for registration which is final and not subject to appeal determining a deficiency in the articles pursuant to § 399 of the Act on Court Procedure in Family Matters and Non-Litigious Matters;

3. upon cancellation of the company for lack of assets according to § 394 of the Act on Court Procedure in Family Matters and in Non-Litigious Matters.

(3) [1]The company shall not be dissolved by reason of the institution of insolvency proceedings over the assets of a limited shareholder. [2]The creditors of a limited shareholder shall not be entitled to terminate the company.

(4) [1]Termination of the company by the limited shareholders or their consent to the dissolution of the company shall require a resolution of the shareholders' meeting. [2]The foregoing shall also apply to a motion for dissolution of the company by judicial decision. [3]The resolution shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [4]The articles may provide for a larger capital majority and for additional requirements.

(5) General partners may, except in the case of expulsion, resign only when the articles so permit.

(6) [1]All general partners shall file the dissolution of the company or the resignation of a general partner for registration in the commercial register. [2]§ 143 (3) of the Commercial Code shall apply accordingly. [3]In the cases of (2) the court shall register the dissolution and the reason for it ex officio. [4]In the case of (2) No. 3, the registration of the dissolution may be omitted.

§ 290 Liquidation

(1) All general partners and one or more persons elected by the shareholders' meeting shall carry out liquidation of the company as liquidators, unless the articles provide otherwise.

(2) Each general partner may also make motion for the appointment or removal of liquidators by the court.

(3) [1]If the company has been dissolved by cancellation due to lack of assets, liquidation shall only take place if it becomes apparent after the cancellation that there are assets subject to distribution. [2]Liquidators shall be appointed by the court upon motion by a party involved.

Book Three. Affiliated Enterprises
Division One. Enterprise Agreements
Section One. Types of Enterprise Agreements

§ 291 Control Agreement, Profit Transfer Agreement

(1) [1]An agreement in which a stock corporation or partnership limited by shares submits the direction of the company to another enterprise (control agreement) or undertakes to transfer its entire profits to another enterprise (profit transfer agreements) shall constitute enterprise agreements. [2]An agreement in which a stock corporation or partnership limited by shares agrees to conduct its business on behalf of another enterprise shall also constitute a profit transfer agreement.

(2) If enterprises that are not controlled by one another submit by agreement to common direction, without one of such enterprises becoming controlled by another contracting enterprise, such agreement shall not constitute a control agreement.

(3) Payments made by a company in case of an existing control agreement or profit transfer agreement shall not constitute a violation of §§ 57, 58 and 60.

§ 292 Other Enterprise Agreements

(1) Agreements in which a stock corporation or partnership limited by shares:

1. undertakes to pool its profits or the profits of certain operations in whole or in part with the profits of other enterprises or certain operations of other enterprises for the purpose of dividing the pool's profits (profit pool);

2. undertakes to transfer a share of its profit or the profit of certain operations in whole in part to another person (agreement to transfer a share of profits);

3. leases or otherwise surrenders the operation of its business to another person (agreement to lease operations, agreement to surrender operations)

shall also constitute enterprise agreements.

(2) An agreement on profit sharing with members of the management board and the supervisory board or with individual employees of the company as well as an arrangement as to profit sharing under agreements entered into in the ordinary course of business or under licensing agreements shall not constitute an agreement to transfer a share of profits.

(3) [1]The fact that an agreement violates §§ 57, 58 and 60 shall not render any agreement to lease or surrender operations, or the resolution by which the shareholders' meeting has consented to such agreement, null and void. [2]Sentence 1 shall not preclude a contesting action against such resolution on the grounds that such agreement violates such provisions.

Section Two. Conclusion, Amendments and Termination of Enterprise Agreements

§ 293 Consent of the Shareholders' Meeting

(1) [1]An enterprise agreement shall only become effective upon consent of the shareholders'

meeting. [2]The resolution shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [3]The articles may provide for a larger capital majority and for additional requirements. [4]The provisions of law and the articles governing amendments to the articles shall not apply to such resolution.

(2) [1]A control agreement or profit transfer agreement shall, if the other party to the agreement is a stock corporation or partnership limited by shares, become effective only if the shareholders' meeting of such other company also consents thereto. [2](1) sentences 2 to 4 shall apply accordingly to any such resolution.

(3) Any such agreement must be made in writing and duly signed.

§ 293a Report on the Enterprise Agreement

(1) [1]The management board of any stock corporation or partnership limited by shares that is party to an enterprise agreement shall make, to the extent that the approval of the shareholders' meeting is required according to § 293, a comprehensive written report that explains and justifies legally and economically the conclusion of the enterprise agreement, its detailed provisions and especially the nature and the level of compensation according § 304 and of the settlement according to § 305; the management boards may make the report jointly. [2]Special difficulties in the valuation of the contracting enterprises and the consequences for the shareholders' holdings must be indicated.

(2) [1]The report need not include facts whose disclosure would be suited to cause considerable disadvantage to one of the contracting enterprises or an affiliated enterprise. [2]In such case, the report must explain the reasons for not disclosing these facts.

(3) The report need not be made if all shareholders of all contracting enterprises waive this right by a publicly certified declaration.

§ 293b Examination of the Enterprise Contract

(1) The enterprise contract shall be audited by one or more expert auditors (contract auditors) for each contracting stock corporation or partnership limited by shares, unless all shares in the dependent company are held by the dominant company.

(2) § 293a (3) shall apply accordingly.

§ 293c Appointment of Contract Auditors

(1) [1]The contract auditors are each to be selected and appointed by the court upon motion by the management boards of the contracting companies. [2]Upon joint motion by the management boards, the auditors may be appointed jointly for all contracting parties. [3]The Regional court in the district of which the dependent company has its seat shall have jurisdiction. [4]If the Regional court has a commercial chamber, then this chamber shall decide instead of the civil chamber. [5]§ 318 (5) of the Commercial Code shall apply for the reimbursement of the court appointed auditors and their remuneration.

(2) § 10 (3) to (5) of the Transformation Act shall apply accordingly.

§ 293d Selection, Position and Accountability of the Contract Auditors

(1) [1]For the selection and the information right of the contract auditors, § 319 (1) to (4), § 319a (1), §319b (1), § 320 (1) sentence 2 and (2) sentences 1 and 2 of the Commercial Code shall apply accordingly. [2]The information right exists with respect to the contracting enterprises and to a group enterprise as well as to a dependent and to a dominant enterprise.

(2) [1]For the accountability of the contract auditors, their assistants and the legal representatives of any auditing company collaborating in the audit, § 323 of the Commercial Code shall apply accordingly. [2]They shall be accountable with respect to contracting enterprises and their shareholders.

§ 293e Audit Report

(1) [1]The contract auditors shall report in writing on the results of the audit. [2]The audit report shall conclude with a recommendation as to whether the proposed compensation or the proposed settlement are adequate. [3]The following must be indicated:

1. the methods by which compensation and settlement were determined;
2. why the use of these methods is appropriate;
3. what compensation or what settlement would have resulted in each case from the use of different methods, to the extent that several methods were used; at the same time, it must be indicated which weight was given to the various methods in determining the proposed compensation or settlement and the underlying assets and which special difficulties occurred in assessing the contracting enterprises.

(2) § 293a (2) and (3) shall apply accordingly.

§ 293f Preparation for the Shareholders' Meeting

(1) From the convocation of the shareholders' meeting that is to resolve on the approval of the enterprise contract, the following must be laid out in the business premises of each of the participating stock corporations or companies limited by shares for review by the shareholders:

1. the enterprise contract;
2. annual accounts and annual reports of the contracting enterprises for the preceding three years;
3. the reports of the management boards made according to § 293a and the reports of the contract auditors made according to § 293e.

(2) On request, each shareholder shall be given a copy of the documents listed in (1) without delay or charge.

(3) The duties under (1) and (2) do not apply if the documents listed in (1) for the same periods of time are available on the company's Internet page.

§ 293g Conduct of the Shareholders' Meeting

(1) The documents listed in § 293f (1) shall be made available in the shareholders' meeting.

(2) [1]The management board shall orally explain the enterprise contract at the beginning of the meeting. [2]It shall be attached to the minutes.

(3) Each shareholder shall also receive in the shareholders' meeting, on request, information about all matters relating to the other contracting party that are relevant to the conclusion of the contract.

§ 294 Registration, Effectiveness

(1) [1]The management board of the company shall file the existence and form of the enterprise agreement and the name of the other contracting party for registration in the commercial register; if there several agreements to transfer a share of profit, the name of the other contracting party may be replaced by another designation determining the respective agreement to transfer a share of profit. [2]The agreement and, if such agreement only becomes effective upon the consent of the shareholders' meeting of the other contracting party, the minutes of such resolution including attachments shall be appended to the filing in original, duplicate or officially certified copy.

(2) The agreement shall only become effective upon registration in the commercial register of the company's domicile.

§ 295 Amendment

(1) [1]An enterprise agreement may only be amended with the consent of the shareholders' meeting. §§ 293 to 294 shall apply accordingly.

(2) [1]The consent of the shareholders' meeting of the company to any amendment of the terms of the agreement which would obligate the company to pay compensation to its outside shareholders or to acquire their shares shall require a separate resolution of the outside shareholders in order to become effective. [2]§ 293 (1) sentences 2 and 3 shall apply to such separate resolution. [3]At the shareholders' meeting resolving upon such consent, each outside shareholder shall upon request be provided with information regarding all matters relating to the other contracting party that are material in the context of such amendment.

§ 296 Cancellation

(1) [1]An enterprise agreement may only be cancelled by mutual agreement at the end of the fiscal year or the accounting period otherwise contractually agreed upon. [2]A retroactive cancellation is not admissible. [3]Cancellation shall be made in writing and duly signed.

(2) [1]An agreement that obligates the company to pay compensation to outside shareholders or to acquire their shares may only be cancelled if the outside shareholders consent

by separate resolution. [2]§ 293 (1) sentences 2 and 3, § 295 (2) sentence 3 shall apply accordingly to such separate resolution.

§ 297 Termination

(1) [1]An enterprise agreement may be terminated for cause without observing any period of notice. [2]Cause shall in particular exist if it is likely that the other contracting party will not be able to fulfil its obligations arising from the agreement.

(2) [1]The management board of the company may only terminate without cause an agreement which obligates the company to pay compensation to the outside shareholders or to acquire their shares if the outside shareholders consent thereto by separate resolution. [2]§ 293 (1) sentences 2 and 3, § 295 (2) sentence 3 shall apply accordingly to such separate resolution.

(3) The notice of termination shall be made in written form.

§ 298 Filing and Registration

The management board of the company shall without undue delay file the cancellation or termination of an enterprise agreement, the grounds and the date of cancellation or termination for registration in the commercial register.

§ 299 Prohibition of Instructions

An enterprise agreement may not serve as the basis for an instruction to the company to amend, continue, cancel or terminate the agreement.

Section Three. Protection of the Company and the Creditors

§ 300 Legal Reserve

The following amounts are to be transferred to the legal reserve in lieu of the amount specified in § 150 (2):

1. if a profit transfer agreement exists, that amount of the annual net profit accruing without such profit transfer, after deducting any loss carried forward from the previous year, which is required in order to fill up, during the first five fiscal years commencing during the term of such agreement or upon completion of a capital increase, the legal reserve, plus the amount of any capital reserve, in equal instalments to one-tenth of the share capital or a higher proportion specified by the articles, but in any event not less than the amount specified in number 2.

2. if an agreement to transfer a share of profits exists, that share of the annual net profit accruing without such profit transfer, after deducting any loss carried forward from the previous year, which would be transferred to the legal reserve pursuant to § 150 (2).

3. if a control agreement exists which does not obligate the company to transfer its entire profit, that amount which is required to fill up the legal reserve in accordance with No. 1, but in any event not less than the amount specified in § 150 (2) or, if the company is

obligated to transfer a share of its profit, the amount specified in No. 2.

§ 301 Maximum Amount of Profit Transfer

[1]Irrespective of any agreements made regarding the amount of profit to be transferred, a company may in no event transfer as profit an amount exceeding the annual net profit accruing without such profit transfer, after deducting any loss carried forward from the previous year, the amount to be transferred to the legal reserve pursuant to § 300 and the undistributable, restricted amount pursuant to § 268 (8) of the Commercial Code. [2]If during the term of the agreement amounts have been transferred to other profit reserves, such amounts may be withdrawn from such other profit reserves and transferred as profit.

§ 302 Assumption of Losses

(1) In the case of a control agreement or profit transfer agreement, the other contracting party shall compensate any annual net loss occurring during the term of the agreement to the extent that such loss is not compensated by withdrawing amounts from the other profit reserves which were transferred to such reserves during the term of the agreement.

(2) If a controlled company has leased or otherwise surrendered the operation of its business to its controlling enterprise, such controlling enterprise shall compensate any annual net loss occurring during the term of the agreement to the extent that the consideration agreed upon for such lease or surrender of operation does not constitute adequate compensation.

(3) [1]The company may only waive or compromise any claim for compensation after the expiration of three years from the date on which the registration of the cancellation or termination of the agreement in the commercial register has been announced pursuant to § 10 of the Commercial Code. [2]The foregoing shall not apply if the party obligated to compensate is insolvent and enters into settlement with his creditors to avoid insolvency proceedings. [3]Such waiver or settlement shall only become effective if the outside shareholders consent thereto by separate resolution and no minority whose holding in aggregate equals or exceeds one-tenth of the share capital represented at the passing of the resolution has recorded an objection in minutes.

(4) The statute of limitation for any claims pursuant to the foregoing provisions shall be ten years starting from the day on which notice of the registration of termination of the agreement with the commercial register has been announced pursuant to § 10 of the Commercial Code.

§ 303 Protection of Creditors

(1) [1]If a control agreement or profit transfer agreement is cancelled or terminated, the other contracting part shall provide security to the creditors of the company whose claims arose prior to the date on which the registration of the cancellation or termination of the agreement in the commercial register has been announced pursuant to § 10 of the Commercial Code, provided that such creditors have applied to such contracting party for such purpose within six months from the date of the announcement of the registration. [2]In the announcement of registration, the creditors shall be advised of such right.

(2) Creditors who in the case of insolvency proceedings have a right to preferential

satisfaction from a fund that has been established pursuant to statutory provisions for their protection and is subject to governmental supervision shall not have the right to demand security.

(3) [1]The other contracting party may in lieu of security guarantee the claim. [2]§ 349 of the Commercial Code, which excludes the benefit of discussion, shall not apply.

Section Four. Protection of Outside Shareholders in Case of Control Agreements or Profit Transfer Agreements

§ 304 Adequate Compensation

(1) [1]A profit transfer agreement shall provide for adequate compensation for outside shareholders by recurring payments in proportion to the shares in the share capital (compensation payment). [2]A control agreement shall, if the company is not obligated to transfer its entire profit, guarantee to the outside shareholders as adequate compensation a certain annual share of profit in the same amount as the compensation payment. [3]Adequate compensation only does not have to be determined if the company does not have any outside shareholders at the time of the adoption of the resolution of the shareholders' meeting on the agreement.

(2) [1]The annual amount to be provided as compensation payment shall be not less than the amount which could be expected to be distributed as the average dividend for each share in view of the past profitability of the company and its prospective profits, taking into account adequate depreciation and reserves for declines in value but exclusive of other profit reserves. [2]If the other contracting party is a stock corporation or a partnership limited by shares, the amount to be provided as compensation payment may be the amount which is paid as dividend on shares of the other company achieving an appropriate conversion ratio. [3]Such appropriate conversion ratio shall be determined by the proportion in which shares of the company, in the case of a merger, would be entitled to shares of the other company.

(3) [1]An agreement which contrary to (1) does not provide for any compensation payment shall be null and void. [2]A contesting action against the resolution by which the shareholders' meeting of the company has consented to the agreement or to an amendment of the agreement falling under § 295 (2), may not be based on § 243 (2) or on the grounds that the compensation provided for in the agreement is inadequate. [3]If the compensation provided for in the agreement is inadequate, the court with jurisdiction pursuant to § 2 of the Corporate Proceedings Act shall upon motion determine the contractually owed compensation and shall, if the agreement provides for a compensation payment computed pursuant to (2) sentence 2, determine the compensation pursuant to such provision.

(4) If the court determines the amount of the compensation payment, the other contracting party may terminate the agreement without complying with any notice period within two months of the date on which the decision has become final and may not be appealed.

§ 305 Settlement

(1) A control agreement or profit transfer agreement shall, in addition to the obligation to provide compensation pursuant to § 304, include the obligation of the other contracting party to acquire the shares of any outside shareholder upon demand by such shareholder against an adequate settlement specified in the agreement.

(2) The agreement shall provide for the following settlement:

1. if the other contracting party is a stock corporation or partnership limited by shares with seat in a member state of the European Union or another contracting state to the Agreement on the European Economic Area and is not a controlled enterprise or subsidiary, own shares of such other company;

2. if the other contracting party is a stock corporation or partnership limited by shares which is a controlled enterprise or subsidiary and the controlling enterprise is a stock corporation or partnership limited by shares with seat in a member state of the European Union or another contracting company of the Agreement on the European Economic Area, either shares of the controlling enterprise or of the parent or a cash settlement;

3. in all other cases, a cash settlement.

(3) [1]If shares of another company are provided as settlement, such settlement shall be considered to be adequate if the shares are provided in the same proportion in which shares of the company would, in the case of a merger, be entitled to shares of the other company, provided that fractional amounts may be compensated by additional cash payments. [2]The adequate cash settlement must take into account the condition of the company at the time of its shareholders' meeting resolving on the agreement. [3]After expiry of the day on which the control agreement or the profit transfer agreement has become effective, interest shall accrue on the cash settlement at the annual rate of five per centage points over the basic rate according to § 247 of the Civil Code; claims for further damages are not excluded.

(4) [1]The obligation to acquire shares may be limited to a specified period of time. [2]Such period of time shall expire not earlier than two months after the date on which the registration of the agreement in the commercial register has been announced pursuant to § 10 of the Commercial Code. [3]If motion has been made for determination of the amount of the compensation payment or settlement by the court with jurisdiction pursuant to § 2 Corporate Proceedings Act, such period of time shall expire not earlier than two months after the date on which the decision on the last motion disposed of has been announced in the Federal Gazette.

(5) [1]A contesting action against the resolution by which the shareholders' meeting of the company has consented to the agreement, or to an amendment thereto falling under § 295 (2), may not be based on the ground that the agreement does not provide for an adequate settlement. [2]If the agreement does not provide for any settlement at all or for a settlement that does not comply with (1) to (3), the court with jurisdiction pursuant to § 2 Corporate Proceedings Act shall upon motion determine the amount of the settlement due under the agreement. [3]In the case of (2) sentence 2, if the agreement provides for the granting of shares of the controlling enterprise or parent company, the court shall determine the ratio in which such shares are to be granted, and if the agreement does not provide for the granting of shares of the controlling enterprise or parent company, the court shall determine the appropriate cash settlement. [4]§ 304 (4) shall apply accordingly.

§ 306 [repealed]

§ 307 Termination of Agreement in the Interests of Outside Shareholders

If the company does not have any outside shareholder at the date of the resolution by its shareholders' meeting on a control agreement of profit transfer agreement, such agreement shall terminate no later than at the end of the fiscal year in which an outside shareholder acquires a shareholding in the company.

Division Two. Power to Direct and Liability in case of Interdependency on Enterprises

Section One. Power to Direct and Liability in case of a Control Agreement

§ 308 Power to Direct

(1) [1]In the case of a control agreement, the controlling enterprise shall be entitled to issue instructions to the management board of the company with respect to management of the company. [2]Unless otherwise provide in such agreement, instructions may be issued which are disadvantageous to the company, if they are advantageous to the controlling enterprise or to affiliated enterprises which are members of the same group as such controlling enterprise and such company.

(2) [1]The management board shall be obligated to comply with the instructions of the controlling enterprise. [2]The management board may not refuse compliance with an instruction on the grounds that such instruction does not in its opinion serve the interests of the controlling enterprise or of affiliated enterprises that are members of the same group as such controlling enterprises and such controlled company, unless such instructions manifestly do not serve such interests.

(3) [1]If the management board has been instructed to undertake a transaction which requires the consent of the company's supervisory board, and such consent has not been granted within a reasonable period of time, the management board of the controlled company shall inform the controlling enterprise thereof. [2]If after such notification the controlling enterprise renews its instruction, the consent of the supervisory board shall no longer be required; if the controlling enterprise has a supervisory board, such instruction may only be renewed with the consent of such supervisory board.

§ 309 Liability of the Legal Representatives of the Controlling Enterprise

(1) In the case of a control agreement, the legal representatives (in the case of a sole proprietor the owner) of the controlling enterprise shall, in issuing instructions to the company, employ the case of a diligent and conscientious manager.

(2) [1]If such legal representatives violate their duties, they shall be jointly and severally liable to the company for any resulting damage. [2]They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager.

(3) [1]The company may waive or compromise any claim for damages not prior to the expiration of three years from the date on which such claim has arisen and only if the outside shareholders consent thereto by separate resolution and no minority whose holding in aggregate equals or exceeds one-tenth of the share capital represented at the passing of the resolution records an objection in the minutes. [2]The foregoing limitation

period shall not apply if the person liable for damages is insolvent and enters into a settlement with his creditors to avoid or terminate insolvency proceedings or if the liability for damages is regulated in an insolvency plan.

(4) [1]Any claim of the company for damages may also be asserted by any shareholder. [2]The shareholders may, however, only demand that compensation be paid to the company. [3]Such claim for damages may furthermore be asserted by the creditors of the company as far as such creditors cannot obtain satisfaction from the company. [4]Liability for damages with respect to the creditors shall neither be extinguished by a waiver nor by a settlement of the company. [5]If insolvency proceedings have been instituted over the assets of the company, the receiver in insolvency shall exercise the rights of the shareholders and creditors to assert any claim of the company for damages during the course of such proceedings.

(5) Claims under the foregoing provisions shall be time barred after expiration of a period of five years.

§ 310 Liability of the Company's Board Members

(1) [1]The members of the management board and the supervisory board of the company shall, in addition to any person liable pursuant to § 309, be jointly and severally liable if they have acted in violation of their duties. [2]They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager.

(2) The consent of the supervisory board to such act shall not preclude liability for damages.

(3) The company's board members shall not be liable for damages if the act causing damage was based on an instruction that was binding pursuant to § 308 (2).

(4) § 309 (3) to (5) shall apply.

Section Two. Liability in Case of no Control Agreement

§ 311 Limitation on the Exercise of Influence

(1) In the absence of a control agreement, a controlling enterprise may not exercise its influence to cause a controlled stock corporation or partnership limited by shares to undertake or refrain from undertaking a disadvantageous transaction or act, unless any disadvantage is compensated.

(2) [1]If such compensation is not made during the fiscal year in which the controlled company is caused such disadvantage, the time and means by which such disadvantage shall be compensated shall be determined no later than the end of such fiscal year. [2]The controlled company shall be granted an entitlement to the measures designated to serve as compensation.

§ 312 Report of the Management Board on Relations with Affiliated Enterprises

(1) [1]In the absence of a control agreement, the management board of a controlled company shall, within the first three months of each fiscal year, render a report on the company's

relations with affiliated enterprises. [2]Such report shall specify all transactions entered into by the company during the previous fiscal year with the controlling enterprise or any enterprise affiliated with such controlling enterprise or at the instruction or in the interest of any such enterprise and all other acts which the controlled company has undertaken or refrained from undertaking at the instruction or in the interest of any such enterprise. [3]Such report shall, with regard to transactions, specify any consideration given or received and, with regard to acts undertaken, state the reasons for such acts and the advantages and disadvantages for the controlled company. [4]If compensation for disadvantages was given, such report shall specify the manner in which such compensation was actually given during the fiscal year and for which measures the company has been granted an entitlement.

(2) Such report shall comply with the principles of conscientious and accurate accounting.

(3) [1]The management board shall, at the end of such reports, comment on whether the company, under the circumstance known to the board at the date on which the company entered into such transaction or undertook or refrained from undertaking such act, received adequate consideration for each such transaction or suffered any disadvantage by reason of undertaking or refraining from undertaking such act. [2]If the company suffered any disadvantage, the management board shall further comment on whether such disadvantage has been compensated. [3]Such comments shall be included in the annual report.

§ 313 Audit by External Auditors

(1) [1]If the annual financial statements are to be audited by an external auditor, the report on relations with affiliated enterprises shall be submitted to the external auditor together with the annual financial statements and the annual report. [2]The auditor shall examine whether:

1. the statements in such report on relation with affiliated enterprises are accurate;

2. the consideration given by the company for the transaction specified in such report was not unreasonably high in view of the circumstances known at the time such transactions were entered into; and, whether any disadvantages have been compensated;

3. there are no circumstances that would justify a different opinion in respect of the acts specified in the report than the opinion of the management board.

[3]§ 320 (1) sentence 2 and (2) sentences 1 and 2 of the Commercial Code shall apply accordingly. [4]The external auditor shall have the rights pursuant to the foregoing provisions also with respect to a member of an affiliated group or a controlled or controlling enterprise.

(2) [1]The external auditor shall report in writing on the findings of the audit. [2]If the auditor finds in the course of the audit of the annual financial statements, the annual report and the report on the relations with affiliated enterprises that such report on relations with affiliated enterprises is incomplete, he shall also report thereon. [3]The external auditor shall sign and submit the audit report to the supervisory board; prior to such submission the management board shall have the right to make a statement thereon.

(3) [1]If the conclusive findings of the audit do not give rise to any objections, the external

auditor shall confirm this with the following note to the report on relations with affiliated enterprises:

On the basis of my/our diligent examination and judgment I/we hereby confirm that:

1. the statements in such report on relation with affiliated enterprises are accurate;

2. the consideration given by the company for the transactions specified in the report was not unreasonably high and any disadvantages incurred have been compensated;

3. there are no circumstances that would justify a different opinion in respect of the acts specified in the report than the opinion of the management board.

[2]No. 2 may be omitted from such note if the report does not specify any transactions and No. 3 may be omitted from such note if the report does not specify any acts. [3]If the external auditor has not determined that the consideration given by the company for any transaction specified in the report was unreasonably high, No. 2 of such note shall be limited to confirmation of such fact.

(4) [1]If objections are to be made or the external auditor has determined that the report on relations with affiliated enterprises is incomplete, the auditors shall either restrict the wording of the confirmation note or refuse to provide any confirmation. [2]If the management board has stated that the company has suffered a disadvantage as a result of certain transactions or acts, and that such disadvantages have not been compensated, such fact shall be stated in the note and the note shall be restricted to any other transactions or acts.

(5) [1]The external auditor shall sign the confirmation note stating the place and date of signature. [2]Such note shall also be included in the audit report.

§ 314 Examination by the Supervisory Board

(1) [1]The management board shall submit to the supervisory board the report on relations with affiliated enterprises immediately after its preparation. [2]This report and, if the annual financial statements are to be audited by an external auditor, the audit report of the external auditor shall be delivered to each member of the supervisory board and, if the supervisory board has so resolved, the members of a committee.

(2) [1]The supervisory board shall examine the report on relations with affiliated enterprises and comment on the findings of such examination in its report to the shareholders' meeting (§ 171 (2)). [2]If the annual financial statements are to be audited by an external auditor, the supervisory board shall in its report further comment on the findings of the audit of the report on relations with affiliated enterprises by the external auditor. [3]The confirmation note of the external auditor shall be included in such report and the refusal to provide such note shall be explicitly stated.

(3) The supervisory board shall, at the end of the report, state whether or not based on the findings of its examination, objections are to be made to the comments of the management board at the end of the report on relations with affiliated enterprises.

(4) If the annual financial statements are to be audited by an external auditor, the external auditor shall attend the deliberations of the supervisory board or a committee regarding

the report on relations with affiliated enterprises and provide a report on the material findings of his audit.

§ 315 Special Audit

[1]The court shall upon motion by a shareholder appoint special auditors to audit the business relations of the company with its controlling enterprise or an enterprise affiliated with such controlling enterprise if:

1. the external auditor has restricted or refused to provide a confirmation note on the report on relations with affiliated enterprises;

2. the supervisory board has stated that objections are to be made to the comments of the management board at the end of the report on relations with affiliated enterprises;

3. the management board has stated that the company has suffered a disadvantage as a result of certain transactions or acts, and such disadvantages have not been compensated.

[2]If other facts support the suspicion that the company has suffered an undue disadvantage, the petition may also be made by shareholders whose aggregate holdings reach the threshold set forth in § 142(2) if they furnish evidence that they have been the holders of the shares for at least three months prior to the date of filing the petition. [3]The district court of the stock corporation's registered seat shall decide on such petition. [4]§ 142 (8) shall apply accordingly. [4]An appeal may be made against such decision. [6]If the shareholders' meeting has appointed special auditors to audit the same matters, each shareholder may file a motion pursuant to § 142 (4).

§ 316 No Report on Relations with Affiliated Enterprises in the Case of a Profit Transfer Agreement

§ 312 to 315 shall not apply if a profit transfer agreement between the controlled company and the controlling enterprise exists.

§ 317 Liability of the Controlling Enterprise and its Legal Representatives

(1) [1]If a controlling enterprise causes a controlled company with which a control agreement does not exist to enter into a transaction or to undertake or refrain from undertaking any act which is disadvantageous for such controlled company, without compensating such disadvantage by the end of the fiscal year or granting to the controlled company an entitlement to any measures serving as compensation for this, such controlling enterprise shall be liable for any resulting damage to such controlled company. [2]Such controlling enterprise shall also be liable to the shareholders of the controlled company for any resulting damage to the shareholders insofar as they have suffered damage in addition to any loss incurred as a result of the damage to the company.

(2) The controlling enterprise shall not be liable if a prudent and a conscientious manager of an independent company would have entered into such transaction or undertaken or refrained from undertaking such act.

(3) The legal representatives of the controlling enterprise who have caused the controlled company to enter into such transaction or undertake or refrain from undertaking such act shall, in addition to the controlling enterprise, be jointly and severally liable.

(4) § 309 (3) to (5) shall apply accordingly.

§ 318 Liability of the Board Members

(1) [1]The members of the management board of the company shall be jointly and severally liable together with the persons liable pursuant to § 317, if, in violation of their duties, they have failed to include any disadvantageous transaction or act in their report on relations of the company with affiliated enterprises or to state that the company has suffered a disadvantage as a result of such transaction or act and that such disadvantage has not been compensated. [2]They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager.

(2) The members of the supervisory board of the company shall be jointly and severally liable together with persons liable pursuant to § 317, if, with respect to any disadvantageous transaction or act, they have violated their duty to examine the report on relations with affiliated enterprises and to report to the shareholders' meeting on the findings of such examination (§ 314); (1) sentence 2 shall apply accordingly.

(3) The board members shall not be liable to the company and the shareholders if any such act was based on a lawful resolution of the shareholders' meeting.

(4) § 309 (3) to (5) shall apply accordingly.

Section Three. Integrated Companies

§ 319 Integration

(1) [1]The shareholders' meeting of a stock corporation may resolve to integrate the company into another stock corporation with domicile in Germany (principal company), if all shares of such company are held by the prospective principal company. [2]The statutory provisions and the provisions of the articles governing amendments to the articles shall not apply to such resolution.

(2) [1]The resolution on integration shall become effective only upon consent by the shareholders' meeting of the prospective principal company. [2]The resolution on the consent shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. [3]The articles may provide for a larger capital majority and for additional requirements. [4](1) sentence 2 shall apply.

(3) [1]From the convocation of the shareholders' meeting of the prospective principal company that is to resolve the approval of the integration, the following must be presented in the business premises of this company for review by the shareholders:

1. a draft of the integration resolution;

2. annual accounts and balance sheets of the participating companies for the preceding three years;

3. a comprehensive written report by the management board of the prospective principal company in which the integration is explained and justified legally and economically (integration report).

[2]Upon request, each shareholder shall receive without delay and free of charge a copy of the documents referred to in sentence 1. [3]The duties in sentences 1 to 2 shall not arise if the documents referred to in sentence 1 are accessible on the future principal company's Internet page for the same period of time. [4]These documents shall be made accessible in the shareholders' meeting. [5]Each shareholder shall upon request also receive in the shareholders' meeting information about all matters relating to the company to be integrated that are relevant in the context of the integration.

(4) [1]The management board of the company to be integrated shall file the integration and the name of the principal company for registration in the commercial register. [2]The minutes of the resolutions of the shareholders' meeting and the appendices thereto shall be appended to such filing in duplicate or officially certified copy.

(5) [1]In the registration according to 4, the management board must declare that an action against the effectiveness of the resolution of the shareholders' meeting has not be raised or has not been raised within the time limits or that such an action has been denied finally and without recourse to appeal or that such an action has been withdrawn; the management board must also inform the registration court of such actions after the registration. [2]If the declaration is not made, then the integration shall not be registered unless, through declarations certified by a notary, those shareholders with standing forfeit the action against the effectiveness of the resolution of the shareholders' meeting.

(6) [1]The declaration according to 5 sentence 1 is not necessary if, after the raising of an action against the effectiveness of the resolution by shareholders' meeting, the court holds, on application of the company against whose shareholders' meeting resolution the action is directed, that the raising of the action does not prevent the registration. [2]§ 247, §§ 82, 83 (1) and § 84 of the Code of Civil Procedure as well as the provisions of the Code of Civil Procedure applicable with regard to proceedings at first instance before regional courts shall be applied to the proceedings unless stated otherwise. [3]The order according to sentence 1 shall be issued if

1. the action is inadmissible or manifestly unfounded,

2. the claimant has not provided deeds within one week after service of the application which prove that he has been holding a proportionate amount of not less than 1,000 euros since notification of the meeting; or

3. it appears preferable that the resolution of the shareholders' meeting takes effect immediately, because the material disadvantages for the company and the shareholders as set forth by the stock corporation outweigh, in the court's opinion, the disadvantages for the opponent, unless the infringement is particularly severe.

[4]In urgent cases, the order can be issued without oral hearing. [5]The decision should be rendered no later than three months following the petition; delays in rendering the decision must be explained in a non-appealable decision. [6]The alleged facts according to which the order can be issued according to sentence 3 must be made credible. [7]The senate of the higher regional court of the stock corporation's registered seat shall decide on such petition. [8]A transfer of such power to decide to a single judge shall be excluded; conciliatory hearings shall not be required. [9]The decision is not subject to a contesting action. [10]If the action proves to be founded, then the company that caused issue of the order must compensate the opponent of the application for the loss incurred due to the registration based on the order. [11]Any deficiencies concerning the resolution shall not affect its implementation after registration; it is not possible to demand as compensation that this effect of the registration be eliminated.

(7) The integration of the company into the principal company shall become effective upon registration of the integration in the commercial register of the integrated company's domicile.

§ 320 Integration by Majority Resolution

(1) [1]The shareholders' meeting of a stock corporation may also resolve to integrate the company into another stock corporation with domicile in Germany if the prospective principal company holds shares of the company representing in aggregate ninety-five per cent of the share capital. [2]Own shares and shares held by another person on behalf of such company shall be deducted from the share capital. [3](2) to (4) shall, in addition to § 319 (1) sentence 2, (2) to (7), apply to the integration.

(2) [1] The announcement of the integration as an item on the agenda shall only be deemed duly made if:

1. such announcement includes the business name and domicile of the prospective principal company;

2. a statement of the prospective principal company has been appended to such announcement in which such prospective principal company offers own shares to shareholders of the company to be integrated as compensation for their shares, and, in the case of § 320b (1) sentence 3, an additional cash payment.

[2]Sentence 1 No. 2 shall also apply to the announcement of the prospective principal company.

(3) [1]The integration shall be audited by expert auditors (integration auditors). [2]Such auditors shall be selected and appointed by the court upon petition of the management board of the prospective principal company. [3]§ 293a (3), §§ 293c to 293e shall apply accordingly.

(4) [1]The documents referred to in § 319 (3) sentence 1 and the audit report according to (3) shall be presented in the business premises of the company to be integrated and the prospective principal company for review by the shareholders as of the convocation of the shareholders' meeting that is to resolve the approval of the integration. [2]The integration report shall explain and justify legally and economically the nature and level of the settlement according to § 320b; it shall indicate special difficulties in assessing the participating companies and the consequences for the holdings of the shareholders. [3]§ 319 (3) sentences 2 to 5 applies accordingly for shareholders of both companies.

§ 320a Effects of the Integration

[1]Upon registration in the commercial register, all shares that are not held by the principal company are transferred to it. [2]Any Certificates issued for these shares shall only guarantee the entitlement to settlement until their delivery to the principal company.

§ 320b Settlement for the Former Shareholders

(1) [1]The former shareholders of the integrated company are entitled to an adequate settlement. [2]They shall be granted own shares of the principal company as settlement. [3]If the principal company is a dependent company, then the former shareholders shall be granted at their election own shares of the principal company or an appropriate cash settlement. [4]If shares in the principal company are granted as settlement, the settlement shall be deemed adequate if the shares are issued in the proportion in which upon a merger a share of the company would be granted shares in the principal company, whereby fractional amounts can be compensated by additional cash payments. [5]The cash settlement must take into account the condition of the company at the time of its shareholders' meeting resolving the integration. [6]The cash settlement and additional cash payments shall accrue interest at the annual rate of five per centage points over the basic rate according to § 247 of the Civil Code from the end of the day on which the registration of the integration is published; claims for further damages are not excluded.

(2) [1]The challenge of the resolution by which the shareholders' meeting of the integrated company resolved the integration cannot be based on § 243 (2) or that the settlement offered by the principal company according to § 320 (2) No. 2 is not adequate. [2]If the settlement offered is not adequate then the court determined by § 2 Corporate Proceedings Act shall on application determine the adequate settlement. [3]The same applies if the principal company has not or has not duly offered a settlement and an action has not been raised within the time limits for a challenge, has been withdrawn or denied finally and without recourse to appeal.

§ 321 Protection of Creditors

(1) [1]Creditors of the integrated company whose claims arose prior to the registration of the integration in the commercial register shall be provided with security insofar as they are not able to demand satisfaction, provided that they have made application for this purpose within six months after the date of such announcement. [2]In the announcement of registration, the creditors shall be advised of such right.

(2) Creditors shall not be entitled to demand provision of security if they have a right to preferential satisfaction in the case of insolvency from a fund which has been created for their protection pursuant to statutory provisions and which is subject to governmental supervision.

§ 322 Liability of the Principal Company

(1) [1]The principal company shall be liable to the creditors of the integrated company as joint and several debtor for the obligations of such company that have been incurred prior to such date. [2]The principal company shall also be liable for all obligations of the integrated company that have been incurred after the integration. [3]Any agreement to the contrary shall be ineffective towards third parties.

(2) If a claim is made against the principal company regarding an obligation of the integrated company, such principal company may raise defences other than those it has in its own right only if such defences may be raised by the integrated company.

(3) [1]The principal company may refuse to satisfy a creditor for as long as the integrated company has the right to rescind the transaction giving rise to such obligation. [2]The principal company shall have the same right for as long as the creditor may obtain satisfaction by setting off against a claim of the integrated company that is due.

(4) A judgment or other judicial decision which is enforceable against the integrated company may not be enforced against the principal company.

§ 323 Principal Company's Power to Direct and Management Board Members' Liability

(1) [1]The principal company shall be entitled to issue instructions to the management board of the integrated company regarding the management of the company. [2]§ 308 (2) sentence 1, (3) §§ 309, 310 shall apply accordingly. [3]§§ 311 to 318 shall not apply.

(2) Payments and other forms of consideration given by the integrated company to the principal company shall not be deemed to constitute a violation of §§ 57, 58 and 60.

§ 324 Legal Reserve, Profit Transfer, Assumption of Losses

(1) The statutory provisions governing the creation of a legal reserve, the use thereof and the transfer of amounts to the legal reserve shall not apply to integrated companies.

(2) [1]§§ 293 to 296, 298 to 303 shall not apply to a profit transfer agreement, a profit sharing arrangement or an agreement to transfer a share of profits between an integrated company and the principal company. [2]The agreement, any amendments thereto and the

cancellation thereof shall be in writing and duly signed. [3]The amount to be transferred as profit may not exceed the distributable profit accruing prior to the profit transfer. [4]The agreement shall expire not later than at the end of the fiscal year in which the integration terminates.

(3) The principal company shall be obligated to compensate any accumulated loss of the integrated company that may otherwise arise insofar as such loss exceeds the amount of the capital reserves and profit reserves.

§ 325 [repealed]

§ 326 Right of the Principal Company's Shareholders to Information

Each shareholder of the principal company shall be entitled to be provided with information regarding matters relating to the integrated company to the same extent he is entitled to be provided with information regarding matters relating to the principal company.

§ 327 Termination of Integration

(1) Integration shall terminate:

1. upon resolution of the shareholders' meeting of the integrated company.
2. if the principal company is no longer a stock corporation with domicile in Germany;
3. if the principal company no longer holds all shares of the integrated company;
4. upon dissolution of the principal company.

(2) If the principal company no longer holds all shares of the integrated company, the principal company shall promptly advise the integrated company thereof in writing.

(3) The management board of the previously integrated company shall promptly file the termination of integration, the reason for this and the date thereof for registration in the commercial register of such company's domicile.

(4) [1]If the integration is terminated, the former principal company shall be liable for all liabilities the formerly integrated stock corporation has incurred until then, provided that the liabilities become due prior to the expiration of five years after the integration has been terminated and the claims against the former principal company are established in a manner as set forth in § 197(1) numbers 3 to 5 of the Civil Code or the court or an authority enforces such claims or applies for their enforcement; in the case of public liabilities an administrative decision shall suffice. [2]The statute of limitation shall begin running from the date on which notice of registration of the termination of the integration has been given pursuant to § 10 of the Commercial Code. [3]For the statute of limitation, §§ 204, 206, 210, 211 and § 212 (2) and (3) of the Civil Code shall apply accordingly. [4]An establishment of the claim in respect of § 197(1) numbers 3 to 5 of the Civil Code is not necessary if the former principal company acknowledges the claim in writing.

Division Four. Squeeze-out of Minority Shareholders

§ 327a Transfer of Shares for Cash Compensation

(1) [1]The shareholders meeting of a stock corporation or of partnership limited by shares may resolve upon request of a shareholder holding 95 per cent of the share capital (principal shareholder) the transfer of the other shareholders' (minority shareholders') shares to the principal shareholder against the payment of adequate cash compensation. [2]§ 285 (2) sentence 1 shall not apply.

(2) For the determination of whether the principal shareholder holds 95 per cent of the share capital, § 16 (2) and (4) shall apply.

§ 327b Cash Compensation

(1) [1]The principal shareholder sets the amount of the cash compensation; it must reflect the circumstances of the corporation at the time the resolution is adopted. [2]The management board shall make available to the principal shareholder all necessary documents and supply information to this end.

(2) Interest shall accrue on the cash compensation at the rate of five per centage points over the applicable base rate according to § 247 of the Civil Code from the publication of the transfer resolution's registration in the commercial register; the assertion of further claims for damage is not excluded.

(3) Before the shareholders meeting is convened, the principal shareholder must deliver to the management board the declaration of a credit institution authorised to operate within the territorial scope of this law by which the credit institution guarantees the performance of the principal shareholder's obligation to pay the minority shareholders the set cash compensation for the transferred shares immediately after registration of the transfer resolution.

§ 327c Preparation of the Shareholders' Meeting

(1) Notice of the transfer as an item on the agenda must contain the following information:

1. business name and domicile of the principal shareholder, in the case of natural persons name and address;

2. the cash compensation set by the principal shareholder.

(2) [1]The principal shareholder must provide the shareholders' meeting with a written report that sets out the preconditions for the transfer and explains and justifies the adequacy of the cash compensation. [2]The adequacy of the cash compensation shall be reviewed by one or more expert auditors. [3]These shall be selected and appointed by the court on application of the principal shareholder. [4]§ 293a (2) and (3), § 293c (1) sentence 3 to 5, (2) and §§ 293d and 293e shall apply accordingly.

(3) From the convocation of the shareholders' meeting onward the following must be made available in the company's office for inspection by the shareholders:

1. the draft of the transfer resolution;

2. the annual financial statements and management reports for the last three business years;

3. the report made by the principal shareholder according to (2) sentence 1;

4. the audit report made according to (2) sentence 2 to 4.

(4) On request, each shareholder shall without undue delay and free of charge be given a copy of the documents listed in (3).

(5) The duties in (3) and (4) shall not arise if the documents referred to in (3) are accessible on the company's Internet page for the same period of time.

§ 327d Conduct of the Shareholders' Meeting

[1]In the shareholders' meeting, the documents described in § 327c (3) shall be made accessible. The management board may give the principal shareholder opportunity to orally explain the draft of the transfer resolution and the setting of the amount of the cash compensation at the beginning of the meeting.

§ 327e Registration of the Transfer Resolution

(1) [1]The management board shall file the transfer resolution for registration in the commercial register. [2]The filing shall be accompanied by the written transfer resolution and its appendices in authentic original or notarized copy.

(2) § 319 (5) and (6) shall apply accordingly.

(3) [1]Upon registration of the transfer resolution in the commercial register, all shares of the minority shareholders shall be transferred to the principal shareholder. [2]Any share certificates issued for these shares only attest to the claim for cash compensation until their delivery to the principal shareholder.

§ 327f Judicial Review of the Compensation

[1]The challenging of the transfer resolution cannot be based on § 243 (2) or on the fact that the cash compensation set by the principal shareholder is inadequate. [2]If the cash compensation is inadequate, the court determined by § 2 of the Corporate Proceedings Act shall set the adequate cash compensation. [3]The same applies if the principal shareholder has not or not duly offered a cash compensation and within the period for challenge a challenge was not raised, withdrawn or finally denied without recourse to appeal.

Division Five. Enterprises with Cross-Shareholdings

§ 328 Limitation of Rights

(1) [1]If a stock corporation or partnership limited by shares and another enterprise constitute enterprises with cross-shareholdings, rights arising from shares which are held by any such enterprise in the other enterprise may not be exercised with respect to more than one-fourth of all shares of such other enterprise as from the date on which such other enterprise has received knowledge of the existence of such cross-shareholding or the other enterprise has given notice to such enterprise pursuant to § 20 (3) or § 21 (1). [2]The foregoing shall not apply to the right to new shares in the case of a capital increase from the company's reserves. [3]§ 16 (4) shall apply.

(2) The restriction on exercise of rights pursuant to (1) shall not apply if such enterprise has given notice to the other enterprise pursuant to § 20 (3) or § 21 (1) prior to receiving such notice from the other enterprise and prior to having gained knowledge of the cross-shareholding.

(3) In the shareholders' meeting of a listed company, an enterprise that is aware of a cross-shareholding according to (1) may not exercise its voting rights to elect members of the supervisory board.

(4) If a stock corporation or partnership limited by shares and another enterprise constitute enterprises with cross shareholdings, such enterprises shall promptly give notice in writing to one another of the amount of such holding and any change therein.

Division Six. Group Statement of Accounts

§§ 329, -393 [repealed]

§ 329 [repealed]

§ 330 [repealed]

§ 331 [repealed]

§ 332 [repealed]

§ 333 [repealed]

§ 334 [repealed]

§ 335 [repealed]

§ 336 [repealed]

§ 337 [repealed]

§ 338 [repealed]

§ 339 [repealed]

§ 340 [repealed]

§ 341 [repealed]

§ 342 [repealed]

§ 343 [repealed]

§ 344 [repealed]

§ 345 [repealed]

§ 346 [repealed]

§ 347 [repealed]

§ 348 [repealed]

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§ 350 [repealed]

§ 351 [repealed]

§ 352 [repealed]

§ 353 [repealed]

§ 354 [repealed]

§ 355 [repealed]

§ 356 [repealed]

§ 357 [repealed]

§ 358 [repealed]

§ 359 [repealed]

§ 360 [repealed]

§ 361 [repealed]

§ 362 [repealed]

§ 363 [repealed]

§ 364 [repealed]

§ 365 [repealed]

§ 366 [repealed]

§ 367 [repealed]

§ 368 [repealed]

§ 369 [repealed]

§ 370 [repealed]

§ 371 [repealed]

§ 372 [repealed]

§ 373 [repealed]

§ 374 [repealed]

§ 375 [repealed]

§ 376 [repealed]

§ 377 [repealed]

§ 378 [repealed]

§ 379 [repealed]

§ 380 [repealed]

§ 381 [repealed]

§ 382 [repealed]

§ 383 [repealed]

§ 384 [repealed]

§ 385 [repealed]

§ 386 [repealed]

§ 387 [repealed]

§ 388 [repealed]

§ 389 [repealed]

§ 390 [repealed]

§ 391 [repealed]

§ 392 [repealed]

§ 393 [repealed]

Book Four. Special, Penal and Final Provisions
Division One. Special Provisions in Case of Participations of Local and Regional Authorities

§ 394 Reports of the Members of the Supervisory Board

[1]Persons who have been elected or delegated to the supervisory board by a local or regional authority shall not be bound by a duty of secrecy with respect to reports that they are required to make to the local or regional authority. [2]The foregoing shall not apply to confidential information and secrets of the company, in particular trade and business secrets, if knowledge thereof is not material in the context of such reports. [3]The duty to report pursuant to sentence 1 may be based on law, the articles or a legal transaction notified to the supervisory board in writing.

§ 395 Duty of Secrecy

(1) Persons who are charged with administering the participations of a local or regional authority or auditing on behalf of a local or regional authority the company, the activities of the municipality in its capacity as shareholder or the activities of members in the supervisory board who have been elected or delegated by the municipality, shall not disclose any confidential information or secrets of the company, in particular trade or business secrets which have become known to them in connection with reports pursuant to § 394; the foregoing shall not apply to internal governmental communications.

(2) Confidential information and secrets of the company, in particular trade and business secrets, may not be disclosed when the findings of audits are published.

Division Two. Judicial Dissolution

§ 396 Requirements

(1) [1]If a stock corporation or a partnership limited by shares endangers the common good as a result of unlawful conduct of its board members and the supervisory board or the shareholders' meeting do not arrange for the dismissal of such board members, the company may be dissolved by judicial decree upon motion by the appropriate highest authority of the state in which the company is domiciled. [2]The regional court of the district in which the company is domiciled shall have exclusive jurisdiction with respect to any such action.

(2) [1]After dissolution, the company shall be liquidated pursuant to §§ 264 to 273. [2]A motion to dismiss or appoint liquidators for cause may also be made by the authority designated in (1) sentence 1.

§ 397 Court Orders in Connection with Dissolution

If an action for dissolution has been brought, the court may upon motion by the authority designated in § 396 (1) sentence 1 issue any necessary orders by preliminary injunction.

§ 398 Registration

[1]The decisions of the court shall be communicated to the court maintaining the commercial register. [2]Such court shall enter such decisions in the commercial register to the extent that they concern legal relations requiring registration.

Division Three. Provisions as to Punishments and Fines, Final Provisions

§ 399 False Statements

(1) Whoever makes false statements or fails to disclose material facts:

1. as founder or member of the management board or supervisory board for the purpose of registration of the company or an agreement according to § 52 (1) sentence 1, with respect to the acquisition of shares, payment of contributions, appropriation of contributions, the share issue price, special benefits, formation expenses, Contributions in kind and acquisitions of assets or in the statement to be made pursuant to § 37a (2), also in connection with § 52 (6) sentence 3;

2. as founder of member of the management board or supervisory board in the formation report, the report on post-formation acquisition or the audit report;

3. in the official announcement pursuant to § 47 No. 3;

4. as a member of the management board of a supervisory board, for purposes of registration of a share capital increase (§§ 182 to 206), with respect to contributions to the previously existing capital, subscription or contribution of the new capital, the share issue price, the issuance of new shares, Contributions in kind, in the announcement pursuant to § 183a (2) sentence 1 in connection with § 37a (2) or in the statement to be made pursuant to § 184 (1) sentence 3;

5. a liquidator, for purposes of registration of the continuation of the company, in connection with the proof to be furnished pursuant to § 274 (3); or

6. as a member of the management board of a stock corporation or the managing body of a foreign legal entity, in the statement to be made pursuant to § 37 (2) sentence 1 or § 81 (3) sentence 1 or as liquidator in the statement to be made pursuant to § 266 (3) sentence 1

shall be punished by imprisonment of up to three years or by fine.

(2) Whoever, as member of the management board or the supervisory board, makes a false statement for purposes of registration of a share capital increase with respect to the statement required pursuant to § 210 (1) sentence 2 shall be punished in the same manner.

§ 400 Misrepresentation

(1) Whoever as a member of the management board or of the supervisory board or as liquidator:

1. misrepresents or conceals the condition of the company, including its relations with affiliated enterprises, in presentations or summaries on the financial condition of the company, statements or information provided at the shareholders' meeting, unless such act constitutes a criminal offence pursuant to § 331 No. 1 or 1a of the Commercial Code, or

2. makes false statements or misrepresents or conceals the condition of the company in disclosures or statements which are required to be made to an auditor of the company or an affiliated enterprise pursuant to the provisions of this Act, unless such act constitutes a criminal offence pursuant to § 331 No. 4 of the Commercial Code

shall be punished by imprisonment of up to three years or by fine.

(2) Whoever, as founder or shareholder, makes false statement or conceals material facts in disclosures or evidence which are required to be made to a formation auditor or other auditor pursuant to the provisions of this Act, shall be punished in the same manner.

§ 401 Violation of Duty in the Event of Loss of Capital, Overindebtedness or Insolvency

(1) Whoever, as member of the management board, in violation of § 92 (1) fails to call a shareholders' meeting and to disclose at such meeting a loss equal to or exceeding one-half of the share capital shall be punished by imprisonment of up to three years or by a fine.

(2) If the offender acts negligently, the punishment shall be imprisonment up to one year or a fine.

§ 402 False Issuance of Certificates Confirming the Right to Vote

(1) Whoever issues falsely or falsifies certificates which are to serve as proof at a shareholders' meeting or separate meeting, shall be punished by imprisonment of up to three years or by fine, unless such act is subject to a more severe punishment in other criminal provisions concerning documents.

(2) Whoever makes use of a false or falsified certificate of the kind specified in (1) for the purpose of exercising voting rights shall be punished in the same manner.

(3) The attempt shall also be punishable.

§ 403 Violation of Duty to Report

(1) Whoever as auditor or assistant to an auditor renders a false report on findings of an audit or fails to disclose material facts in such report shall be punished by imprisonment up to three years or by fine.

(2) If the offender acted for remuneration or with the intent to enrich himself of another person or causing damage to another person, the punishment shall be imprisonment up to five years or a fine.

§ 404 Violation of the Duty of Confidentiality

(1) Whoever without authorisation discloses a secret of the company, in particular a trade or business secret, shall be punished by imprisonment of up to one year, in case of a listed company up to two years, or by fine if such secret became known to him in his capacity as

1. a member of the management board or supervisory board or a liquidator;

2. auditor or assistant to an auditor

in the case of number 2, however, only if such act does not constitute a criminal offence pursuant to § 333 of the Commercial Code.

(2) [1]If such offender acted for remuneration or with the intent to enrich himself or another person or causing damage to another person, the punishment shall be imprisonment of up to two years, in case of a listed company up to three years, or a fine. [2]Whoever unlawfully uses a secret of the kind specified in (1), in particular a trade or business secret, which has become known to him under the circumstances of (1) shall be punished in the same manner.

(3) [1]Such act shall be prosecuted only upon complaint by the company. [2]Such complaint may be made by the supervisory board if a member of the management board or liquidator committed such act; such complaint may be made by the management board or the liquidators if a member of the supervisory board committed such act.

§ 404a Violation of duties in case of audits

Anyone who, as a member of the supervisory board or as a member of an audit committee of a company which is capital-market oriented within the meaning of § 264d of the Commercial Code, a CRR credit institution within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or an insurance undertaking within the meaning of Article 2 (1) of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (Official Journal L 374 of 31 December 1991, p. 7) as last amended by Directive 2006/46/EC (Official Journal L 224 of 16 August 2006, p. 1),

1. commits any of the acts specified in § 405 (3b), (3c) or (3d) and gains a pecuniary advantage for it or accepts the promise of such advantage; or

2. persistently repeats any of the acts specified in § 405 (3b), (3c) or (3d) shall be punished by a term of imprisonment of up to one year or a fine.

§ 405 Administrative Offences

(1) Any member of the management board or management board or liquidator who

1. issues registered share certificates in which the amount of partial contributions is not stated or issues bearer shares prior to contribution in full of the issue price;

2. issues share certificates or interim certificates prior to registration of the company or, in the case of a capital increase, the completion of the share capital increase, or, in the case of a conditional capital increase or a capital increase from the company's reserves, the resolution on the conditional capital increase or the capital increase from the company's reserves;

3. issues share certificates or interim certificates which have a par value less than the minimum par value pursuant to § 8 (2) sentence 1 or which, in case of a company with no-par value shares, represent a lower par value than permitted as minimum amount pursuant to § 8 (3) sentence 3, or

4. a) acquires own shares in violation of § 71 (1) No. 1 to 4 or (2) or, in connection with § 71e (1), takes a pledge on such shares;

   b) fails to offer own shares which are to be disposed of (§ 71c (1) and (2));

   c) fails to take measures necessary for preparation of a resolution on the cancellation of own shares (§ 71c (3));

5. [repealed]

shall be guilty of an administrative offence.

(2) Whoever as shareholder or proxy fails to provide or provides incorrectly the information to be included in the list pursuant to § 129 shall also be guilty of an administrative offence.

(2a) Whoever contrary to § 67 (4) sentence 2, also in connection with sentence 3, fails to make a notice or does so incorrectly commits an offence.

(3) Whoever:

1. uses shares of another person, without authorisation to act as proxy and without the approval of such other person, to exercise rights at a shareholders' meeting or a separate meeting;

2. uses shares of another person which he has acquired by granting or promising special benefits to exercise rights at a shareholders' meeting or a separate meeting;

3. permits the use of shares to another person for the purpose specified in No. 2 against the grant or promise of special benefits;

4. uses another person's shares for which neither he nor the other person represented by him may exercise voting rights pursuant to § 135 to exercise voting rights;

5. permits the use of shares or uses such shares to exercise voting rights which neither he nor the other person represented by him may exercise pursuant to § 20 (7), § 21 (4), §§ 71b, 71d sentence 4, § 134 (1), §§ 135, 136, 142 (1) sentence 2 and § 285 (1);

6. demands special benefits, or demands a promise for or accepts such special benefits, as consideration for voting or refraining from voting in a prescribed manner at a shareholders' meeting or a separate meeting; or

7. offers, promises or grants special benefits as consideration to another person for voting or refraining from voting in a prescribed manner at a shareholders' meeting or a separate meeting shall be guilty of an administrative offence.

(3a) Whoever

1. contrary to § 121 (4a) sentence 1, also in connection with § 124 (1) sentence 3, intentionally or recklessly fails to serve the notice or serves it incorrectly, incompletely or not in time; or

2. contrary to § 124a intentionally or recklessly fails to make statements accessible or makes them accessible incorrectly or incompletely

commits an administrative offence.

(3b) An administrative offence is committed by any person who, as a member of the supervisory board or as a member of an audit committee of a company which is capital-market oriented within the meaning of § 264d of the Commercial Code, a CRR credit institution within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or an insurance undertaking within the meaning of Article 2 (1) of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (Official Journal L 374 of 31 December 1991, p. 7) as last amended by Directive 2006/46/EC (Official Journal L 224 of 16 August 2006, p. 1),

1. does not supervise the independence of the auditor or the audit firm in accordance with Article 4 (3) sub-paragraph 2, Article 5 (4) sub-paragraph 1 sentence 1 or Article 6 (2) of Regulation (EU) No. 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (Official Journal L 158 of 27 May 2014, p. 77, L 170 of 11 June 2014, p. 66); or

2. submits a recommendation for the appointment of an auditor or an audit firm which does not comply with the requirements laid down in Article 16 (2) sub-paragraphs 2 or 3 of Regulation (EU) No. 537/2014 or which was not preceded by a selection procedure pursuant to Article 16 (3) sub-paragraph 1 of Regulation (EU) No. 537/2014.

(3c) An administrative offence is committed by any person who, as a member of a supervisory board of a company specified in (3b) which has not appointed an audit committee, submits to the shareholders' meeting a proposal for the appointment of an auditor or an audit firm which does not comply with the requirements laid down in Article 16 (5) sub-paragraph 1 of Regulation (EU) No. 537/2014.

(3d) An administrative offence is committed by any person who, as a member of a supervisory board of a company specified in (3b) which has appointed an audit committee, submits to the shareholders' meeting a proposal for the appointment of an auditor or an audit firm which does not comply with the requirements laid down in Article 16 (5) sub-paragraph 1 or sub-paragraph 2 sentence 1 or sentence 2 of Regulation (EU) No. 537/2014.

(4) In the cases of (3b) to (3d), an administrative offence may be punished by imposing a fine of up to fifty thousand euros and, in the other cases, by imposing a fine of up to twenty-five thousand euros.

(5) In the cases of (3b) to (3d), the administrative authority within the meaning of § 36 (1) No. 1 of the Administrative Offences Act for CRR credit institutions within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos.

1 and 2 of the Banking Act, and for insurance undertakings within the meaning of Article 2 (1) of Directive 91/674/EEC is the Federal Financial Supervisory Authority, and in any other cases it is the Federal Office of Justice.

§ 406 [repealed]

§ 407 Compliance Fines

(1) [1]The court maintaining the commercial register shall threaten to impose fines in order to insure compliance by members of the management board and liquidators who fail to comply with § 52 (2) sentences 2 to 4, § 71c, § 73 (3) sentence 2, §§ 80, 90,104 (1), § 111 (2), § 145, §§ 170, 171 (3) or (4) sentence 1 in connection with (3), §§ 175, 179a (2) sentence 1 to 3, § 214 (1), § 246 (4), §§ 248a, 259 (5), § 268 (4), §§ 270 (1), § 273 (2), § 293f, § 293g (1), § 312 (1), § 313 (1), § 314 (1); § 14 of the Commercial Code shall remain unaffected. [2]Each such fine may not exceed five thousand euros.

(2) Filings to the commercial register for registration pursuant to §§ 36,45, 52, 181 (1), §§ 184, 188, 195, 210, 223, 237 (4), §§ 274, 294 (1), § 319 (3) may not be compelled by the setting of fines.

§ 407a Notifications to the Auditor Oversight Body

(1) The administrative authority which is competent pursuant to § 405 (5) shall submit to the Auditor Oversight Body at the Federal Office for Economic Affairs and Export Control all decisions imposing fines pursuant to § 405 (3b) to (3d).

(2) 1In criminal proceedings involving a criminal offence pursuant to § 404a, the public prosecutor's office shall, if public prosecution is initiated, submit to the Auditor Oversight Body the decision which ends the proceedings. 2If an appeal has been lodged against the decision, reference to such appeal shall be made when submitting the decision.

§ 408 Criminal Liability of General Partners of a Partnership Limited by Shares

[1]§§ 399 to 407 shall apply accordingly to partnerships limited by shares. [2]Insofar as such provisions refer to members of the management board, such provisions shall in the case of a partnership limited by shares apply to the general partners.

§ 409 Berlin Clause

[vitiated]

§ 410 Entry into Force

This Act shall enter into force on January 1, 1966.

Disclaimer

The present translation is for convenience purposes only and intended to facilitate the understanding of the German law. Any liability with regard to the completeness and correctness of the contents shall be explicitly excluded. This document is not intended to give legal advice and, accordingly, it should not be relied upon. It should not be regarded as a comprehensive statement of the law and practice in this area. Readers must take specific legal advice on any particular matter which concerns them. If you require any advice or information, please speak to your usual contact at Norton Rose Fulbright.

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EXHIBIT B

EXHIBIT B

Exhibit B
Articles Concerning Corporate Governance Problems

Deutsche Crisis Shows Failure of German Corporate Governance Model, Raji Menon, Oct 06, 2016 www.Responsible-Investor.com

German Governance Must Be Fit for Purpose: Recent scandals have exposed shortcomings in the corporate model, The Financial Times Editorial Board, May 12, 2019

The Flaws of Germany's Corporate Board System, Dieter Fockenbrock, May 28, 2018, Handelsblatt

Big Investors Step Up Protest Votes at European Companies, Jennifer Thompson. Sept 11, 2019, Financial Times

In Germany, a Weird Tolerance for Corporate Crime, Richard L. Cassin, July 30, 2020, The FCPA Blog

Something Is Rotten With the State of German Business, Matthew Lynn, April 29, 2019, www.Telegraph.co.UK/Business

Bayer's Woes Point to a Wider Truth About Germany: A country that excels at innovation shrinks from the consequences of it, Frederick Studemann, May 16, 2019, Financial Times

Is Something Rotten in the State of Corporate Germany? The manner of Martin Winterkorn's resignation calls into question German corporate governance practices, Leonid Bershidsky, Sept 24, 2015, Bloomberg

VW, A Horror Story of Bad Governance and the Destruction of Corporate Value, Lady Olga Maitland, 2015, Copenhagen Compliance Global GRC Solutions

Image Problems Mount in Corporate Germany: Many big German companies have become embroiled in criminal investigations recently, suggesting a worsening of ethical standards in corporate Germany, Rolf Wenkel, December 17, 2012, Deutsche Welle www.dw.com

Boards Behaving Badly: Why the leading citizens of corporate Germany are so scandal-prone, Aug 06, 2009, The Economist

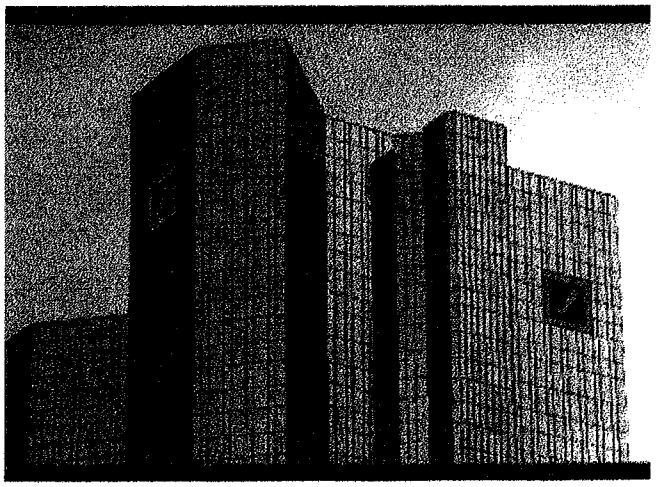
German Corporations—and Regulation—Are in the Dock: The country's consensual model of capitalism needs an overhaul in the wake of Wirecard's implosion, Jonathan Guthrie, June 30, 2020, Financial Times

Why Germany Inc Needs a Big Governance Reboot: Too many giants of the Dax are suffering from self-inflicted wounds, Olaf Storbeck, August 20, 2019, Financial Times

Bribes, Corrupt Chiefs and Paid-For Sex: Corporate Germany is in crisis, David Gow, August 01, 2005

No Derivative Shareholder Suits in Europe—A Model of Percentage Limits and Collusion, Kristoffel Grechenig and Michael Sekyra, May 2010, Max Planck Institute for Research

Deutsche crisis shows failure of German corporate governance model, says Professor John Kay



You know you're in trouble when Professor John Kay is on your case.

The respected economist says the collapse of investor confidence in Deutsche Bank, which has seen its shares plummet to multi-decade lows, reflects a failure of the German corporate governance model which is incapable of dealing with the "arrogant management" of large businesses.

Kay, whose UK-government commissioned Kay Review looked into the practices of short-termism in the UK capital markets, said that while the German corporate governance model had worked well for small and medium companies, recent corporate governance scandals had shown that this model did not work for larger businesses like Deutsche and Volkswagen (VW).

"The way corporate governance works in Germany has strengthened the position of incumbent management, and this has worked very well for small and medium companies who have that freedom to develop

the position of incumbent management, and this has worked very well for small and medium companies who have that freedom to develop effectively.

"But the very same system has shown that it is not capable of dealing with the arrogant management of large businesses. We have seen that at VW and we are now seeing that with Deutsche," he told RI in an interview.

Shares in Germany's largest lender went into freefall on news that the US Department of Justice is seeking up to $14bn to settle claims that Deutsche mis-sold US mortgage-backed securities before the financial crisis. The stock has rallied in recent days on reports that the bank was close to agreeing a much lower figure of $5.4 billion.

Although the current loss of investor confidence has brought the bank's precarious financial position into sharp focus, investor misgivings over failings at the bank's management and supervisory board have a longer history.

Earlier this year, Deutsche shareholders very narrowly lost a vote to carry out a special audit of its management and supervisory boards, showing the depth of investor concern.

At the bank's AGM in May, several high-profile pension funds including US pension giants CalPERS and CalSTRS, the Canadian Pension Plan Investment Board and Dutch state pension fund APG, supported a shareholder proposal for an independent audit of the bank's management and supervisory board. In the end, however, it was narrowly defeated, with 53.6% of shares voting 'no'."There have been worries about Deutsche and its approach for a little while now," said one UK institutional investor who declined to be named.

"But the bank had not really addressed investor concerns over its level of transparency and disclosure. So they never really gave investors the confidence when the sun was shining, so to speak, and as a result they are in a much weaker position with investors as the storm is coming," the person added.

The investor added that with a reduced fine, the bank should try and draw a line under its current woes. Future steps could include a board renewal and increased transparency.

Kay said that one way forward would be to break up the bank, to make it a smaller, more specialist institution.

"We don't really need these diverse financial institutions. We might find that if Deutsche is broken up, some of its bits will not be able to survive while some others may become viable financial businesses," he added.

Kay noted that with its level of leverage, Deutsche worked like a very large hedge fund that also had a retail and commercial bank attached to it. With the total volume of derivatives exposures estimated at $600-700trn globally, Deutsche Bank and JP Morgan account for 10% each of that total exposure, he said.

Deutsche shares have lost 50% of their value this year, and last week plunged to a 30-year low, at one point below the key 10-euro level. Shares are now trading at 11.50 euros.

There have been reports of hedge funds shorting the stock and indeed the percentage of shares out on loan — from institutional investors — has spiked to its highest level this year at 5.6% on October 3, up from 5.3% on September 30, according to the latest data from Markit.

Kay said: "I think this is a very rational evaluation of the stock in a modern capital market from an institutional investor point of view – although this has come about a bit belatedly – which is 'I don't know what's going on, so I am not going anywhere near that stock'."

However, there may be more pain ahead for Deutsche investors. Credit Suisse analyst John Peace said that even if the US litigation is settled at reasonable levels, other cases (including Russia and FX) could create "additional headline risks and will weigh on core capital generation" up to 2018.

He added: "Even with no dividend in 2016/2017 and benefits from recent disposals we still think the bank will struggle to meet its capital targets organically."

The next scheduled event for Deutsche is its third quarter earnings report on October 27, which should make interesting reading.

Opinion **The FT View**

German governance must be fit for purpose

Recent scandals have exposed shortcomings in the corporate model

THE EDITORIAL BOARD

Bayer faces investor fury over its Monsanto takeover © AFP

The editorial board MAY 12 2019

The once purring engine of Germany Inc is sputtering. Bayer faces investor fury over its disastrous Monsanto takeover. The ailing Deutsche Bank's leadership is under pressure after the collapse of merger talks with Commerzbank. VW is still battling to restore shareholders' faith four years after the emissions scandal. Some of the blame must go to a corporate governance system that can be parochial, inward looking and less responsive to shareholders than it should be.

There are ironies here. While Germany still has plenty of scandal-free world-beaters, governance problems are emerging just when reformers are suggesting US companies, say, should start to look a little more German. Senator Elizabeth Warren's Accountable Capitalism Act would require large US companies to take interests of workers, customers and communities into account along with shareholders — and allow employees to elect 40 per cent of boards of directors. Both are defining features of German capitalism.

Germany, meanwhile, has been encouraged in the past two decades to shift to a more US-style focus on shareholder value. Webs of cross-shareholdings between banks, insurers and large businesses have been partly unwound. A governance code adopted in 2002 has encouraged shareholder activism.

Employee representation on boards is credited, in part, with leading to higher employee satisfaction and productivity, and lower income inequality. But having employee representatives who only represent German staff can be poorly suited to increasingly globalised businesses. It has sometimes enabled German workers to block job cuts or prevent functions being shifted to lower-cost countries. A bigger problem can be the dynamics of Germany's two-tier structure — where management boards run operations, overseen by non-executive supervisory boards of investor and staff representatives.

The logic of the two-tier system is to preserve a clear line between executives and supervising non-executives, promoting a long-term view. But there can be too much of a revolving door between the tiers. While allowing executives to step up to supervisory boards might promote continuity, it can create conflicts of interests. A powerful chair may be too attached to strategies he or she put in place — and thwart new bosses' attempts to make changes.

Indeed, the Bayer-Monsanto merger appears a case study in such issues. Bayer's chairman, Werner Wenning, had explored a Monsanto takeover when he was chief executive. He was in close contact with his friend Werner Baumann, then Bayer's strategy chief, during the 2016 transaction and involved in negotiating the deal, announced days after Mr Baumann became chief executive. Germany would be well advised to introduce a mandatory "cooling off" period preventing executives moving directly to supervisory boards.

Boards also tend to be overly German-dominated — EY says 71 per cent of supervisory board members and 64 per cent of executive board members are German. They lack diversity in skills, nationality and ethnic origin. Digital expertise is often lacking, too

The problems at some German flagships coincide with hand-wringing over the country's failure to translate its manufacturing and engineering prowess into tech leadership, or create world-beating companies at the rate of the US or China. Addressing those issues will require longer-term moves to increase venture capital and private equity-type funding, and ensure the education system produces the appropriate skills. Ensuring the corporate governance model is fit for purpose, however, would be a good first step.

Letter in response to this editorial comment:

Your criticism of German governance is unjustified / From Chris Kniel, Orinda, CA, US

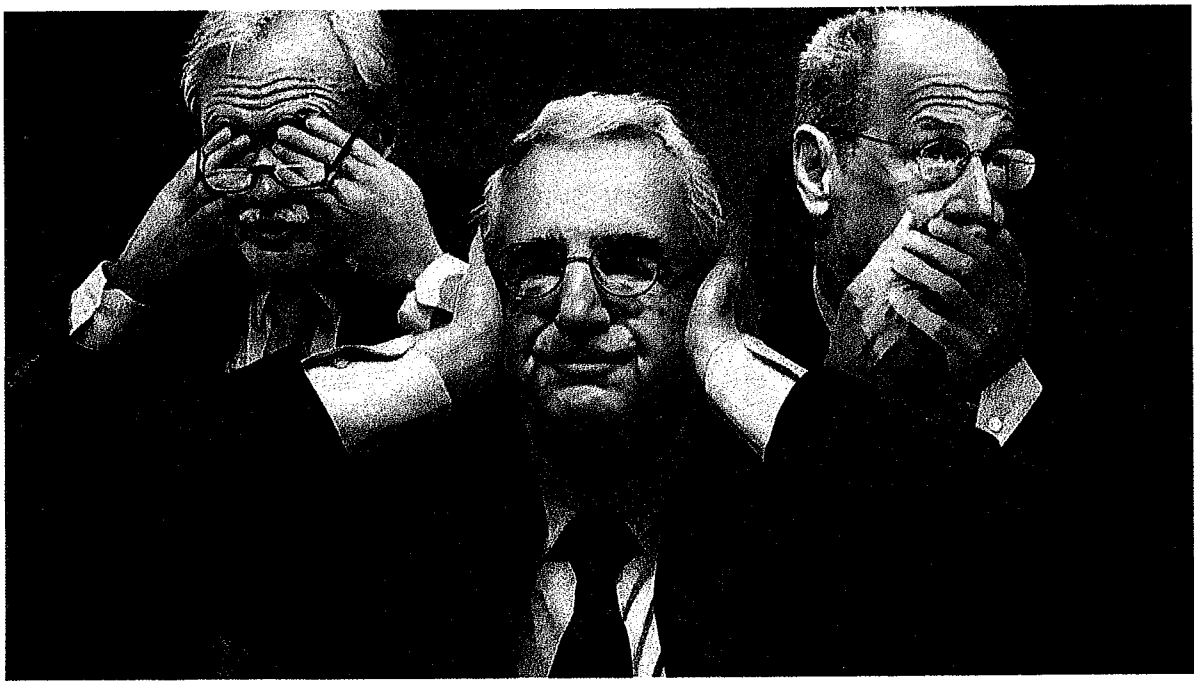
Handelsblatt

OF LAYMEN AND LEMMINGS

The flaws of Germany's corporate board system

von: Dieter Fockenbrock
Datum: 28.05.2018 16:36 Uhr

Turmoil at blue-chip companies from Deutsche Bank to VW highlights the fault lines in German corporate governance: too much groupthink, too little diversity.



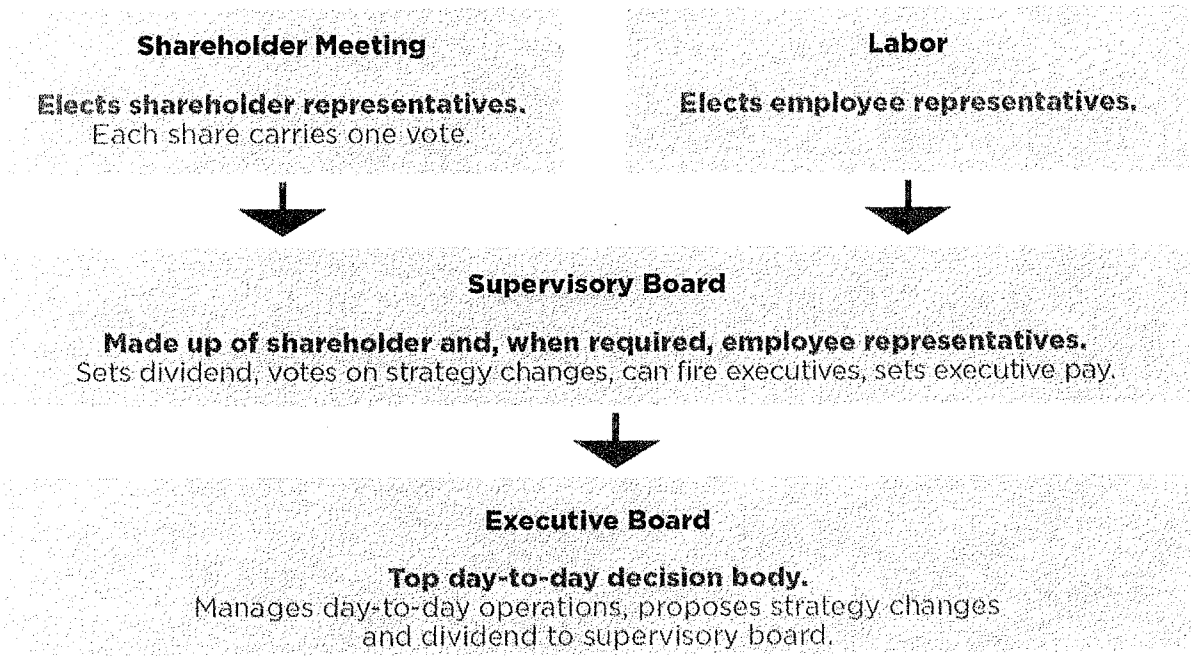
Please, no monkey business.

As Deutsche Bank's share price sagged to an all-time low last week, investors blamed the bank's non-executive board chairman, Paul Achleitner, for poor management. During its annual shareholders' meeting on Thursday, fund managers criticized Mr. Achleitner for slow decision-making and flip-flopping on strategy. "Why did you not act sooner when it became clear that the strategy wasn't working?" asked a fund manager of Deka Investments.

In Germany's two-tier board system, Mr. Achleitner and his fellow non-executive directors are responsible for monitoring the bank's executives. The so-called supervisors approve strategy

changes, dividend payouts and have the power to fire executives. But the troubles at Deutsche Bank and other listed companies show that Germany's peculiar corporate governance system can lead to strategic failures costing millions – or even billions – of euros.

Deutsche Bank's share price has halved since Mr. Achleitner became chairman. VW's Dieselgate scandal has cost the carmaker €25 billion since US regulators revealed the emissions fraud in 2015. Deutsche Börse's attempt to merge with the London Stock Exchange triggered an investigation into insider trading by CEO Carsten Kengeter, who ultimately resigned last year. Bilfinger, once Germany's largest construction firm, has shrunk down to a mid-sized engineering firm after a series of strategic blunders and corruption cases.



27 Two tier board-01 German corporate governance system model supervisory board executive board non-executive panel

Germany's peculiar two-tier board system, combined with workers' right to nominate up to half of the non-executive board, are not to blame for the scandals, experts argued. "If Germany's two-tier system is applied properly, it can outperform the one-tier board system," said Christian Strenger, former head of fund manager DWS and an ex-member of Germany's Corporate Governance Committee.

Instead, a lack of expertise and tunnel vision are often the cause for mismanagement and weak oversight by the non-executive panel, formally known as a supervisory board. The directors should possess expert industry knowledge and be as ambitious as the executives. Florian Schilling, a specialist in auditing boards, urges managers to consider supervisory positions as serious professions and not just a side job to pick up during retirement. "It would really make sense if more successful managers make the switch earlier and collect a number of non-executive positions and not wait until the retirement age kicks in," he said.

Hans-Christoph Hirt, an executive at British asset manager Hermes, also stressed the need for industry expertise and experience as well as diversity on Germany's supervisory boards. "A problem is the lack of international and ethnic variety because German language skills are often a prerequisite," Mr. Hirt said. Combined with a high number of working hours and a relatively low pay, it is difficult to attract non-executive directors from the US or Asia, he said.

More female board members would also help to improve checks and balances between management and non-executives, Mr. Hirt added. Promoting diversity was one of the reasons Germany adopted a gender quota for supervisory boards, forcing big, listed companies to have women occupy at least 30 percent of non-executive positions.

Two examples illustrate how a lack of diversity can cause havoc. At Volkswagen, controlled by the Porsche and Piëch families and the state of Lower Saxony, a top-down management structure created a culture where honesty and openness were absent, allowing employees to deceive 11 million car owners for almost a decade. A closely held alliance of non-executive directors and labor representatives was unable to discover the fraud. At Deutsche Börse, the groupthink promoted by non-executive chairman Joachim Faber and CEO Carsten Kengeter led to the strategic failures that ended Mr. Kengeter's term early and damaged Mr. Faber's reputation.

Diversity does not always guarantee success, unfortunately. At Deutsche Bank, women have occupied more than 30 percent of non-executive seats for years, but this hasn't kept the bank from running into trouble repeatedly. An international board with non-executive directors from the US, Britain and Switzerland hasn't prevented it, either. Perhaps there were simply too many finance experts on the panel, who failed to see what strategy would best fit Germany's biggest bank.

Dieter Fockenbrock is Handelsblatt's chief correspondent for the companies and markets desk, focusing on corporate governance, opinion and rail transport. To contact the author: fockenbrock@handelsblatt.com

FTfm Fund management

Big investors step up protest votes at European companies

Germany leads with a 108 per cent increase in shareholder dissent

Bayer's Werner Baumann was the first chief executive of a German blue-chip company to suffer a no-confidence vote © Bloomberg

Jennifer Thompson SEPTEMBER 11 2019

Shareholder dissent in Germany and Spain has risen sharply this year as big investors hold executives to account over pay, governance standards and corporate scandals.

The proportion of resolutions at large German companies that experienced significant shareholder dissent when voted on at annual meetings increased 108.6 per cent between 2018 and 2019 while in Spain this rose 21.1 per cent, according to Georgeson, the shareholder engagement and governance consultancy.

Overall there was a 6.7 per cent increase in the proportion of resolutions experiencing dissent in big European markets including the UK, France, Italy, Germany, Spain, Switzerland and the Netherlands.

"We have seen a lot of active ownership. It is on the increase," said Domenic Brancati, chief executive for UK and Europe at Georgeson. "We're seeing investors [become] more willing to vote against binding resolutions."

Georgeson defines a contested vote as one that is opposed by more than 10 per cent of shareholders.

"Voting your shares is a crucial mechanism to enable responsible investors to hold companies to account," said Fergus Moffatt, head of UK policy at responsible investment group ShareAction. "As well as a way of promoting good corporate governance, this rise in dissent is a positive sign that investors are not too cosy with management."

In Germany the number of proposals relating to the election of supervisory board members that were contested rose 366 per cent.

There was also a sharp rise (233 per cent) in the number of contested votes relating to so-called discharge proposals, which ask investors to approve how a company's board ran the business in the past year. Common in many European countries, these are usually a formality but are a way for shareholders to register their discontent.

The most prominent instance occurred at Bayer, where in April more than 55 per cent of shareholders at the German conglomerate's annual meeting voted against ratifying chief executive Werner Baumann and his team. He is the first serving chief executive of a German blue-chip company to suffer such a vote of no confidence.

Shareholders were angry about a steep fall in Bayer's share price since its acquisition of US rival Monsanto in a $63bn deal last year as well as mounting legal problems over glyphosate, a herbicide that was marketed by Monsanto.

In Spain proposals relating to director elections were the most likely to be contested at companies listed on Madrid's Ibex 35 index of large companies.

Executive pay was also a flashpoint for investors. Dissent on remuneration policy votes, where shareholders get a say on the overall design of pay packages, increased by 107 per cent in the UK for FTSE 100 companies compared with 2018, although there was a slight (8 per cent) decrease in the proportion of contested remuneration report votes.

"Executive pay continues to be one of the big topics," said Amy Wilson, a senior manager at Hermes EOS, the investors' adviser with £501bn assets under advice. But she added that engagement behind the scenes also takes place. "It's a more complex picture than just the vote rate."

Georgeson warned that Germany and the Netherlands are the most likely to be unprepared for the introduction of annual votes on executive remuneration which will become compulsory across the EU next year. Just 14 per cent of German companies and a third of Dutch companies held votes on executive remuneration this year.

The FCPA Blog

News and commentary about white-collar crime, enforcement, and compliance

At Large: In Germany, a weird tolerance for corporate crime

Richard L. Cassin July 30, 2020 7:48 am

For at least ten years, Germany's financial regulator heard detailed complaints from reliable sources about a $2 billion accounting fraud at Wirecard AG but failed to act.

The *Wall Street Journal* said the warnings to BaFin (the Federal Financial Supervisory Authority) came from U.S. authorities, investors, journalists, and possibly even company insiders. Instead of investigating the red flags, BaFin attacked Wirecard's critics.

The *Journal's* report then said, "Germany has a patchy record in fighting corporate crime. Volkswagen AG's giant emissions-cheating scandal was uncovered by California. The U.S. has imposed more money-laundering fines on troubled German lender Deutsche Bank AG than Germany has."

The *Journal* didn't mention anti-bribery enforcement but should have. It's an excellent way to measure the robustness of a country's commitment to fighting corporate crime.

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Here's the record. Since 2008, the DOJ and SEC have prosecuted ten German firms for FCPA offenses, imposing total financial penalties of $1.4 billion. The enforcement streak started with Siemens. That was followed by FCPA cases against SAP, Allianz, Linde Group, Zimmer Biomet, Bilfinger, Deutsche Telekom, and Daimler. The two most recent FCPA cases against German companies, both in 2019, involved Fresenius and Deutsche Bank.

In other words, the United States, not Germany, has led anti-bribery enforcement against German companies. If Germany had prosecuted those ten companies first, it's unlikely the DOJ and SEC would have stepped in.

So, what's the problem with German enforcement? Berlin-based Transparency International said, "Wirecard is not an isolated case." TI blamed "structural problems in the German legal system" and the lack of legal protections for whistleblowers.

Meanwhile, the German government fired BaFin from its role in overseeing financial markets. A Justice Ministry spokesman said Germany is reviewing the extent of reforms needed to ensure "functioning and transparent capital markets."

Are German regulators entirely to blame? No. BaFin didn't cause the Wirecard scandal, just as German prosecutors didn't cause the FCPA violations. Company executives and employees committed the crimes that underlie the scandals.

So another question arises: What's wrong with German compliance? There's no simple answer. Who can say which came first: The *laissez-faire* attitude of German regulators toward corporate lawbreakers, or the lawbreaking attitude of German executives?

Whatever the root cause, it's clear that changes are needed in the cultures of both government and business. Otherwise, Germany won't overcome what appears to be a weird tolerance for white-collar lawlessness.

Am I being unfair to Germany? After all, the United States has prosecuted a dozen UK-based companies for FCPA offenses since 2008, compared with ten German companies. True. But, the UK responded with the powerful Bribery Act, and with SFO enforcement actions against Rolls-Royce, Airbus, Alstom, Unaoil, Innospec, F.H. Bertling, and many others.

France? Six French companies have faced FCPA charges since 2008. And like the UK, France has responded by enacting Sapin II, a potentially far-reaching anti-corruption law.

Both the UK Bribery Act and Sapin II signaled cultural shifts toward enforcement, and both laws have been driving UK and French companies to adopt more effective compliance programs. Is there any similar cultural shift happening today in Germany? Perhaps the Wirecard scandal, which rivals Enron's rise and fall for gruesome corporate and regulatory behavior, will be the catalyst for change that Germany needs.

Richard L. Cassin

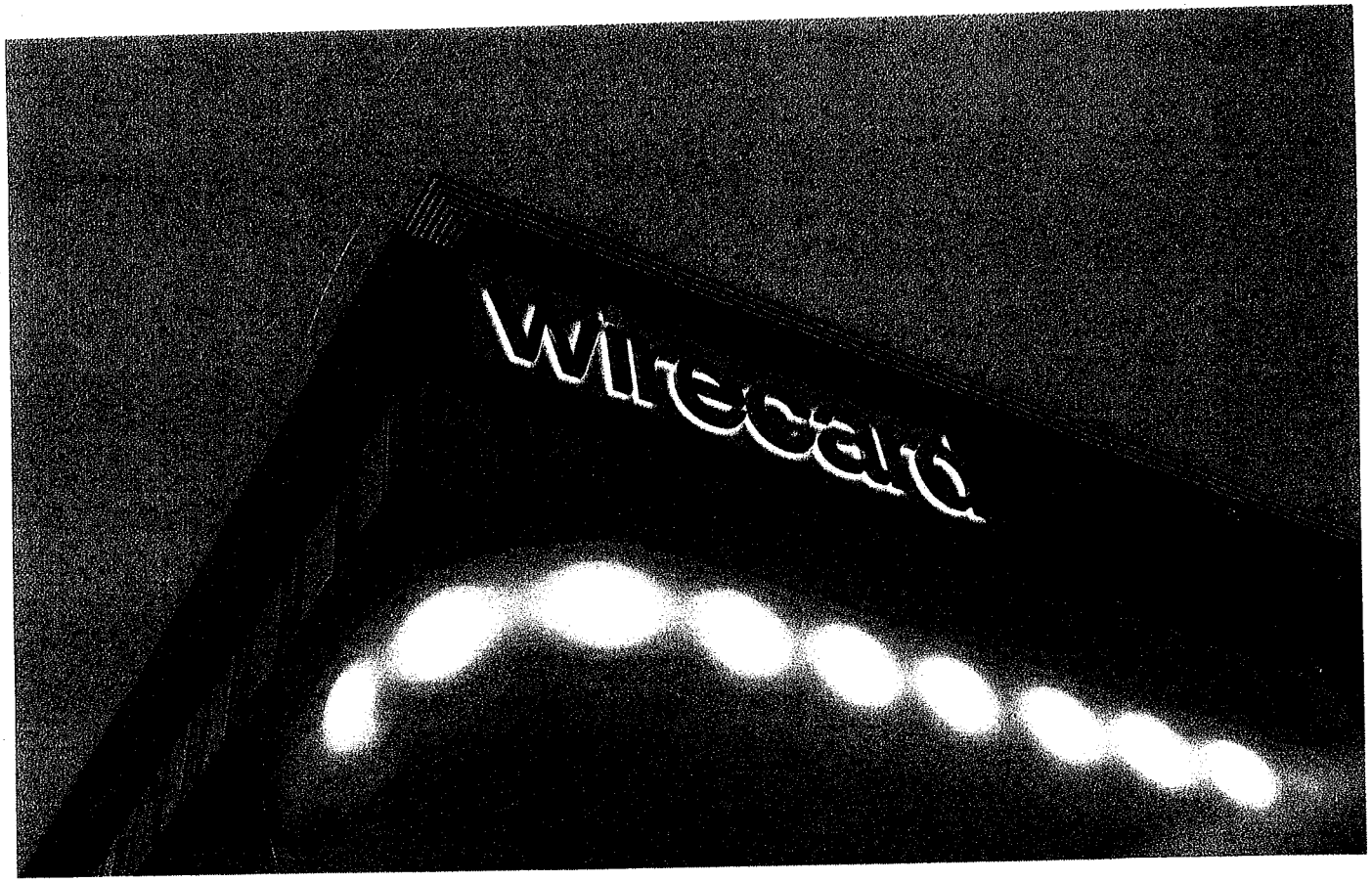
Founder of the FCPA Blog and Editor at Large. He has been named multiple times as one of the 100 Most Influential People in Business Ethics by *Ethisphere Magazine* and is a *Trust Across America* Top Thought Leader. He's a member of the DC, Virginia, and Florida bars. His At Large column is a regular feature of the FCPA Blog and his Chat Large videos are shown on FCPA Blog+.

Post Tags: Airbus SE, Allianz SE, BaFin, Bilfinger SE, Daimler, Deutsche Bank, Deutsche Telekom, FH Bertling, Germany, Innospec, Linde Group, Rolls Royce, SAP, Sapin II, Siemens AG, Transparency International, UK Bribery Act, Unaoil, Volkswagen, Wall Street Journal, Whistleblower Protection, Wirecard AG, Zimmer Biomet

10 Comments

Claire Martin
July 30, 2020 at 8:00 am

Something is rotten with the state of German business



The tech company Wirecard has just become the latest major German business to become embroiled in problems

Greece, for sure. Probably Italy as well. Perhaps China, Brazil and anywhere in the Middle East. There are plenty of countries around the world where we suspect that business can be corrupt, not many deals get done without some money changing hands along the line, and where bribes and backhanders are woven into everyday commercial life. But Germany is probably not on the list. And yet it should be.

In fact, over the last decade, many business scandals have been stamped with the words "Made In Germany". Such as? The tech company Wirecard has just become the latest major German business to become embroiled in

problems. Before that, Volkswagen was caught cheating on diesel emissions standards, Siemens was caught up in one of the most serious bribery cases of all time, while Deutsche Bank has been handed massive fines for breaking financial rules.

Corruption appears endemic, and within the country's very biggest and, on the surface most prestigious, companies. Of course, that might just be a coincidence. But it increasingly looks as if there is something rotten in Germany's business culture and, even worse, no one plans to do anything to fix it.

Over the years, there have always been plenty of major scandals in business. The Madoff affair in the US, the systematic fictions of Enron in the same country, the Polly Peck and Maxwell scandals in this country in the Eighties and Nineties, or the Parmalat affair in Italy a decade later. Big money has always attracted conmen, cheats, liars and frauds, and there have always been businesses that stray over the line into outright criminality. There probably always will be. And yet, it is noticeable in the last decade that increasingly it is a German company at the heart of the biggest scandals.

The latest is the high-flying tech start-up Wirecard. The payments company is one of Europe's most impressive fintech businesses and last year replaced Commerzbank in the blue-chip DAX index. Earlier this year, the Financial Times reported on allegations of fraud and accounting irregularities at its Singapore office.

In fairness, the company denies those stories, and indeed the Japanese tech investor SoftBank this month took a big stake in the business, which suggests that the alleged scandal may yet blow over. Even so, there have been serious questions about the way the company conducts itself. Indeed,

only last week the FT reported more questions over the profits allegedly made by three "opaque partners".

There is no doubt about the other scandals that have embroiled Germany's biggest companies. In 2015, Volkswagen was caught up in one of the worst of all time when it was discovered the auto manufacturer had been systematically fixing diesel emissions tests.

Eventually Martin Winterkorn, the chairman, was forced to resign, and the company still faces investigations and possible fines over the affair. Likewise, the electronics giant Siemens has been caught up in some of the largest bribery scandals of all time. It was fined a record $800m (£619m) in the US after a long-running investigation into bribery and corruption. Deutsche Bank, still the country's most prestigious financial institution, has faced allegations over money laundering and fraud.

Bloomberg recently calculated it had paid $18bn in fines over the last decade – more than its current market value – and in November last year the German authorities mounted a raid on its offices over yet another investigation. Those are four of Germany's biggest companies.

We have an image of Germany as a very law-abiding country, and on one level that is certainly true. The streets are safe, and no one can pay a bribe to get out of a parking fine. Transparency International ranks it as the 11th least corrupt country in the world, level with the UK. Backhanders are clearly not routine. And yet right at the top of the country's biggest companies it is starting to look painfully obvious there is an honesty issue. Why? There are three possible explanations.

First, Germany has developed an inward-looking corporate culture where rules end up at risk of being bent. With the possible exception of France's CAC-40, there is no more moribund major index in the world than the DAX.

Most of the companies on it have been around for decades, if not centuries, and are staffed by managers who have spent their entire careers within the same giant corporation. It is hard to think of a better system for creating cover-ups and complacency, or a culture where breaking the rules is just accepted as the norm. No one asks difficult questions, and they are quickly frozen out if they do.

Next, there is not nearly enough scrutiny of companies, either from shareholders, the press, or government. Most of the scandals uncovered have come to light elsewhere, usually in the US. It is rare that Germany's own regulators discover anything – which suggests they are hardly even trying.

Finally, it is stuck with an old fashioned, export dominated economy where there is a constant temptation to break the rules. A huge percentage of Germany's industrial base consists of big orders to the developing world. You don't get those deals without being willing to grease a few palms. The country's business establishment has allowed itself to become reliant on wheeler-dealing with the murkiest corners of the world. It can hardly complain if that means executives often stray into breaking the law. It is part of the business model.

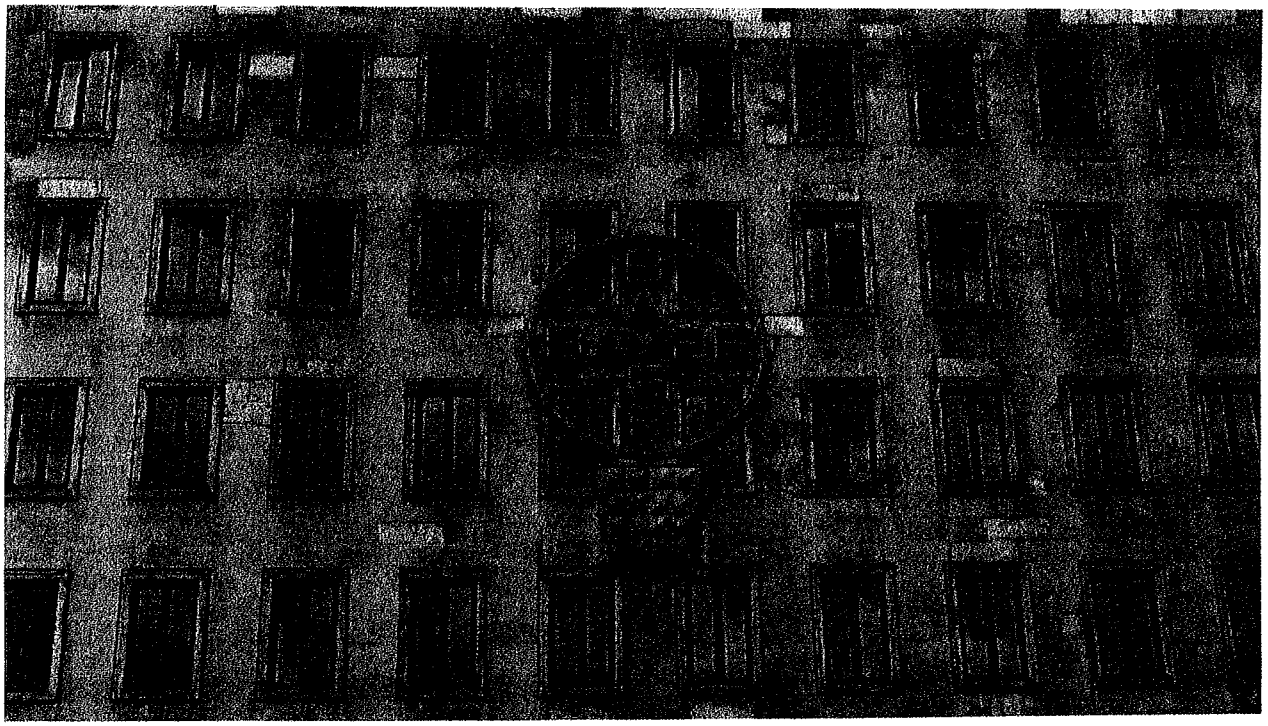
The Germans are fond of portraying themselves as the exemplars of responsible, socially conscious capitalism. In truth, however, the hypocrisy is starting to become nauseating. There is clearly something rotten within Germany's business culture – and even worse, no one seems to want to do anything about it.

Opinion **Bayer AG**

Bayer's woes point to a wider truth about Germany

A country that excels at innovation shrinks from the consequences of it

FREDERICK STUDEMANN



The Bayer case touches on a German paradox: an enthusiasm for technical innovation combined with a profound unease of its consequences
© Reuters

Frederick Studemann MAY 16 2019

As working dinners go, it was something different. A clutch of journalists gathered in a swanky Berlin restaurant to hear all about the marvels and benefits of genetically modified foods — and to sample some of what sceptics dubbed "Franken foods". A case of savouring the first draft of history.

The gathering, in the late 1990s, was all part of a charm offensive laid on by some German chemicals companies. They wanted to make the case for innovation that would herald a new era in food science, the only way to provide enough sustenance for a booming world population. Among those at the forefront of this endeavour was Monsanto of the US.

Faced with considerable opposition at home — those charm offensives went down like rank wine — companies like Bayer were left to explore other means of staying at the forefront of innovation, often looking abroad and to acquisitions to do so.

Memories of those times came back to me this week with the news that Bayer had lost another court case in the US, presenting the German company with a bill that could potentially run to billions of dollars. The California case relates to serious illness allegedly caused by Roundup, a weedkiller produced by Monsanto, which Bayer acquired last year for $63bn.

Now, in the wake of the court case and a falling share price, some observers have been quick to speculate that this may all spell "*das Aus*" — the end — for the 155-year-old company based in Leverkusen on the banks of the Rhine. Even if it does not come to that, Bayer's woes are a massive comedown for a company long synonymous with industrial research prowess and commercial success. The chemicals giant was among a clutch of big German companies — the fabled "Deutschland AG" — that collectively embodied the country's economic recovery after the second world war and its distinctive way of doing business.

"Companies like Bayer, BASF and Daimler were the flag-carriers for the postwar system," says Ursula Weidenfeld, author of books on German business. "They played a big role in the community, financing the sports clubs and parks, and looked after their employees, training them properly and so on. They saw themselves as the good guys."

Now the company that gave the world aspirin has got a major league headache. It has also provided a case study in two significant features of German business today: the challenges of big global acquisitions, and the ability to pursue top-level technological innovation in the face of societal and political resistance.

Bayer's current problems in the US see it join fellow members of the old Deutschland AG club — Volkswagen, Daimler and Deutsche Bank — in discovering that the land of boundless opportunities is also one of many pitfalls and challenges, as well as costly lawsuits.

The Bayer case also touches on another very German paradox: an enthusiasm and gift for technical innovation combined with a profound unease, and rejection, of its consequences. From nuclear power to biotechnology, Germany has produced much world-class, groundbreaking research — and some of the most vehement opposition to its application. The country once at the forefront of civil nuclear power technology has chosen to switch off its reactors; the cradle of much innovation in chemicals is noted for its organic tastes.

In seeking to explain this, some point to a moralising tendency, the product of deep religious roots informed by the darker lessons of recent history. Others quip that it is all part of the brooding national character. For Klaus Schweinsberg, a professor of business who advises a number of top German executives, it also stems from a reluctance fully to accept the consequences of cutting-edge innovation. "We want it, we develop it, but at the end of the day we don't want it here, so it has to then happen abroad," he says.

This is, he adds, a fair reflection of the end of the era of Angela Merkel, chancellor: wanting global relevance while avoiding tough discussions. It is a course that has arguably served Germany well over the past decade or so — but not always without cost, as Bayer has learnt.

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Opinion

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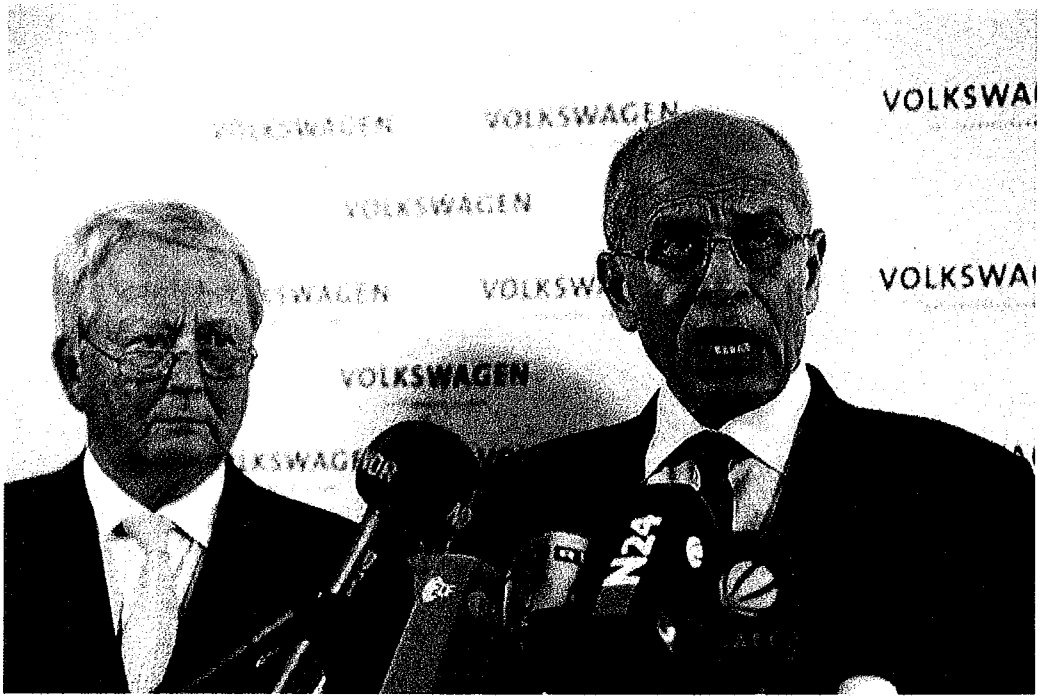
Is Something Rotten in the State of Corporate Germany?

The manner of Martin Winterkorn's resignation calls into question German corporate governance practices.

By Leonid Bershidsky
September 24, 2015, 7:06 AM PDT



Weasel words. *Photographer: Alexander Koerner/Getty Images*

Leonid Bershidsky is Bloomberg Opinion's Europe columnist. He was the founding editor of the Russian business daily Vedomosti and founded the opinion website Slon.ru.

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COMMENTS
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In this article

As it accepted the resignation of Chief Executive Martin Winterkorn on Wednesday, the executive committee of Volkswagen's supervisory board praised his "towering contributions" to the company that stands to lose much of its $37 billion cash stash making amends for major fraud committed on Winterkorn's watch. Such graciousness is a German tradition, and it raises the question whether there's something fundamentally wrong with the country's corporate establishment.

In its statement, the committee declares as fact that Winterkorn "had no knowledge of the manipulation of emissions data." There was no way to establish that in the short time since VW's use of special software to cheat

VOW
VOLKSWAGEN AG
146.30 EUR
▼ -1.10 -0.75%

SIE
SIEMENS AG-REG
111.08 EUR
▲ +0.18 +0.16%

DBK
DEUTSCHE BANK-RG
7.87 EUR
▼ -0.10 -1.22%

emissions tests came to light. The board, which in April backed Winterkorn in a battle with company patriarch Ferdinand Piech, must have taken the chief executive's world for it. That is amazing leniency on the part of a group of people charged with looking out for shareholders' interests, given that VW's stock is down 28 percent since September 18.

There's nothing unusual about it, though. When Anshu Jain stepped down as co-chief executive of Deutsche Bank in June, the bank's stock price was down 17 percent from this year's high in April, dogged by continuing heavy fines for all sorts of past misdeeds -- many committed on Jain's watch -- and a helpless restructuring plan he had proposed. Yet Paul Achleitner, chairman of Deutsche's supervisory board, expressed his appreciation for the contribution of Jain and the other co-chief executive, Juergen Fitschen, who is leaving at the end of this year, in almost the same words the VW board used for Winterkorn.

In 2013, the supervisory board of Siemens, Germany's fifth biggest company by revenue, announced the resignation of Peter Loescher, whose time as chief executive was marked by costly delays in important projects and woeful strategic errors, noting that "Under his leadership, the company achieved a substantially higher level of performance and profitability." Loescher was credited with cleaning up Siemens after the company was caught bribing officials in a number of countries to land contracts. That scandal was the undoing of his predecessor Klaus Kleinfeld, who was seen off with the message that thanks to his leadership, "Siemens is in better condition than ever before."

This is not a question of decorum. It may be that malfeasance of the kind seen at VW, Deutsche Bank and Siemens over the years, as well as a lack of executive responsibility for it -- beyond the nuisance of having to resign and be sorely missed -- is built into the German corporate governance system.

This system is distinctive in that it recognizes the interests of more than just the shareholders. Other stakeholders,

such as workers, local governments and often creditors are represented on supervisory boards. In accordance with German law, half of Volkswagen's board consists of employee representatives elected by the workforce. Besides, two of the board's 20 members are delegated by the state of Lower Saxony. Votes by the workers and the local bureaucrats secured Winterkorn's boardroom triumph in April. Workers' representatives, including labor union leaders, take up half the seats on the boards of Siemens and Deutsche Bank, too.

This is called "co-determination." The term has more to it, though, than joint decision-making. As a result, employees' and other stakeholders' interests become closely aligned with those of management. There's a strong *esprit de corps*, which isn't necessarily conducive to a clean, value-based culture. In a recent paper, the University of Michigan's David Hess recalled the Siemens bribery scandal:

> "Although the German laws had changed to make it clear that bribing foreign government officials was illegal, the company continued to pay bribes because, as one manager stated, employees believed they had to pay them or else 'we'd ruin the company.' "

It is a feature of every scandal that it is followed by promises of a clean-up. VW has promised "full consequences" for employees found guilty of wrongdoing. Deutsche Bank and Siemens created elaborate anti-corruption programs. Whether they are effective is another matter. Deutsche Bank is now scaling back its Russian business following investigations into benchmark fixing and money laundering on behalf of Russian clients. Siemens still faces repercussions from the old bribery scandal in countries from Brazil to Israel to Greece.

No wonder it often takes intervention from foreign authorities to uncover wrongdoing by German corporations. In the cases of VW and Siemens, U.S. probes led to the damaging revelations. At Deutsche Bank, shady practices might have continued but for the attention of financial regulators in the U.S. and the U.K. German corporations are inclusive but, in part because of that, closed systems: They keep stakeholders happy, but when

outsiders ruin the cozy atmosphere, shareholder returns tend to plummet and the consequences are spread over many years.

Chancellor Angela Merkel, who has run Germany for the last decade, has done a lot to turn it into a values-based society. It's easy to attack German corporations from that point of view. "Valuable cars can only be built if values matter in a company," Heribert Prantl wrote in a Sueddeutssche Zeitung column criticizing Volkswagen for letting Winterkorn get off so lightly. "The big question now is when VW will be valuable again. A resignation is not enough here."

The German corporate establishment is out of step with a society that is actively atoning for its 20th century sins. If it cannot cleanse itself, perhaps changes are needed to the corporate governance system to give investors a bigger role and give other stakeholders a stronger voice.

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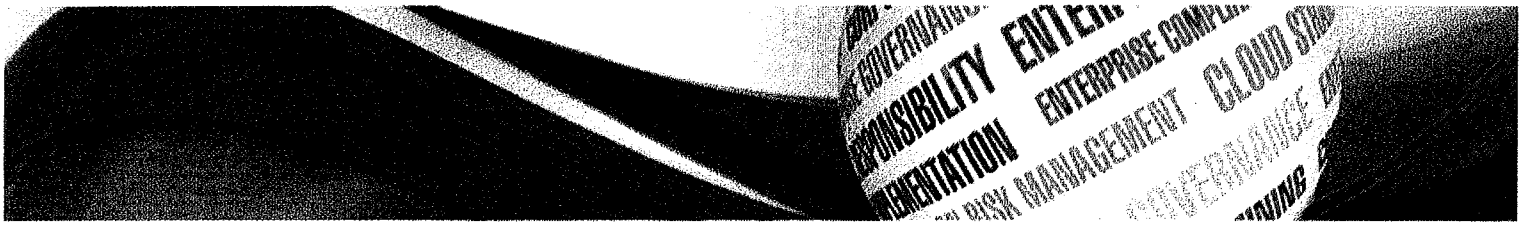


VW, A HORROR STORY OF BAD GOVERNANCE AND THE DESTRUCTION OF CORPORATE VALUES

Bad Corporate Governance often signals concern for the board and management to identify the broken 'governance' components in the organisation. There is a need for the right analysis that is capable of providing the insight, culture and nature of the significant risks. At the 9th annual European GRC Summit in Stockholm, we will review the governance processes to evaluate their corporate vulnerability, and provide guidance on a systematic evaluation to look for symptoms of bad governance behavior that identify the key risk areas.

The German corporate governance code provides some of the components of bad corporate behavior. Weak company culture is often the root cause of many non-compliance issues, flawed corporate governance failures and deficient risk and control processes. The symptoms of a bad governance culture are the challenges that German corporate directors face, in order to diagnose and oversee the company's risk culture and determine the deficiencies for further action.

To find the symptoms of bad governance culture and challenges, there is a need to diagnose the problems created by the German Corporate Governance Code, for governance deficiencies. However to evaluate the governance causes that foster a weak company culture, root-cause of non-compliance issues, global governance failures and deficient risk and control processes, a solid governance platform is needed.

One of the problems is the composition of Germany's supervisory boards. The board members of listed companies are much older, have longer tenure, and are less likely to have specific industry experience, compared to other big European economies. The German supervisory boards are also often bulky, with up to 20 to 30 members, including management.

The second problem, not particularly exposed only in Germany, is the multitude of family-controlled firms. Such corporate constructions can often lead to a problem, if the relationship of trust between the board, management, minority and controlling shareholders does not work. Naturally this leads to the departure from the standard control functions that minority

Issue XVIII
Issue XIX
Issue XX
Issue XXI

shareholders can exercise over management.

The third Governance issue is the absence of large, independent institutional investors. Shareholder activism is restrained by the limited powers granted to concerned investors. In many other European countries, failings of corporate governance mandates are addressed by stakeholders that press for change or private equity or hedge funds that threaten to take over companies that are performing poorly. German institutional investors, hold a 2.1 percent stake in VW, compared to a 26.3 percent of the shares owned by foreign institutions.

The fourth management problem is that employee representation often takes half the seats of the company's supervisory board. Therefore, a separate management board handles running the day today business and addresses the interest of all stakeholders, and not just a shareholders alone, a problem many global chairmen also face.

The combination of the above Governance restraints is probably the root-cause, which often underlines most corporate scandals that are due to governance failures. In the case of Volkswagen, the focus of the governance comments and analysis based on their annual report, it seems that the role of the board and institutional shareholders, prevents the detection of incentive structures that determine employee actions of fraud. The absence of governance components can contribute to passive stakeholders that are unable to act to discover GRC structures that might influence managers or employees to commit fraud.

Imperfect Industrial champions

Some of the German famed global industrial champions, have not been model corporate citizens. Since 2005, a series of scandals have hit the German companies and has brought embarrassment to their corporate culture. Allegations and admissions of bribery, corruption and misdeeds have surfaced at the highest levels of business at Siemens, BMW, Infineon and Commerzbank. Executives were fired, and some faced criminal investigations or prison.

Recently Deutsche Bank AG was fined 8.4 musd by the Dubai Financial Services Authority for serious breaches relating to failures in internal governance, risk management and compliance (GRC) systems and controls on anti-money laundering processes.

Fundamental change

The continued number of significant scandals, reveal that the EU directives governing accountability and transparency in business toward shareholders, the public, oversight and regulatory agencies as well as all other stakeholders, seems to be under developed in Germany.

The continued number of large corporate scandals provides sufficient evidence that nonadherence to GRC mandates is an issue and could be a part and parcel of the business culture. The board of directors must undertake an annual GRC assessment to ensure that monitoring controls and measures are in place to improve the tone-at-the-top on all GRC issues.

In addition there must be a serious re-examination of particular governance componenets and issues in realtion to the dual board structure, code-of-conduct and the ethical behavior of employees at all levels, so that fraud, violations, bribery, and other serious compliance breaches are timely discovered.

At the 9th annual European GRC Summit we address the above with the following two keynotes;

What Do Ceos & Non-Executive Directors Expect From The Grc Officers?

- What's the right level of communication to business stakeholders?
- What's the Right Level of GRC Communication to Business Stakeholders, Non-Executive Directors, and CEOs
- What's the right level of communication to business stakeholders?

Lady Olga Maitland, Chairman Copenhagen Compliance

How Can The Board Of Directors Fulfill Their Monitoring Responsibilities And Support Senior Management With Governance, Audit, Legal, And Risk Compliance?
How can the board of directors help GRC officers to understand, build and manage their GRC, ethics & code-of-conduct programs effectively, for better reporting to the board, stakeholders, and oversight authorities?
Andrea Gisle Joosen, Chairman of the Board/Non-Executive Director of ICA Gruppen AB, Teknikmagasinet AB, Dixons Carphone Plc, James Hardie Industries plc.

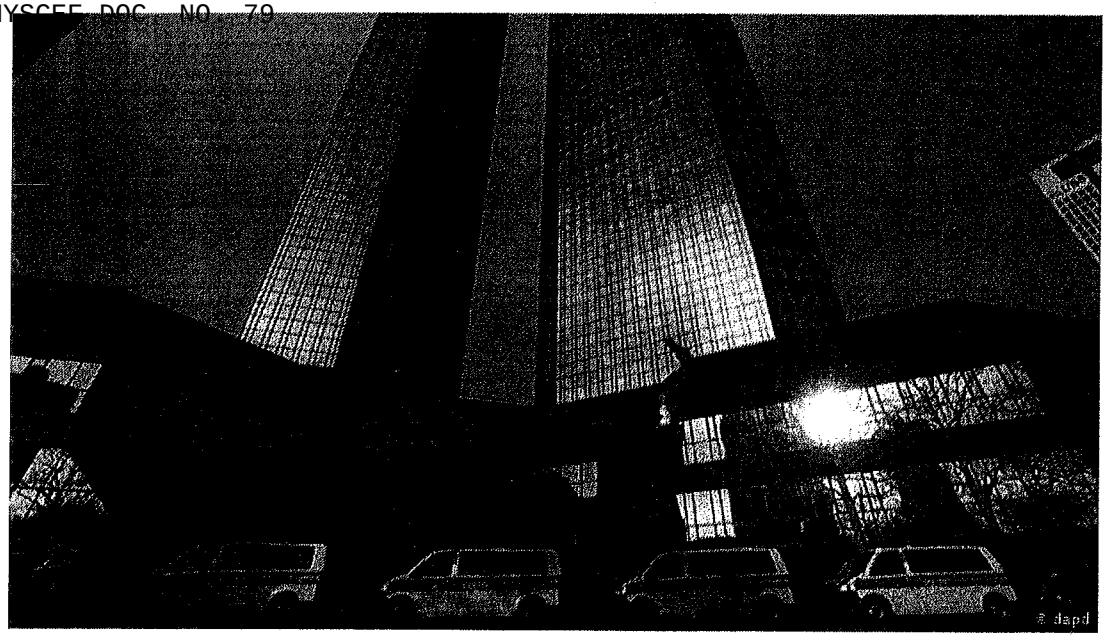
Dec 11, 2012

BUSINESS

Image problems mount in corporate Germany

Many big German companies have become embroiled in criminal investigations recently, suggesting a worsening of ethical standards in corporate Germany. But only ethics pay off in the end, business experts say.

Tax fraud, money laundering and embezzlement - the list of allegations leveled against Deutsche Bank Chief Executive Jürgen Fitschen recently has become an outright scandal. They add to a number of woes besetting Germany's biggest private bank such as manipulation of the London Interbank Offered Rate (Libor) - a key interest rate for loans - or a libel lawsuit brought against Deutsche Bank by media mogul Leo Kirch.



Police raiding Deutsche Bank's headquarters means bad publicity

It was hardly possible to quantify the pecuniary losses resulting from a tarnished image, Josef Wieland told DW, nor would they show up in balance sheets. However, a ruined reputation might eventually lead to the "collapse" of a business in the long run, the expert for corporate ethics at Konstanz University said.

"Questions of what type of employees might be attracted by such a business, and how do customers react, have a lot to do with a firm's ethical reputation, which is why companies put enormous emphasis on the issue," he added.

Sex and crime

Nevertheless, a number of big German corporations have moved into the focus of German law enforcement authorities in recent years.

Steelmaker ThyssenKrupp, for example, is being investigated for forming a price-fixing cartel in the elevator market and the rail track business.

Truck and bus manufacturer MAN is said to have offered millions in kickbacks in return for lucrative deals from public and private transport companies in several countries.

An investigation into luxury carmaker Daimler uncovered evidence of graft in 22 countries around the world, while its German mass market counterpart Volkswagen was convicted of bribing labor representatives on its board with expensive presents, luxury travels and sex parties. Similarly unethical behavior had been rampant within the ERGO insurance group, it was uncovered last year.

These scandals seem to suggest that compliance with ethical standards in business remains underdeveloped in German companies.

Role models needed

Christoph Lütge, Professor for Business Ethics at Munich Technical University denied this. Noting that compliance just meant abiding by the rules and laws of a country, he told DW that most of the big corporations in Germany had invested substantial sums in setting up compliance units in their operations.

However, Josef Wieland disagreed, stressing that complying with existing rules and laws was not enough.

"What really matters is compliance and integrity, meaning the leadership example, or the 'tone from the top,' shapes the business culture within a company," he told DW.

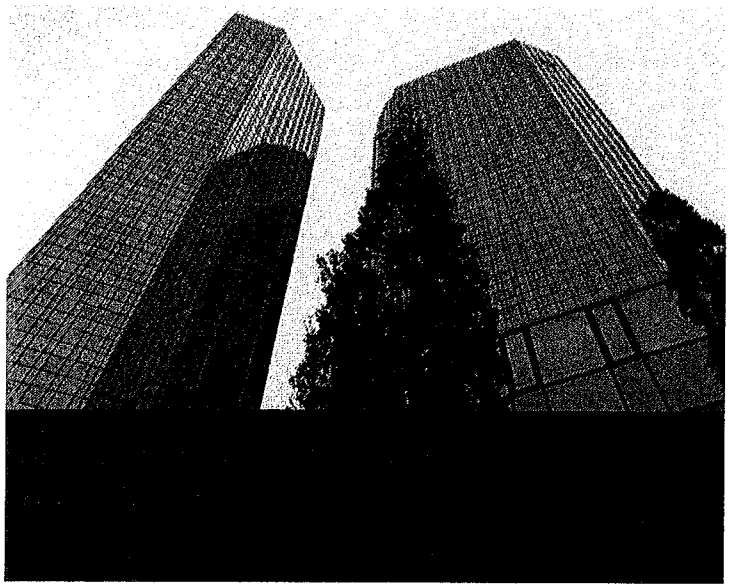
Without integrity and determination among company leaders, the behavior of employees is bound to stray from the right course, he added.

Clean business pays off

In 2006, German engineering giant Siemens was involved in the biggest-ever graft scandal in German business history, as investigators

uncovered bribery payments to the tune of 1.3 billion euros ($1.7 billion). As a result, Siemens was given a hefty fine of 1.2 billion euros by a German court and a penalty, reportedly at least as high, by a court in the United States.

"At least since the Siemens case, we know that non-compliance with ethical standards can turn out to be quite expensive," Josef Wieland told DW.



A tarnished reputation might not have an exact price tag, he said, but falling share prices as a result of mounting internal costs would certainly wake up investors.

"Shareholders have a vested interest in compliance and should make sure ethical standards are observed," he added.

In most German companies, the fact that honesty eventually pays off, appears to dominate business policy. Christoph Lütge pointed out that honesty is best served in a functioning business environment, in which consumers ensure that ethics were matched with commercial success.

Rolf Wenkel, uhe/sej

DW RECOMMENDS

» Deutsche Bank fails to change its culture
Already struggling with a bad reputation for past banking practices, Deutsche Bank has suffered another blow in the effort to polish its image. Top brass at Germany's largest bank are under investigation for tax evasion. (13.12.2012)

» Deutsche Bank CEO Fitschen in focus of tax fraud probe
Police have raided Deutsche Bank offices in several cities in search of evidence of tax fraud and money laundering related to EU carbon emissions trade. One of the bank's two chief executives is now under investigation. (12.12.2012)

» ThyssenKrupp sacks managers amid graft, cartel allegations
German steelmaker ThyssenKrupp has dismissed three senior managers involved in a series of scandals about luxury travels, price fixing and mismanagement. The reshuffle is dubbed a "fresh start" for the struggling firm. (06.12.2012)

Business

Aug 6th 2009 edition ›

Germany's flawed corporate governance

Boards behaving badly

Why the leading citizens of corporate Germany are so scandal-prone

BERLIN

Illustration by David Simonds

THE streets of Germany's main cities still throng with shoppers; no shops are shuttered. Much credit for that is due to the country's famed industrial champions, which have been model corporate citizens throughout the recession, keeping employees on the payroll and investing for the long-term. Yet many of them are also remarkably scandal-prone. Big companies such as Deutsche Bank, Deutsche Telekom, Deutsche Bahn and Lidl have been caught spying on workers, journalists or board members. Siemens has confessed to bribing customers and MAN is being investigated for the same. At Volkswagen, a manager was caught paying off a member of its supervisory board. Schaeffler and Porsche are in trouble after launching murky, ill-conceived takeovers involving derivatives and mountains of debt. Yet these two seemingly contradictory aspects of German corporate behaviour may be opposite sides of the same coin.

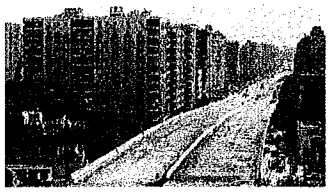
One reason why Germany's biggest firms have not cut many jobs is its cherished model of stakeholder capitalism, which took root after the second world war and contributed to its rapid economic growth until the 1980s. Under this model, workers' representatives fill half the seats on firms' supervisory boards. A separate management board is responsible for running the business day to day. Companies are also required to act in the interest of all "stakeholders", not just of shareholders.

That creates a tension between profits and jobs. A seminal, if dated, study is illustrative. It found that 83% of German managers surveyed in 1995 considered that the companies they worked for belonged to stakeholders rather than shareholders. Some 60% said that saving jobs was more important than paying dividends. In America and Britain, by contrast, almost 90% of managers said that paying dividends was more important than preserving jobs and 75% of managers felt that firms belonged to their shareholders.

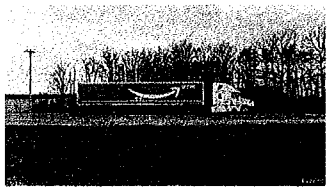
Many Germans see this focus on stakeholders as a strength. Germany's Governance Commission, an official watchdog, decided earlier this year that German corporate governance had "proved its worth during the current crisis". Involving employees in hard decisions about restructuring can help in a downturn. Firms such as

Readers' favourites

UNITED STATES
Mike Pence v Kamala Harris ends in a normal sort of a draw



MIDDLE EAST & AFRICA
Egypt is busily building expressways



BUSINESS
Google, antitrust and how best to regulate big tech

Daimler have cut working hours and pay, with the support of their employees. And IG Metall, Germany's main industrial union, is in talks with several troubled firms about pay cuts for its members in exchange for shares.

German firms are renowned for taking "long-term" decisions. Even as revenues have plunged, Germany's big carmakers, for instance, have kept up spending on research and technology. "Workers' representatives tend to be very entrepreneurial," says Walter Friederichs of Russell Reynolds Associates, a recruitment firm. "They want to preserve the company for the future."

Yet Germany's system of corporate governance also lends itself to bad behaviour. One problem is the composition of Germany's supervisory boards: a study of Germany's biggest listed firms by Russell Reynolds found that on average their board members were older, had longer tenure, were less likely to have specific industry experience and were far less likely to be foreign than in Europe's other big economies. German supervisory boards are also often unwieldy, with up to 20 members. When the firm's management is included, meetings run to 30 people.

A second problem is the preponderance of family-controlled firms. That leads to a focus on the relationship between minority and controlling shareholders, rather than on the control that shareholders as a whole exercise over managers, says Matteo Tonello, a corporate-governance expert at the Conference Board, a think-tank.

Weak oversight of firms, private and public, may have contributed to the recent troubles of leading German firms that have allowed strong managers or controlling shareholders to take on too much risk, says Jörg Rocholl of the European School of Management and Technology in Berlin. One such example is Porsche, which for years resisted demands from the stock exchange to publish quarterly reports (it argued they would reflect badly on it during slow quarters). It is now being taken over by Volkswagen, its erstwhile target in a drawn-out takeover battle, after buckling under the weight of debt and derivatives it took on in a bid to wrest control of VW.

In many other countries, failings of corporate governance can often be addressed from the outside by shareholders pressing for change or taking over companies that are performing poorly. But in Germany this sort of activism is restrained by the absence of large, independent institutional investors and by the limited powers granted to activist investors.

Much has changed in Germany since the days of Deutschland AG, when banks and big firms had complex cross-holdings that prevented hostile takeovers. Even so, scepticism about shareholders' role in holding managers to account is still deep seated, says Hans Hirt, head of corporate governance at Hermes, a British fund manager with investments in Germany.

Hedge funds and private-equity firms are barely tolerated. After activist shareholders led by the Children's Investment Fund, a London hedge fund, forced Deutsche Börse to abandon its bid for the London Stock Exchange in 2005, the government passed laws making it harder for minority shareholders to push reforms. Christopher Hohn, who runs the fund, was labelled a "locust" for his aggressive tactics, and has since given up trying to change the company. Few Germans are likely to do battle in his stead.

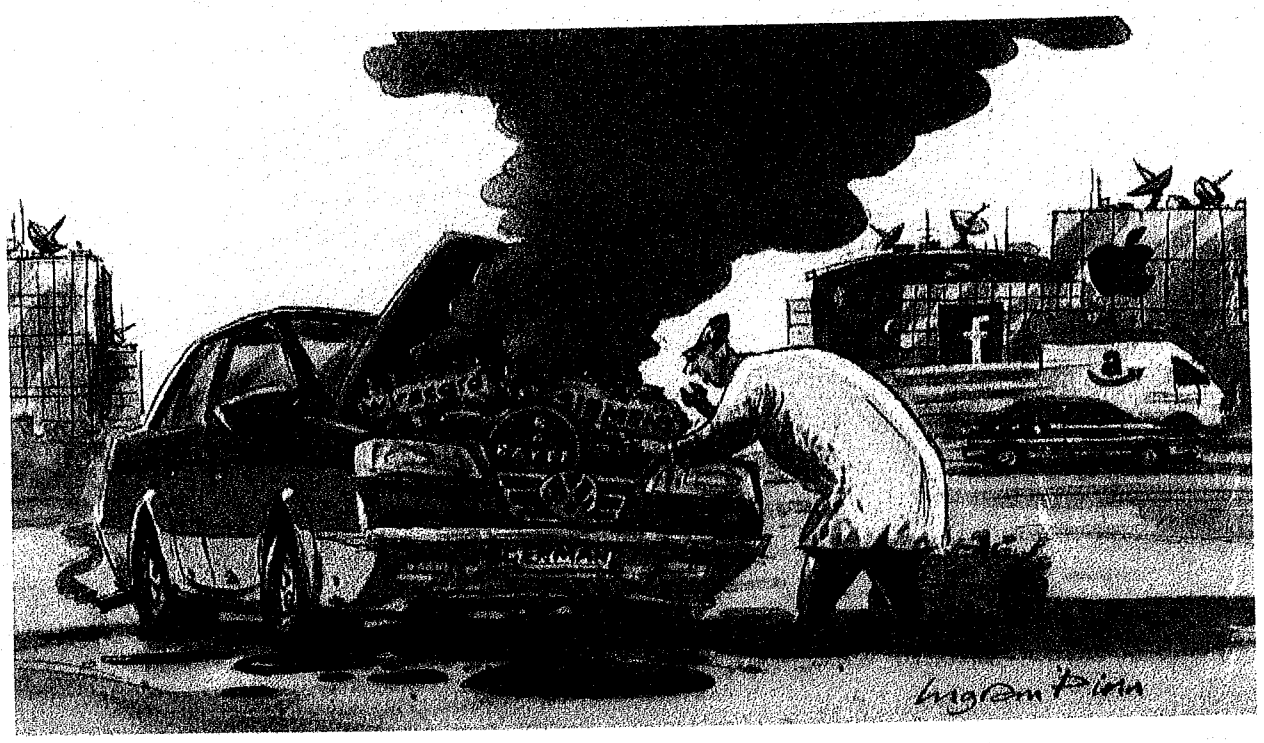
This article appeared in the Business section of the print edition under the headline "Boards behaving badly"

Opinion **Germany**

German corporations – and regulation – are in the dock

The country's consensual model of capitalism needs an overhaul in the wake of Wirecard's implosion

JONATHAN GUTHRIE



© Ingram Pinn

Jonathan Guthrie JUNE 30 2020

Gears were seizing up and gaskets burning out long before the emergency stop on the autobahn. Now the consensual German model of business has suffered multiple mechanical failures. Wirecard, the payments group that bolstered German tech credentials, has imploded in fraud. Bayer is taking up to $11bn in charges mostly triggered by a disastrous US takeover. Once-proud conglomerates Siemens and Thyssenkrupp are shrinking. Volkswagen's service life shortens each time Tesla's outlook improves.

Worried engineers are peering under the hood. What has gone wrong? Germany has been Europe's postwar economic motor. Technocratic and collaborative, German business fostered close links with workers, lenders and the state. The US model looked anarchic in comparison — warring bosses and entrepreneurs pumped up with equity and spoiling for a fight. But coronavirus has intensified the challenges facing manufacturing-focused Germany and the opportunities for the tech-led US.

Germany can we talk? "Sure. I'm driving but I'm German so that's second nature," jokes an economist via his hands-free, "I don't think there is any common thread between Wirecard and these other examples." According to him, the worst accidents occur when German business adopts US ways. Wirecard had a two-tier board structure, like most German businesses. But its supervisory board was seemingly full of corporate yespersons, not vigilant workers as governance rules dictate. And the group was led by a bossy entrepreneur.

Kenneth Amaeshi, a professor of business at Edinburgh university, disagrees with such exceptionalism. He believes the Wirecard scandal puts German stakeholder capitalism "in the dock". It points to a structural weakness of regulation, he says. He is right.

German financial regulator BaFin failed by restricting its oversight to Wirecard's German banking arm. A German banker says: "BaFin isn't in the same league as the [UK's] Financial Conduct Authority, which impressed me when I was in London." A banker who privately confesses an admiration for the FCA? Is that a first?

In the past, UK regulation has had a reputation for laissez-faire laziness. Germany's regulatory lapses spring from another root: a love of consensus. This is the cause of the German model's problems. Watchdogs assume CEOs must know what they are doing — after all, many have PhDs. Supervisory boards assume the same thing, so long as jobs are safe. When consensus has delivered huge economic dividends, people who ask tough questions can look like wreckers. That is why the German financial establishment turned on journalists and hedge funds who doubted Wirecard's financial solidity.

Consensus is to blame for other woes. It suited Bayer's bosses and workers to buy Monsanto for $63bn in cash in 2018 because this promised to make the chemicals group invulnerable to takeover. Engineers Siemens and Thyssenkrupp were permitted to muddle along as outdated conglomerates long after a wave of break-ups in the US and UK. VW perpetrated a diesel emissions testing scandal while dithering over electric vehicles thanks to fierce executives and a board crowded with trade unionists and political appointees.

Consensus has failed to foster German tech start-ups to rival the US giants. For that, you need disruptive mavericks financed with patient equity. The collapse of Wirecard has left SAP, a software group founded in 1972, as Germany's only large quoted tech company.

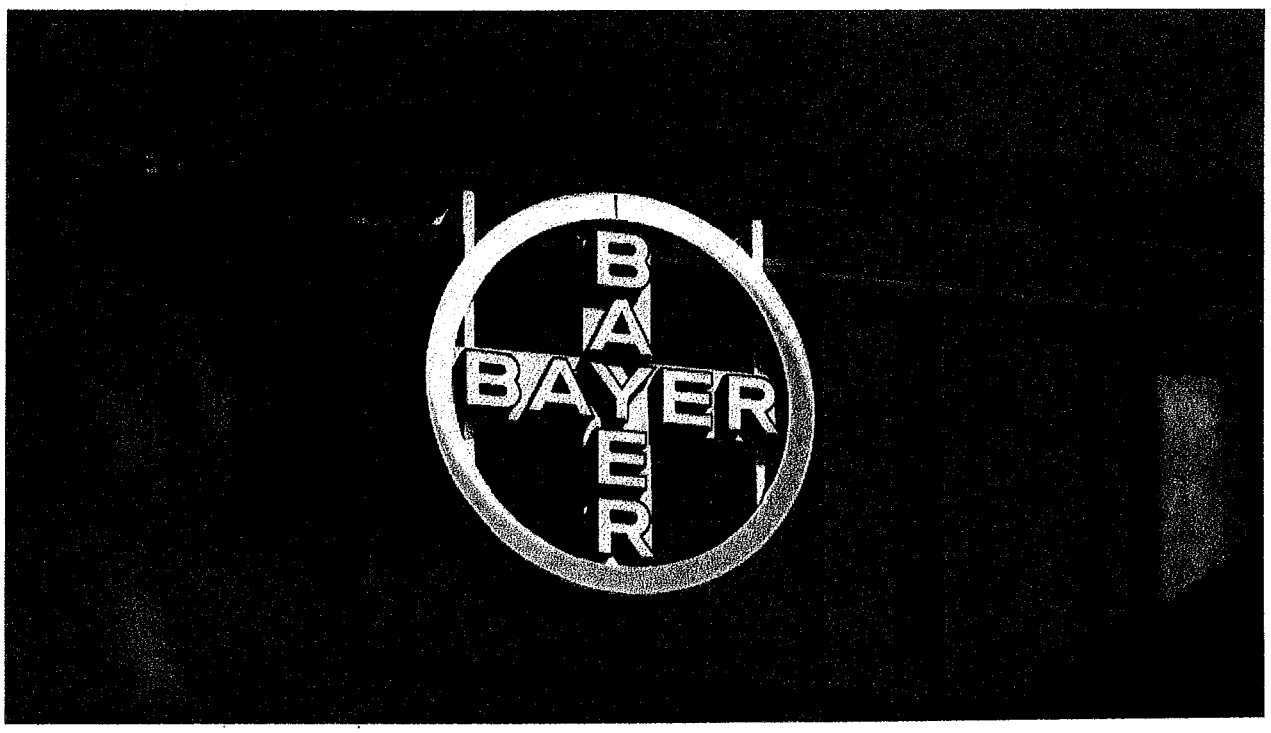
The UK, of course, has none. Even so, German economists ponder whether *Rheinischer Kapitalismus* can be re-engineered, or is fit only for the crusher. "Germany is good at making incremental improvements," says Allianz's Katharina Utermöhl, "the question is whether stakeholders have the will to update the German model deeply". They have done so before. In the noughties, Germany unpicked Deutschland AG, an incestuous network of crossholdings between banks and industry.

Opinion **Markets Insight**

Why Germany Inc needs a big governance reboot

Too many giants of the Dax are suffering from self-inflicted wounds

OLAF STORBECK



Bayer is reeling from its acquisition of Monsanto © Reuters

Olaf Storbeck AUGUST 20 2019

German engineering has long been the envy of the world. Recently, however, the country's blue chips have not just excelled in cranking out top-notch cars, drugs and machine tools. A large part of the corporate sector has become extraordinarily adept at shooting itself in the foot.

Eight of the 30 Dax companies are currently suffering from self-inflicted wounds that have cost shareholders dearly. The three carmakers Volkswagen, Daimler and BMW, as well as automotive supplier Continental, are all paying the price for clinging on to an increasingly obsolescent technology, the internal combustion engine. One leading private equity investor says that group's "collective failure" has been caused by "the arrogance of power".

This to-weedkiller group Bayer, meanwhile, is reeling from its acquisition of Monsanto, the US seeds group, which may rank among the most disastrous in history. And there are more. Byzantine industrial conglomerate Thyssenkrupp has been on a strategic odyssey for more than a decade, desperately looking for new options after its fourth profit warning in just over a year. Deutsche Bank has only recently abandoned a dream of becoming the European Goldman Sachs, while Wirecard had to delay its 2018 annual report amid a police probe in Singapore.

With a combined market capitalisation of about €270bn, these eight companies represent about one-quarter of the Dax's total value. Excluding Wirecard, which despite this year's troubles has seen a strong rally in its shares, the problem children have witnessed combined falls of about €100bn in their stock market value over the past five years.

The worst offender is not even part of that list, as it dropped out of the Dax altogether. In 2015, Europe's largest potash producer K+S rejected a takeover approach by Canadian rival PotashCorp of Saskatchewan. The suitor had offered a 40 per cent premium, valuing K+S at close to €8bn. K+S's management argued that the offer "does not adequately reflect [its] fundamental value". But since PotashCorp was shooed away the Kassel-based company's market cap has collapsed to below €3bn.

German companies have no monopoly on managerial incompetence and corporate blunders. However, the remarkable clustering among Dax companies suggest that the German situation is more than just a coincidence. The most plausible explanation is that the pattern is linked to flaws in Germany's distinctive model of corporate governance.

Entrenched managers can still run blue chips in their own way, lacking efficient checks and balances from the supervisory board as well as from shareholders.

Take Bayer. Investors fled the drugmaker's stock in droves once the high price for Monsanto was announced. Yet management — with backing from the supervisory board, led by ex-chief executive Werner Wenning — did not budge. German corporate law does not prescribe a shareholder vote on mergers and acquisitions; regardless of a deal's size, all that is needed is the supervisory board's approval.

To some extent, Bayer shareholders have only themselves to blame. Prior to the deal, they had granted the group a five-year permit to increase the share count by as much as 45 per cent — opening the door for Bayer to fund the $64bn takeover, Germany's biggest ever.

Such far-reaching "general mandates" are a standard feature for listed German companies. Intended to offer a fast track to new capital in an emergency, they can instead be used as a way for managers to put their own interests ahead of shareholders.

Before Bayer tabled its bid for Monsanto, the US group had flagged interest in buying the German company's crop science division, people familiar with the matter told the Financial Times. Such a transaction could have left Bayer's shareholders with a rich premium and billions in cash to spend on beefing up the core drugs segment.

But nothing came of it. By buying Monsanto instead, Bayer designed its own poison pill. It was too effective by half, roughly halving Bayer's stock market value from a peak in April 2015.

Such misguided actions, which go against the grain of shareholder democracy, are made easier by Germany's governance structures. More often that not, supervisory boards are made up of corporate lightweights who do not challenge management enough. "This is probably one of the fundamental reasons why returns in private equity are significantly higher," says the senior private-equity investor.

Shareholders, as well as workers, who find themselves in financially weaker companies that eventually come in for tough restructurings, are the ultimate losers. Last October the Dax lost its historic premium, on a price/book value basis, to the Euro Stoxx 50, the blue-chip benchmark for the eurozone, and is now trading at a record discount. Against the US yardstick, the S&P 500, Germany's discount on a similar basis is at its widest for 18 years.

Just halving that valuation gap would be more than enough to create a stock market rally in Germany.

AUG 01, 2003

The Guardian

Bribes, corrupt chiefs and paid-for sex ... corporate Germany is in crisis

Big brands are being linked to widespread corruption

Car manufacturers BMW, DaimlerChrysler and Volkswagen; the country's fourth-largest financial institution, Commerzbank; Europe's largest chip-producer, Infineon - five of Germany's leading firms, all members of its Dax-30 blue-chip index, have become embroiled in corruption scandals in recent months.

The revelations of kickbacks, money-laundering and paid-for sex have shocked a country that is already trying - and failing - to come to terms with its fall from grace as Europe's model economy and is mired in anxious depression. Not so much banana republic as backhander republic.

A handful of senior executives, including Peter Hartz, VW's personnel chief and architect of the Schröder government's labour reforms, have resigned; others are being investigated by criminal prosecutors. The country's two-tier company board structure, including the role of the supervisory board, has come under increased criticism.

There are even suggestions that corruption is endemic in German corporate culture.

"It's normal that the cases only come to light by accident and the 'dark' numbers are very high, but only 5% to 10% of cases become known," says Peter von Blomberg, deputy chairman of the German chapter of Transparency International. A former executive with insurer Allianz and protagonist of a series of measures to combat corruption through whistle-blowing and binding codes of corporate behaviour, he says: "We are speaking of the tip of an iceberg, but the problem is that we don't know how big the iceberg is."

He points to a prominent state prosecutor who claims corruption is so rife that in the construction sector alone - which is allegedly responsible for 40% of cases - the damage to the economy runs at €5bn (£3.4bn) a year.

But he says these are crude estimates, pointing out that Germany ranks quite high for lack of corruption in international indices - a few places ahead of Britain but behind Nordic countries such as Finland.

'Politically sensitive'

Professor Manuel Theisen, who holds the chair of business administration at Munich university, insists that the phenomenon is widespread but agrees that greater transparency, especially after the scandals in America such as Enron and WorldCom, has played a crucial role.

But he also believes that the dire economic situation has encouraged people, including investors, to come forward with allegations and says it's no accident that three of the scandal-hit firms are in the car sector.

"One in eight German jobs is in the industry and it's also the most politically sensitive. It's probably no accident that at VW, where politicians sit on the supervisory board, there's a battle between the socialists and the Christian Democrats outside in Lower Saxony."

The car industry is vulnerable because poor profit margins force purchasers to squeeze suppliers with price cuts, and they in turn are desperate to keep business. Prof Theisen says managers do not see backhanders as a crime but as a premium or even a commission for winning a contract.

More generally, he argues that the notion of shareholder value, of executives working for a firm's investors, cuts too little ice. "It is too small a part of the consciousness of managers who are more and more looking to increase their own wealth and line their back pockets."

Old boys' network

Mr von Blomberg believes there should be a binding code, backed by sanctions or prosecution, for executives and managers.

Publisher of a specialist magazine, the Supervisory Board, Prof Theisen agrees that such boards are too often part of a cosy old boys' network, with members lacking the courage to put forward alternative views or too prone to turn a blind eye to the workings of the executive board - to which they may have once belonged.

This failing has been most striking at VW, where union leaders on the works council not only negotiate pay and conditions but also sit on the board and appear content to be paid off with free trips, gifts, false expenses claims and even prostitutes paid for by the firm. Ferdinand Piech, the supervisory board chairman and former chief executive, has disclaimed any knowledge or responsibility and says he deliberately stayed away from the firm to allow more scope for his successor as chief executive, Bernd Pischetsrieder.

He says he will now be present once a week, adding more "bite" to clearing up management mistakes.

Internal controls

But Prof Theisen believes it is not the role of the supervisory board, which meets at most 12 times a year for six-hour sessions, to exercise internal controls; that is the job of the executive board - which, under German law, shares collective liability for all its members.

"They are all responsible for what an individual does."

Ultimately, commentators point to a cultural gap, a failure of corporate governance, at the heart of the recent scandals. Mr von Blomberg proposes reforms such as greater training in risk management, job rotation, more Chinese walls and, above all, an external, independent ombudsman to whom whistle-blowers can turn anonymously to expose scandals without exposing themselves.

But in a country which is only just now preparing to force companies to publish full-scale remuneration reports, it's corporate culture itself that needs to change.

The roll call of shame

Tip of the iceberg? The five corruption scandals rocking Germany:

· Volkswagen: three senior executives and chairman of works council resign. Allegations are: works council members given free trips, gifts for spouses, call-girls signed and paid for as company expenses; bogus firms set up by executives to build dealerships

· Commerzbank: alleged cover-up of money-laundering for Russian telecoms company; Andreas de Maiziere quits executive board; five current and former employees investigated

· Infineon: Andreas von Zitzewitz, executive director for memory chips, forced out over allegations that he took €259,000 over two years for setting up contracts for sponsoring motor-sports

· DaimlerChrysler: head of Mercedes distribution business in Germany sacked for allegedly using company money to build home for girlfriend in Majorca

· BMW: purchasing manager allegedly paid $100,000 in bribes by a supplier; wife paid for non-existent consulting work

America faces an epic choice ...

... in the coming weeks, and the results will define the country for a generation. These are perilous times. Over the last four years, much of what the Guardian holds dear has been threatened - democracy, civility, truth.

The country is at a crossroads. The Supreme Court hangs in the balance - and with it, the future of abortion and voting rights, healthcare, climate policy and much more. Science is in a battle with conjecture and instinct to determine policy in the middle of a pandemic. At the same time, the US is reckoning with centuries of racial injustice - as the White House stokes division along racial lines. At a time like this, an independent news organization that fights for truth and holds power to account is not just optional. It is essential.

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No Derivative Shareholder Suits in Europe – A Model of Percentage Limits and Collusion

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NO DERIVATIVE SHAREHOLDER SUITS IN EUROPE - A MODEL OF PERCENTAGE LIMITS AND COLLUSION

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We address one of the cardinal puzzles of European corporate law: the lack of derivate shareholder suits. We explain this phenomenon on the basis of percentage limits which require shareholders to hold a minimum amount of shares in order to bring a lawsuit. We show that, under this legal regime, managers will collude with large shareholders by means of settlements or bribes that impose a negative externality on small shareholders. Contrary to conventional agency models, we find that large shareholders do not monitor the management; as a consequence, there is no free riding opportunity for small shareholders.

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Introduction

In the vast majority of European jurisdictions minority shareholders can bring a derivative lawsuit against the management for breach of fiduciary duty.[1] Surprisingly, in spite of corporate fraud, there are practically no such lawsuits in continental Europe. Both the European Jurists Forum as well as the German Jurists Forum have issued experts opinions that include various proposals for a better regulation of management liability.[2] The fact that there are no derivate lawsuits is puzzling. Given that managerial actions are not directly observable, we should expect to have some misconduct and some lawsuits. If shareholders decided not to bring lawsuits at all, the managers would misappropriate as much or as often as possible. Clearly, shareholders would then bring at least some lawsuits. As a general result, Jensen & Meckling (1976) famously articulated that the principals choose some positive monitoring effort to deter managerial misconduct.

So far no theoretic models have been developed to explain the puzzle of no derivative lawsuits. Intuitive reasons, as offered in the legal literature, include the argument that shareholders are subject to a free rider problem.[3] We offer an alternative explanation for why there are no lawsuits based on the law of percentage limits: in a large number of European countries shareholders can only bring an action if they hold a minimum stake of typically 5% or 10%.[4] Given that not all shareholders are allowed to bring a legal action, the manager can misappropriate corporate assets and collude with potential plaintiff-shareholders by bribing them. Since shareholders receive a fraction of the damage payment proportional to their shareholdings, it will always pay for the manager to misappropriate a given amount and settle with potential plaintiffs for a fraction of the amount misappropriated. Such collusive agreements impose a negative externality on small shareholders which can be described as an extreme form of agency costs.

Our paper ties in with the scarce theoretical literature on derivative shareholder suits (Stepanov, 2006, Stremitzer 2007) as well as with agency models (see Shleifer & Vishny, 1997). Private benefits are a well known phenomenon absent percentage limits and have been described as an agency problem between the management and the shareholders. It is conventionally believed that large shareholders mitigate the agency problem between the management and the shareholders but they create a new agency problem, namely between large and small shareholders (Black, 1992; Admati, Pfleiderer & Zechner, 1994; Gilson & Gordon, 2003). Empirical evidence, which shows that large blocks trade at a higher price than single shares, strongly supports this theory (Barclay & Holderness, 1989 and 1992; Zingales, 1995). Of course, collusion between large shareholders and managers cannot explain, absent percentage limits, why there are no lawsuits. Small shareholders would monitor and sanction misappropriation by large shareholders. We would expect some misappropriation and some lawsuits, contrary to our observation in continental Europe. Other than most agency models (e.g. Alchian & Demsetz, 1972; Jensen & Meckling, 1976; Grossmann & Hart, 1983; Demsetz, 1986), we find an equilibrium with zero lawsuits and zero monitoring, where the managers collude with plaintiff-shareholders. If percentage limits are lowered beyond a certain threshold, we obtain the conventional results. Managers will sometimes misappropriate corporate assets and shareholders will sometimes

[1] In greater detail see Kalss (ed., 2005).
[2] See Kalss (2005a); Baums (2000). The scholarly discussion includes e.g. Eckert, Grechenig & Stremitzer (2005).
[3] See Adams (1997). However, Adams does not explicitly draw the connection to the complete absence of derivative lawsuits.
[4] 5% (Czech Republic, Spain, Slovakia), 10% (Austria, Bulgaria, Hungary, Slovenia, Sweden); see also 1% (Germany), 2,5% (Italy).

sanction this behavior. Our results are consistent with empirical data which show that in countries *with* percentage limits there are no lawsuits (Kalss, 2005) and in countries *without* percentage limits, such as the United States and England, there are lawsuits (Cheffins & Black, 2006).

A basic model of shareholder suits

In a given firm, there is a manager M, shareholders with a stake larger than the percentage limits required to bring an action (plaintiff-shareholders) and shareholders with a stake lower than the percentage limits, thus not entitled to bring an action (non-plaintiff-shareholders). We define $\mu \in (0;1)$ as the sum of the shares of the plaintiff-shareholders, observable by both parties. Consequently, the remaining shareholders hold a total stake of $1-\mu$, where μ depends on the ownership structure and on percentage limits provided for by the national laws. The lower the legal percentage limit to bring an action is, the larger the total share of plaintiff-shareholders is; hence, the higher is μ. That is, the total share that will be able to bring an action will be larger if the percentage limit is 1% than if it were 10%. Any shareholder that holds between 1% and 10% would only be allowed to bring an action in the first case.

For simplification, we treat all plaintiff-shareholders as one coalition P and abstract from collective action problems. Under the current law, only very few, closely cooperating shareholders are allowed to bring an action. This is not crucial to our main results as they hold true for n plaintiff-shareholders who act independent from each other. Since non-plaintiff-shareholders cannot bring an action they are not part of our model. Under the European national laws, small shareholders could form a coalition to reach the percentage limit required to bring a lawsuit jointly. However, the costs of bringing a lawsuit collectively would be prohibitively high (e.g. due to the fact that it is practically impossible to the get contact data of other small shareholders).[5]

At t=1, the manager decides whether or not to misappropriate a given fraction $\alpha \in (0;1)$ of the corporate assets $A \in (0;\infty)$ to the detriment of all shareholders, where αA represents a self-dealing opportunity. This kind of misappropriation refers to all kinds of wealth transfers that somehow benefit the manager (often referred to as tunneling, e.g. Johnson et al. 2000), including the misappropriation of an investment opportunity that belong to the corporation, the sale of assets to the manager or a close friend below market value, the employment of an unqualified applicant who has a close relationship with the manager, the use of the staff car for private purposes. We assume that the opportunity for misappropriating assets is common knowledge; but whether or not M has actually engaged in misappropriation is unknown to the shareholder. This reflects the fact that everybody has some minimum information about potential (not actual) misappropriation. Any investor with a share large enough to bring an action is likely to be represented in the board and thus has direct access to such information.

At this point, M can also decide whether or not to offer P a bribe $\Phi \in [0;\infty)$ in order to induce P not to bring a lawsuit. The payoff of the manager for not stealing is zero.

At t=2, P decides whether or not to bring an action against the manager, depending on the offer he may have received. If a suit is successful the damages paid go to the corporation, i. e. each shareholder benefits from the damage payment according to his individual participation in the

[5] See Kalss/Eckert (2005) summarizing the European situation.

corporation. The litigation costs c are borne by the loser (that is, by P if he loses and not by all shareholders) and include the costs of the winning party (Eckert, Grechenig & Stremitzer, 2005).

Instead of bringing a lawsuit, P can decide to accept the bribe or pre-trial settlement offer, respectively, if M has made one. Such settlements are enforceable either in the form of a contract or as a procedural agreement. Note that M has the power to make a take-it-or-leave-it-offer due to the specific legal environment under which (1) it is always P who makes the last decision on whether or not to bring a lawsuit, (2) suits are limited to a certain time period after the damage occurs and (3) once a lawsuit has been brought, settlements are prohibited (or require the consent of minority shareholders).

We assume that M and P are risk neutral and that the court decisions are correct. The fact that judges, other than the shareholders, can observe the manager's decision in our model is due to comprehensive legal powers, including the possibility to request and obtain undisclosed documents. Simple business decisions are not part of our analysis, since managers are shielded from liability under the business judgment rule or a European counterpart.

All formal proofs are in the Appendix.[6]

A pure strategy of M includes a combination of the stealing and the bribing choice. A pure strategy of P consists of the choice to bring a lawsuit for every possible offer he could receive.

Lemma 1. *If M decides to make an offer $\Phi>0$, the offer will always be $\mu\alpha A$ and P will always accept it. M will only offer $\mu\alpha A$ if he has previously stolen αA.*

Proof: M will only make a positive offer if he has previously stolen αA; if he had not stolen it would be better for him not to make an offer. The intuition behind the fact that the only possible offer is $\mu\alpha A$ is the following: $\mu\alpha A$ is the amount P can obtain by bringing a lawsuit (that is the stolen amount αA multiplied with P's stake μ); thus, M will not make an offer larger than that. Any offer lower than $\mu\alpha A$ would inform P of an illegal conduct; P would reject the offer, bring a lawsuit and obtain full compensation for his loss ($\mu\alpha A$). Of course, P would accept an offer $\mu\alpha A$.■

We define M's reduced set of pure strategies as $\{M_h, M_d, M_c\}$; where M_h means that the manager acts honestly and offers no bribe, M_d that the manager acts dishonestly, that is, M misappropriates αA without offering a bribe to P, and M_c means that M acts collusively, that is he misappropriates αA and offers P a bribe $\mu\alpha A$. We define P's reduced set of pure strategies as $\{P_n, P_s\}$, such that (if no offer was made), P_n means that P does not bring an action, and P_s means that he brings an action. If an offer was made, P accepts it in both cases.

The payoffs are as follows [P,M]

	M_h	M_d	M_c
P_n	0, 0	$-\mu\alpha A$, αA	0, $(1-\mu)\alpha A$
P_s	$-c$, 0	0, $-c$	0, $(1-\mu)\alpha A$

[6] Downloadable on one of the authors' homepages.

Proposition 1.1. *The manager and the plaintiff-shareholder will always act collusively (M_c, P_s); this directly implies that the shareholder will never bring a lawsuit.*

Proof: We eliminate strictly und weakly dominated strategies (M_h, P_n, M_d). ■

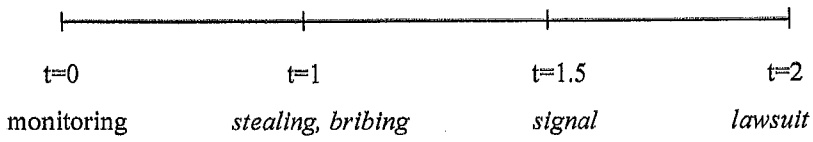
Proposition 1.2. *The result of proposition 1.1. holds true in a game of n plaintiff-shareholders.*

Proof: The rationale is the same as in Lemma 1 and Proposition 1.1. for every single shareholder of n potential plaintiffs: M is better off stealing and bribing all plaintiff-shareholders than to be honest because $(1-\mu)\alpha A>0$. If M decided to steal and not to offer bribes to all plaintiff shareholders, it would be optimal for any shareholder not bribed to bring a lawsuit. If M decided to steal with some probability and not to offer bribes to all plaintiff shareholders, at least one shareholder that has not been offered a bribe would bring a lawsuit with some probability, according to the volunteer's dilemma (Poundstone, 1992). ■

Monitoring

It is conventionally believed that large shareholders monitor the managers and that small shareholders are free riders (Admati, Pfleider & Zechner, 1994). Large shareholders have lower monitoring costs per single share; thus, they will have more incentives to monitor.[7] This disadvantage is argued to be offset by private benefits that large shareholders receive in compensation for their costs. In contrast to the dominant view, developed against the background of American law where every single shareholder can bring an action, our model predicts that the large shareholders have no incentives to incur those monitoring costs. Since the large shareholders know that the management will misappropriate corporate assets and offer them a part of the proceeds, large shareholders will choose zero monitoring (and small shareholders have nothing to free ride). This can be pointed out by introducing a monitoring decision and a signal to the basic model.

Assume that P chooses monitoring costs $m\in[0;\infty)$ at t=0, which the manager M can observe. The manager knows how frequently P asks for information and how detailed the information has to be. After the stealing and bribing decision at t=1, P receives a signal $S\in\{0,1\}$ that indicates whether or not M has breached the law, where 1 means that he has stolen αA and 0 that he has not stolen αA. We define $s(m)\in[0.5;1)$ as the probability that the signal is correct. If P chooses zero monitoring costs, the signal is random [$s(0)=0.5$]. If P increases his monitoring costs he will receive a better signal at a marginally decreasing rate [$s(m)'>0$, $s(m)''<0$]. We also assume that S is asymptotically correct [$\lim_{m\to\infty} s(m)=1$] and that the first marginal unit of monitoring is infinitely useful [$\lim_{m\to 0} s'(m)=\infty$]. The signal function $s(m)$ is common knowledge. As in the basic model, the decision to bring a lawsuit follows at t=2.



A strategy of M includes a combination of the stealing choice and the bribing choice for every possible monitoring choice of P. A strategy of P includes a combination of the monitoring choice and the choice of bringing a lawsuit, for every possible combination of a signal and a bribe offer.

[7] The same argument was made with regard to shareholder suits; see van Aaken (2004), Eckert, Grechenig & Stremitzer (2005).

Since m can be observed by both players, we can first solve the subgame starting at t=2 for a given m. As in Lemma 1, we eliminate implausible offers and are left with $\mu\alpha A$ as the only possible offer $\Phi>0$.

We define P's reduced set of strategies as $\{P_a, P_v, P_c, P_b\}$, such that (if no offer was made): P_a means that P does not bring an action, independent of the signal (apathetic), P_v means that P brings an action if S=1 and does not bring an action if S=0 (vigilant), P_c means that P brings an action if S=0 and does not bring an action if S=1 (confused), P_b means that he brings an action independent of the signal (belligerent). If an offer $\Phi=\mu\alpha A$ was made, P will accept it under all four strategies.

This leaves us with the following strategy space: $\{P_a, P_v, P_c, P_b\}\times\{M_h, M_d, M_c\}$. Since m are sunk costs, they are not displayed.

	M_h	M_d	M_c
P_a	0, 0	$-\mu\alpha A$, αA	0, $(1-\mu)\alpha A$
P_v	$[1-s(m)](-c)$, 0	$[1-s(m)](-\mu\alpha A)$, $[1-s(m)]\alpha A-s(m)c$	0, $(1-\mu)\alpha A$
P_c	$s(m)(-c)$, 0	$s(m)(-\mu\alpha A)$, $s(m)\alpha A-[1-s(m)]c$	0, $(1-\mu)\alpha A$
P_b	$-c$, 0	0, $-c$	0, $(1-\mu)\alpha A$

Proposition 2.1. *The manager and the plaintiff-shareholder will always act collusively (M_c, P_b), that is, the shareholder will never bring a lawsuit.*

Proof. As in the Proof of Proposition 1.1., we eliminate strictly und weakly dominated strategies (M_h, P_a, P_v, P_c, M_d). The fact that M steals αA and offers P a bribe $\mu\alpha A$ (which P accepts) is independent of the signal. ■

Proposition 2.2 *P chooses zero monitoring.*

Proof. Because of the strategic setting, both M und P know that there will be collusion. Since no information can be obtained from the signal, P will not invest in monitoring. ■

Proposition 2.3. *The results of propositions 2.1 and 2.2 hold true in a game of n plaintiff-shareholders.*

Proof. As in Proposition 1.2. ■

Costs of misappropriation

Typically, misappropriation is costly; therefore, the manager's gains are somewhat lower than the amount stolen. We discount the gains by $\beta\in(0;1)$, where β will be close to 1 if misappropriation is almost costless and close to 0 otherwise. Concealment costs are common knowledge and include establishing a separate company, bribing the news media, potential criminal sanctions, public enforcement etc. Any reputational gain M may receive for an honest behavior is captured by β as well (by increasing the opportunity costs of stealing).

	M_h	M_d	M_c
P_a	0, 0	$-\mu\alpha A$, $\beta\alpha A$	0, $(\beta-\mu)\alpha A$
P_v	$[1-s(m)](-c)$, 0	$[1-s(m)](-\mu\alpha A)$, $[1-s(m)]\beta\alpha A-s(m)[c+(1-\beta)\alpha A]$	0, $(\beta-\mu)\alpha A$
P_c	$s(m)(-c)$, 0	$s(m)(-\mu\alpha A)$, $s(m)\beta\alpha A-[1-s(m)]\ [c+(1-\beta)\alpha A]$	0, $(\beta-\mu)\alpha A$
P_b	$-c$, 0	0, $-[c+(1-\beta)\alpha A]$	0, $(\beta-\mu)\alpha A$

We distinguish between two cases: $\mu<\beta$ and $\mu>\beta$.

Proposition 3.1 *With high percentage limits, $\mu<\beta$, there is the same equilibrium as in Proposition 1.1, with stealing, bribing, no lawsuits, and no monitoring.*

Proof: As for Proposition 2.1-2.2. ■

Proposition 3.2. *With low percentage limits, $\mu>\beta$, we find a mixed strategy equilibrium, where M sometimes steals but never bribes P. There is some monitoring and there are some lawsuits.*

Proof. M_c is strictly dominated by M_h, since collusion is not profitable anymore. M_h, M_d, P_a, and P_b cannot be part of a pure strategy equilibrium since P's best reaction to an honest manager would be never to bring a lawsuit. Of course, then M's best answer would be to steal to which P's best reaction would be to bring a lawsuit to which M's best reaction would be to be honest. Consequently, there must be some stealing and some lawsuits. Since the signal has an impact on the outcome, there will be some monitoring. ■

Proposition 3.3. *The fact that with high percentage, there is collusion, and no monitoring; and the fact that with low percentage limits there is some stealing by M, some litigation, and some monitoring holds true for n plaintiff-shareholders.*

Proof. Follows from Proposition 1.2, 2.3, 3.1 and 3.2. ■

Suits & monitoring

The first case ($\mu<\beta$) stands for high percentage limits or low costs of stealing. With high percentage limits the coalition of potential plaintiff-shareholders is small (low μ). As an outside observer, we may not be able to exactly determine the costs of stealing in order to know which set of parameters represents our current situation. However, we know that $\mu<\beta$ is the only set of parameters that leads to an equilibrium where there are no lawsuits at all. Since empirical data suggests that there are no lawsuits, $\mu<\beta$ seems to best represent the current situation. This is consistent with the fact that current European percentage limits are relatively high, typically requiring shareholders to hold stakes of at least several million Euros.

If the percentage limits are decreased beyond a certain threshold, the manager will not be able to bribe the coalition of plaintiff-shareholders. At a certain point ($\mu>\beta$) the manager's private benefits $\beta\alpha A$ are simply not large enough to bribe all potential plaintiff-shareholders, so that M's strategy to steal and bribe P is strictly dominated by M's strategy to act honestly. Clearly, this result cannot only be reached by lowering the percentage limits but also by increasing the costs of stealing, e. g. through more severe criminal sanctions. Of course, it is difficult for legislators to exactly determine the limiting value $\mu=\beta$ because the legislators do not know the exact costs of stealing (and because μ and β vary across corporations). How far the percentage limits need to be decreased (or the costs of stealing be increased) is an empirical question. Only if percentage limits are abandoned altogether we can be sure that $\mu>\beta$ in all firms.

Extensions

Repeated game & bargaining power

Plaintiffs may hold some of the bargaining power, e.g. due to the threat to dismiss the management. However, the collusion results ($\mu<\beta$) are qualitatively the same as long as the shareholder's negotiation power is not unrealistically large (where he would leave the manager with a loss). A simple fairness premium would only affect the division of benefits but not influence the collusion equilibrium. In a repeated game, such an equilibrium could even be

maintained in the extreme case of a large bargaining power for the shareholders.[8] Since the shareholders want to participate in the private benefits of the managers in the future, they will not demand a bribe that leaves the manager with a loss.

For the case of low percentage limits ($\mu>\beta$), one may argue that there are no lawsuits in a repeated game, because M and P play the social optimal strategy, i.e. the cooperative strategy, where there is no stealing, no lawsuits, and no monitoring. However, this cannot be an equilibrium even in a repeated game, because M will steal at least in one period, since P cannot punish M in the next period (M acts honestly and has nothing to fear from a lawsuit). In anticipation, P will bring a lawsuit with some probability.

Additional monitoring effort

The model assumes that the opportunity of misappropriation is common knowledge and that the shareholders can bring a lawsuit even without any monitoring effort. First, the model could easily be extended to a first-step monitoring decision which tells P whether there is an opportunity for misappropriation or not. In the first case, the game follows as described (with sufficient knowledge to bring a lawsuit); otherwise, the game ends immediately, with no lawsuits due to the absence of potential plaintiffs. Our main results explaining the absence of lawsuits are qualitatively the same. Most importantly, in the basic model, such "first-step" monitoring would only affect the distribution of private benefits, that is, it would not deter managerial misconduct and it would not allow free riding by the non-plaintiff-shareholders.

The fact that no (additional) monitoring is needed to bring a lawsuit in our basic model goes in line with European procedural law which is governed by an *inquisitorial system* where the judge collects the evidence (as opposed to an adversarial system), and with the fact that the plaintiff could incur "monitoring costs" *after* the misappropriation which count as litigation costs c, and thus, are subject to reimbursement under the European Rule of litigation costs.

Collective action among non-plaintiff-shareholders

A potential extension of our model includes endogenizing α, with $\mu(\alpha)$ and $\mu(\alpha)'>0$. If costs of forming a coalition are constant but not prohibitive for small shareholders, then the share of plaintiffs is smaller if the amount misappropriated is lower. This is due to the fact that for some plaintiffs it will not pay to enter into a coalition. In this case, the manager will choose an α^* such that $\mu(\alpha^*)<\beta$ in order for his payoff to be positive. As collective actions become less costly, there will be less misappropriation; however, there will be no litigation due to collusion and no monitoring according to our basic model. In fact, this would rule out an equilibrium with litigation ($\mu>\beta$).

Discussion

We have argued that the lack of derivative lawsuits in continental Europe is due to percentage limits as provided for in the various jurisdictions. Percentage limits require shareholders to hold a minimum share of typically 5 or 10% in order to bring an action against the management. These widespread legal provisions allow the managers to misappropriate corporate assets and bribe the potential plaintiff-shareholders, imposing a negative externality on the remaining shareholders. Our analysis implies that we should observe lawsuits in countries without percentage limits and no lawsuits in countries with (high) percentage limits. This is consistent

[8] That is, if the discount factor is not too high (cf. repeated prisoner's dilemma).

with the empirical data mentioned in the introduction. As an exception, few or no lawsuits are reported in Switzerland and France where there are no percentage limits. This seems to be due to national peculiarities, like a percentage limit for initiating an investigation essential for bringing a lawsuits (Switzerland)[9] or the fact that legal expenses cannot be shifted to the company so that expected returns from lawsuits are typically negative (France) (Cheffins & Black, 2006). Since our model does not apply to these countries, further research in this regard could be fruitful.

Where collusion is profitable, all shareholders choose zero monitoring, the managers choose to misappropriate corporate assets and to offer the potential plaintiff-shareholders a bribe which they accept. Such settlements are different from regular settlement in that they have no deterrence effect on the manager's decision to misappropriate. If percentage limits are decreased beyond a certain threshold, potential plaintiff-shareholders will monitor the managers and the managers will misappropriate corporate assets less often than before. In this case, lawsuits will deter managers from their illegal conduct. The same result can be achieved by increasing the costs of stealing beyond a certain threshold. To increase the costs of stealing, however, is likely to be more difficult than simply reducing the percentage limits. Yet another possibility for the legislator to deter misappropriation, is to facilitate collective lawsuits. If getting together is less costly for shareholders, the total share of shareholders able to bring an action will be larger.

Our analysis suggests that percentage limits increase the problem of bribery and misappropriation. However, one cannot conclude without empirical evidence that lower percentage limits would lead to higher social welfare. That is so because with high percentage limits there is more misappropriation and thus higher costs of stealing but no monitoring costs and no litigation costs. In turn, with low percentage limits, the total costs of stealing are clearly lower but costs associated with litigation and monitoring are higher. At this point, we can only say that an equilibrium where managers steal and bribe the large shareholders is unlikely to be socially optimal because it leaves property rights partially unprotected and small shareholders will invest less than optimal.

Potential extensions of our model involve endogenizing the ownership structure under a regime of percentage limits, biased courts, special rules of litigation and other national peculiarities. We have tried to spark a discussion on shareholder suits that goes both beyond the verbal arguments offered so far in the legal literature as well as beyond the empirical studies offered in the economic literature. The paper emphasizes the importance of the laws on percentage limits (that until now have been neglected) and shows the potentially severe consequences.

[9] Art 697b of the Swiss Obligationenrecht.

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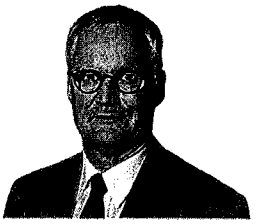
EXHIBIT C-1

EXHIBIT C-1

Gleiss Lutz

PROF. DR. WULF GOETTE
OF COUNSEL | RECHTSANWALT



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EXPERTISE

Wulf, a former member and chair of the corporate law division of the Federal Court of Justice, advises on all matters relating corporate law.

VITA

He studied at the University of Bonn. Doctorate in 1974. Wulf has been active as Of Counsel for Gleiss Lutz since 2010.

He entered the judicial service in the state of North Rhine-Westphalia in 1975. Expert in the Ministry of Justice in North Rhine-Westphalia in 1981. Judge at the Cologne Higher Regional Court 1983 and member of a division for civil matters 1986. Appointment as a federal court judge 1990, member of the 2nd Division for Civil Matters and (from 1996-2005) the Antitrust Division, June 2005 to September 2010 presiding judge of the 2nd Division for Civil Matters. Honorary professor at the Ruprecht Karl University of Heidelberg since 1997.
Wulf is co-editor of the „Münchener Kommentare on the Stock Corporation Act and the Act concerning Limited Liability Companies" as well as, among others, the journals „ZGR – Zeitschrift für Unternehmens- und Gesellschaftsrecht" and „NZG – Neue Zeitschrift für Gesellschaftsrecht".

He speaks German and English.

EXHIBIT C-2

EXHIBIT C-2

Law Firms Searched in Connection With Deutsche Bank Case

Investigation Concerns Bank's Legal Row with Heirs of Leo Kirch

By Isabel Gomez
Updated March 24, 2014 4:16 pm ET

State prosecutors have searched the premises of the law firms representing Deutsche Bank AG, widening their investigation of executives connected to the bank's legal row with the heirs of late media mogul Leo Kirch, the law firms said Monday.

Both the Frankfurt office of Hengeler Mueller and the Munich office of Gleiss Lutz were searched on Tuesday last week, the law firms confirmed. Although Deutsche Bank settled the lawsuit with the Kirch heirs this year, prosecutors continue to investigate whether any former or current board members, including Co-Chief Executive Jürgen Fitschen, may have given false testimony in the case. They are also investigating whether individual lawyers assisted executives in giving false testimony, a spokesman for Hengeler Mueller said.

The searches indicate that the prosecutors have strong arguments against Deutsche Bank's attorneys because it isn't easy to search lawyers' offices in Germany. Attorneys have the right to refuse to testify, except when certain facts substantiate the suspicion that they are involved in the offense or acted as an accessory, or committed obstruction of justice or receiving of stolen goods. In these cases, prosecutors can also seize documents.

Deutsche Bank declined to comment Monday. The Munich prosecutors' office, which would be responsible for both searches, also declined to comment. In February, Mr. Fitschen said he hadn't lied or given false testimony.

Deutsche Bank settled with Kirch heirs last month by agreeing to pay more than €900 million ($1.24 billion) to end a long-running legal battle. Before his death, Mr. Kirch accused Deutsche Bank of being partly responsible for his media empire's insolvency, after Deutsche Bank's then-CEO Rolf Breuer said in a 2002 TV interview that it was unlikely the company would receive any further loans or equity.

At Hengeler Mueller, prosecutors confiscated documents related to the case, the law firm said. A spokeswoman for Gleiss Lutz declined to comment on whether investigators seized any documents.

—Eyk Henning contributed to this article.

Write to Isabel Gomez at isabel.gomez@wsj.com

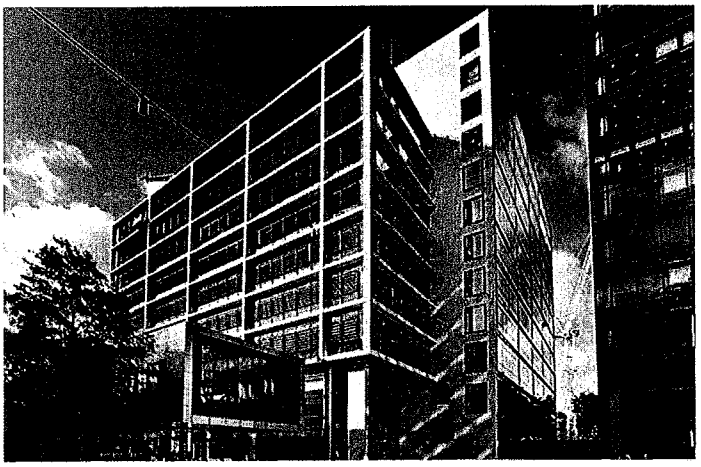
EXHIBIT C-3

EXHIBIT C-3

US firm Ropes & Gray has reshuffled its City management in a bid to re-focus capabilities across Europe

24 July 2014 12:27pm | Jaishree Kalia

Leadership Ropes & Gray



Five years on from the launch of its London office, co-managing partners Mike Goetz and Maurice Allen will split from their dual role with Allen appointed to the newly created role of senior partner. Goetz continues as London head and co-head of the firm's finance practice alongside Jay Kim in New York and Byung Choi in Boston.

Allen will focus on client and business development, recruitment and the firm's European strategy while also remaining involved in client work, including Liberty Global and Bain Capital.

The new role comes as the firm sets up a strategy to develop its European offering focused on building new practice areas in London that run adjacent to existing ones and strengthening the firm's relationship with clients doing business in Europe.

'London is very much part of our global network and strongly links to our offering in Asia and the US,' say Allen. 'Around one-third of our lawyers in the US are litigators so we are considering whether we need more litigators in London.'

The firm is also considering whether to expand its City corporate and finance capability by adding an equity capital markets and structured finance offering on the back of growing client demand. The concept forms part of the firm's wider strategy of targeting businesses that have a US/European element.

Ropes & Gray has already expanded its investment management offering in London with the recent hire of Monica Gogna from Pinsent Masons who joins in August, and Dechert partner Michelle Moran who joined last year. The firm is also planning to grow its government enforcement practice specifically to boost its anti-bribery offering.

Because the firm does not have any European offices outside of London, it regularly uses local firms, as well as larger international firms, to cover regions where it is not based. For example, the firm frequently uses Gleiss Lutz, Hengeler Mueller and Noerr in Germany, but worked alongside Freshfields Bruckhaus Deringer to advise on Liberty Global's £5.7bn acquisition of Dutch cable operator Ziggo.

The firm has four offices across Asia and aims to open a further outpost in Beijing in the near future.

Jaishree.kalia@legalease.co.uk

EXHIBIT C-4

EXHIBIT C-4

Honorary professors, lecturers

Prof. Dr. Wulf Goette
Lawyer, Gleiss Lutz (formerly presiding judge at the BGH)

Prof. Dr. Stephan Harbarth, LL.M. (Yale)
President of the Federal Constitutional Court
The current lectures of Prof. Harbarth can be found here.

Email: stephan.harbarth@igw.uni-heidelberg.de

Prof. Dr. Hans-Jürgen Hellwig
Lawyer, Hengeler Mueller

Prof. Dr. Thomas Liebscher
Lawyer, SZA Schilling, Zutt & Anschütz
You can find the current lectures of Prof. Liebscher here.

Dr. Eberhard Schollmeyer, LL.M. (Emory Univ.)
Ministerialrat, Federal Ministry of Justice and Consumer Protection.
The current lectures of Prof. Schollmeyer can be found here.

EXHIBIT D

EXHIBIT D

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	1999 Avenue of the Stars	Los Angeles	90067
	2650 Birch Street	Palo Alto	94306
	101 California Street	San Francisco	94111
	1801 E. St. Andrews Place	Santa Ana	92705
Delaware	1011 Centre Road, Motgomery Building of E.A. Delle Donne Corporate Center	Wilmington	19805
District of Columbia	801 17th Street, N.W.	Washington	20006
Florida	5022 Gate Parkway	Jacksonville	32256
	5201 Gate Parkway	Jacksonville	32256
	600 Brickell Ave, Suite 2050	Miami	33131
Georgia	3414 Peachtree Road, N.E., Monarch Plaza	Atlanta	30326
	6 Concourse Parkway, Suite 2135	Atlanta	30328
Illinois	222 South Riverside Plaza, Riverside Plaza	Chicago	60606
Massachusetts	One International Place	Boston	02110
	100 Summer Street, 8th Floor	Boston	02110
	321 Summer Street, Suite 405	Boston	02110
New York	875 3rd Avenue	New York	10022
	60 Wall Street	New York	10005
North Carolina	1000 CentreGreen Way	Cary	27513
	3000 CentreGreen Way, CentreGreen Four	Cary	27513
	4000 CentreGreen Way, CentreGreen Four	Cary	27513

	200 South Tryon Street	Charlotte	28202
Virginia	8401 Greensboro Drive, Suite 950	McLean	22102
Texas	200 Crescent Court, The Crescent	Dallas	75201
Washington	701 Pike Street, One Convention Place	Seattle	98101

EXHIBIT E

EXHIBIT E

ORIGINAL

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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MICHAEL MASON-MAHON, Derivatively on Behalf of HSBC HOLDINGS PLC, HSBC BANK USA, N.A., HSBC NORTH AMERICA HOLDINGS, INC., and HSBC USA INC., Nominal Defendants,

Plaintiff,

-against-

DOUGLAS J. FLINT et al.,

Defendants.

-and-

HSBC HOLDINGS PLC, HSBC BANK USA, N.A., HSBC NORTH AMERICA HOLDINGS, INC., and HSBC USA INC.,

Nominal Defendants.

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NASSAU COUNTY

TRIAL/IAS PART: 14

Index No: 602052-14
Motion Seq. No. 3
Submission Date: 8/26/15

Papers Read on this motion:

Notice of Motion.....x
Willscher Affirmation in Support, Matthews Affirmation in Support and Exhibits.....x
Todd Affirmation in Support and Exhibits.....x
Answer to Amended and Supplemental Verified Shareholder Derivative Complaint.....x
Memorandum of Law in Support.....x
Compendium of Unreported Authorities Cited in Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Memorandum of Law in Opposition.....x
Compendium of Unreported Authorities Cited in Memorandum of Law in Opposition.....x

Papers Read (cont.)

Willscher Reply Affirmation and Exhibit.....x
Reply Memorandum in Further Support.....x
Compendium of Unreported Authorities Cited in Reply Memorandum.....x

This matter is before the court on the motion filed by Nominal Defendants HSBC Holdings plc, HSBC Bank USA, N.A., HSBC North America Holdings Inc. and HSBC USA Inc. ("Movants") on March 18, 2015 and submitted on August 26, 2015, following oral argument before the Court. For the reasons set forth below, the Court grants the motion and dismisses the Complaint as asserted against Movants.

BACKGROUND

A. Relief Sought

Movants move for an Order dismissing the Amended and Supplemental Verified Shareholder Derivative Complaint ("Complaint") (Ex. 2 to Willscher Aff. in Supp.), without leave to replead, 1) pursuant to CPLR §§ 3211(a)(2), (3), and (7), based on Plaintiff's lack of standing to bring derivative or multiple derivative claims on behalf of Movants or, in the alternative, 2) in favor of the English High Court under CPLR § 327 and the doctrine of *forum non conveniens*.

Plaintiff Michael Mason-Mahon ("Plaintiff"), Derivatively on behalf of HSBC Holdings plc, HSBC Bank USA, N.A., HSBC North America Holdings, Inc., and HSBC USA Inc., opposes the motion.

B. The Parties' History

Plaintiff Michael Mason-Mahon is a British citizen and shareholder in HSBC Holdings, plc ("HSBC" or "Company"), an English company headquartered in London. The Company is a publicly owned company whose shares are listed on the London and Paris Stock Exchanges, as well as other Stock Exchanges, and whose American Depositary Shares ("ADS") are registered with the United States Securities and Exchange Commission and traded on the New York Stock Exchange (Comp. at ¶ 3). Plaintiff alleges that the Company and its subsidiaries have operations in New York, and that the Company's common stock and ADS are owned by hundreds, if not

thousands, of citizens of New York and other states (*id.*).

In 2014, Plaintiff, whom Movants characterize as "a self-styled, shareholder activist" (Movants' Memo. of Law at p. 3), commenced this shareholder derivative action as against, *inter alia*, numerous individual defendants – all either current of former directors of HSBC - and various subsidiaries of HSBC. The Complaint alleges that prior to 2012, the United States Department of Justice and the New York County District Attorney conducted criminal investigations into the banking activities of HSBC and its subsidiaries, including HSBC Bank USA, N.A. ("HSBC Bank"). Based on those investigations, the Department of Justice, in December of 2012, filed a four-count, criminal information alleging, *inter alia*, that HSBC and HSBC Bank willfully violated various federal statutes[1] governing, *inter alia*, money laundering and other financial and/or business and banking crimes. The information alleges, in substance, that HSBC failed to monitor, report and detect money laundering activities and other illegal conduct and also facilitated legally prohibited transactions with a number of sanctioned entities, among them Iran, Sudan and Burma.

Shortly after the information was filed, HSBC and HSBC Bank entered into a comprehensive settlement agreement, specifically the "Deferred Prosecution Agreement," ("DPA") (Ex. 1 to Rigrodsky Aff. in Opp.), which was to be effective for a period of five years (*see* DPA at ¶ 3). In accord with the relevant provisions of the DPA, the involved HSBC entities: 1) admitted the wrongdoing of which they were accused, as further detailed in the information and an annexed attachment; 2) acknowledged that they were responsible for the acts of their officers, directors and employees; 3) agreed to implement a series of remedial measures aimed at rectifying the banking oversight deficiencies identified in the underlying information; and 4) agreed to make payments totaling $1.92 billion to U.S. authorities, including penalties and forfeitures of $1,256,000,000 to the Department of Justice and $375,000,000 to the District Attorney of New York County, and agreed to strengthen their compliance policies and procedures (Comp. at ¶ 170).

Based on these facts and others, the Complaint asserts four causes of action as against the

[1]The statutes referred to in the Complaint and the Deferred Prosecution Agreement include, *inter alia,* the Bank Secrecy Act , 31 U.S.C. § 5311 *et seq* and the Trading with the Enemy Act, 50 U.S.C. App. § 1-44.

individual director-defendants. These causes of action sound in breach of fiduciary duty and waste pursuant to Business Corporation Law ("BCL") §§ 626 and 720, common law waste, and common law aiding and abetting the breach of fiduciary duties. Plaintiff alleges that the individual defendants are fiduciaries of the Company, the Bank and the Subsidiary Entities, and of the Company's public shareholders, and owe them the duty to conduct the Company's, Bank's and Subsidiary Entities' business "loyally, faithfully, diligently and prudently" (Comp. at ¶ 217). Plaintiff further alleges that the individual defendants breached that duty of care, and committed waste, by "abdicating their corporate responsibilities and mismanaging the Company, the Bank, and/or the Subsidiary Entities" (Comp. at ¶ 218), as evidenced by, *inter alia*, the criminal violations for which the various HSBC entities admitted complicity, and for which those entities were thereafter required to "wrongfully expend and waste billions of dollars in corporate assets" (Comp. at ¶ 227).

C. The Parties' Positions

Movants move to dismiss the Complaint based on their contention that Plaintiff lacks standing to maintain a derivative action in New York. Movants contend that English Law governs pursuant to the so called "internal affairs doctrine," under which Courts apply the law of the jurisdiction in which a corporation or company is organized to certain derivative claims, including the threshold demand issues. Defendants submit that, under applicable English Law, specifically the United Kingdom Companies Act of 2006 ("English Companies Act") (Ex. 2 to Todd Aff. in Supp. at tabs 1 and 2), a shareholder of an English company may not maintain a derivative action without having first obtained permission from the English High Court, a pre-action step concededly not taken by Plaintiff prior to the commencement of this action.

Plaintiff opposes the motion, submitting that application of the internal affairs doctrine is inappropriate in light of HSBC's allegedly egregious conduct, which he describes as injurious to "the security and well-being of the citizens of the United States in general and New York in particular" (P's Memo. of Law in Opp. at p. 13). Plaintiff contends that applying English law will thwart both national and New York interests in protecting national security and, relatedly, that New York courts have a strong interest in hearing cases that implicate national security in New York. Plaintiff argues that the Company used New York as the "hub" for its illegal activity

(P's Memo. of Law in Opp. at p. 16), and that its improper conduct, including the falsification of records of New York financial institutions, demonstrates significant contacts with New York warranting the application of an exception to the internal affairs doctrine. Plaintiff also relies on *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC,* 118 A.D.3d 422 (1st Dept. 2014) ("*Culligan*") which, to the extent relevant here, construed BCL § 1319(a) as requiring the application of New York Law in derivative actions involving foreign corporations doing business in New York.

RULING OF THE COURT

A. Internal Affairs Doctrine

One of the abiding principles of the law of corporations is that the issue of corporate governance, including the threshold question of whether demand on the corporation is required prior to commencing a derivative lawsuit, is governed by the law of the state in which the corporation is chartered. *Hart v. General Motors Corp.*, 129 A.D.2d 179, 182 (1st Dept. 1987). *Accord Lerner v. Prince,* 119 A.D.3d 122, 128 (1st Dept. 2014). This doctrine, known as the "internal affairs doctrine" is predicated on the recognition that only one State should have the authority to regulate a corporation's internal affairs – matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders – because otherwise a corporation could be faced with conflicting demands. *Edgar v. Mite Corp.*, 457 U.S. 624, 645 (1982), citing Restatement (Second) of Conflict of Laws § 302, Comment b, pp. 307-308 (1971). Application of this choice of law principle achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983), citing Restatement (Second) of Conflict of Laws § 302, Comments a and e (1971).

The internal affairs doctrine provides that the rights of a shareholder in a foreign company, including the right to sue derivatively, are determined by the law of the place where the company is incorporated. *In re BP p.l.c. Derivative Litigation*, 507 F. Supp. 2d 302, 307 (S.D.N.Y. 2007), citing *Atherton v. FDIC*, 519 U.S. 213, 214 (1997). The internal affairs doctrine has been applied repeatedly to determine the fiduciary duty of a foreign corporation's

directors. *Hausman v. Buckley*, 299 F.2d 696, 703 (2d Cir. 1962) citing, *inter alia*, *Upson v. Otis*, 155 F.2d 606, 610 (2d Cir. 1946). And reference has been made to the law of the state of incorporation to resolve problems concerning one's status as a stockholder. *Hausman*, 299 F.2d at 703 citing, *inter alia*, *Milvy v. Adams*, 16 F.R.D. 105 (S.D.N.Y. 1954).

In line with these principles, New York courts decide questions relating to corporate internal affairs in accordance with the law of the place of incorporation. *KDW Restructuring & Liquidation Servs. LLC v. Greenfield*, 874 F. Supp. 2d 213, 221 (S.D.N.Y. 2012), quoting *Scottish Air Int'l Inc. v. British Caledonian*, 81 F.3d 1224, 1234 (2d Cir. 1996) (citation omitted). New York courts thus look to the law of the state of incorporation in adjudicating a corporation's internal affairs, including questions as to the relationship between the corporation's shareholders and its directors. *Galef v. Alexander*, 615 F.2d 51, 58 (2nd Cir. 1980) citing, *inter alia*, *Hausman,* 299 F.2d at 702-706 (2nd Cir. 1962); *Rottenberg v. Pfeiffer*, 59 A.D.2d 756 (2d Dept. 1977), *lv. app. granted*, 44 N.Y.2d 642 (1978). Thus, the internal affairs doctrine has been historically applied to pre-suit derivative action demands and related rules. *See*, *e.g.*, *O'Donnell v Ferro,* 303 A.D.2d 567 (2d Dept. 2003) (law of Delaware, state of incorporation, applied to sufficiency of demand).

The internal affairs doctrine does have a public policy exception, which has two potential prongs. *In re BP p.l.c. Derivative Litigation*, 507 F. Supp. 2d at 308. The first is available when the pertinent laws of the jurisdiction of incorporation are objectively immoral or unjust. *Id.*, quoting *Hausman*, 299 F.2d at 705, citing *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111 (1918). The second public policy exception applies where application of the local law of some other state is required by reason of the overriding interest in that other state in the issue to be decided. *In re BP p.l.c. Derivative Litigation*, 507 F. Supp. 2d at 308-309, quoting Restatement (Second) of Conflict of Laws at § 302, cmts. b and c.

Under the public policy exception, when otherwise applicable foreign law would violate some fundamental principle of justice, some prevalent conception of good morals, and/or some deep-rooted tradition of the common weal, the court may refuse to enforce that foreign law. *Cooney v. Osgood Mach.,* 81 N.Y.2d 66, 78 (1993), *quoting Loucks v Standard Oil Co.,* 224 N.Y. at 111. The party seeking to invoke the exception has the burden of proving that the foreign

law is contrary to New York public policy. *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 202 (1985). It is a heavy burden because public policy is not measured by individual notions of expediency and fairness or by a showing that the foreign law is unreasonable or unwise. *Id.*, citing *Loucks v Standard Oil Co.*, 224 N.Y. at 111.

B. Application of these Principles to the Instant Action

The Court grants the motion and dismisses the Complaint as asserted against Movants based on its conclusion that Movants have established that Plaintiff lacks standing to maintain this action in New York. There is no dispute that the Company in which Plaintiff holds stock is an entity organized and headquartered in Great Britain. Moreover, there is no dispute that the focus of the lawsuit, instituted by an English citizen, is alleged fiduciary misconduct and waste committed by non-resident corporate directors of an English company. This lawsuit thus fits within the myriad precedents from New York and elsewhere applying the internal affairs doctrine to pre-suit derivative action demands and related rules such as the English statute at issue here. That English statute requires that a shareholder first obtain permission from the English High Court before commencing a derivative action, which admittedly was not done here.

The principles and policy rationale underlying the rule are pertinent and applicable to Plaintiff's derivative claims as set forth in the Complaint. Plaintiff's claims directly involve the relationship between an English company and its shareholders, and the application of the internal affairs doctrine to the resolution of those claims will foster the desired result of having foreign courts apply their own law to disputes involving corporations domiciled in their jurisdictions. Although Plaintiff's submissions provide extensive detail regarding the improprieties previously committed by the HSBC entities, the issue that is central to Plaintiff's Complaint is not whether those entities violated Federal or State banking laws but, rather, whether the directors breached their fiduciary duties to the named entities and thereby harmed them, so as to support the award of money damages demanded in the Complaint. It is not the Court's function in a derivative action to ensure that Defendants are censured or penalized for violating statutory law or allegedly threatening the security of United States and/or the citizens of New York. And, somewhat notably, the HSBC entities have already been held to account by prosecutorial authorities in a forum suited to the accomplishment of that task.

Nor will this action directly affect any national or New York security concerns, irrespective of what its outcome may ultimately be. Indeed, a derivative action such as this is designed to provide redress in the form of financial compensation to the allegedly damaged entity, not to confer any particular benefit upon the citizenry of New York or otherwise directly redress the concerns set forth in the DPA.

Plaintiff has not met its burden of establishing the appropriateness of applying the public policy exception to the internal affairs doctrine in this action. The pre-action requirements applicable to derivative claims under English law do not violate fundamental principles of justice or otherwise warrant the application of an exception to the internal affairs doctrine. The English Companies Act of 2006 does not violate any significant New York public policy simply because Plaintiff, an English citizen suing to recover money damages payable to an English company, must pursue his claims in accord with the judicial permission requirements of English law. Indeed, as recognized by Judge Cote in *Seybold v. Groenink*, 2007 WL 737502 (S.D.N.Y. March 12, 2007), the New York policy at issue in a shareholders derivative lawsuit is the "right of stockholders to participate in the management of a corporation through the intervention of the courts." *Id.* at *7, quoting *Hausman*, 299 F.2d at 705. Such a policy does not compel application of the public policy exception.

The fact that English law provides different avenues than New York law for shareholders to address malfeasance by directors does not establish that the English system is immoral or unjust. While English Law may impose different or more restrictive pre-action statutory requirements in derivative lawsuits, Plaintiff has not identified a New York public policy which particularly favors, or is otherwise relevantly solicitous of, plaintiffs in shareholder derivative actions. In fact, in *Bansbach v. Zinn,* 1 N.Y.3d 1 (2003), *rearg. den.*, 1 N.Y.3d 593 (2004), the Court of Appeals observed that shareholder derivative suits, on the one hand, are not favored because they ask courts to second-guess the business judgment of the individuals charged with managing the company but, on the other hand, serve the important purpose of protecting corporations and minority shareholders against officers and directors who, in discharging their official responsibilities, place other interests ahead of those of the corporation. *Id.* at 8. This view of shareholder derivative suits, which includes the analysis of the negative aspects of such

suits, belies Plaintiff's claim that there is a compelling national or state interest in having this action litigated in New York. In light of the foregoing, Plaintiff has not demonstrated the appropriateness of applying the public policy exception to the internal affairs rule in analyzing the issue of Plaintiff's standing to bring this derivative suit in New York.

The Court also concludes that *Culligan* does not compel a different result. *Culligan* departs from existing Second Department authority, pursuant to which the internal affairs doctrine has been uniformly applied to derivative action demand issues and related matters. In addition, shortly before *Culligan* was decided, the First Department reaffirmed the principle that New York choice-of-law rules provide that substantive issues such as issues of corporate governance, including the threshold demand issue, are governed by the law of the state in which the corporation is chartered. *Lerner v. Prince*, 119 A.D.3d 122, 128 (1st Dept. 2014) (applying Delaware law to issue of Plaintiff's right to discovery in demand-refusal case involving a Delaware corporation with its principal place of business in New York). In light of existing Second Department authority, and in consideration of the principles set forth in other relevant case law, the Court cannot conclude that BCL § 1319(a) effectively trumps the internal affairs doctrine as applicable to a foreign corporation. Accordingly, based on the Court's conclusion that English law is applicable, and because Plaintiff has admittedly failed to comply with its pre-action requirements and dictates, the Court dismisses the Complaint as asserted against Movants.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
November 12, 2015

HON. TIMOTHY S. DRISCOLL
J.S.C.

EXHIBIT F

EXHIBIT F

Lawsuits filed in New York Supreme Court in the past 15 years by Deutsche Bank AG as a plaintiff, asserting venue in NY.

DEUTSCHE BANK AG NEW YORK vs. FUNDACION HJDK
County Supreme Court - Mar 02, 2020 - 0651419/2020 - CD-ECONTRACT

DEUTSCHE BANK AG vs. UNIVERSAL LOGISTIC MATTERS
Feb 13, 2018 0656981/2017 E-OTHER Deutsche Bank Ag

DEUTSCHE BANK AG vs. VIK ERIK MARTIN
May 16, 2016 0652156/2016 CD-EOTHER COMMERCIAL Deutsche Bank Ag

DEUTSCHE BANK AG vs. NYC DEPARTMENT FINANCE
Apr 21, 2015 - 0100034/2015 - ARTICLE 78 - Deutsche Bank Ag

0161257/2013. DEUTSCHE BANK AG vs. VIK ALEXANDER
Feb 28, 2014 - 0161257/2013 - E-CONTRACT - Deutsche Bank Ag

DEUTSCHE BANK AG vs. SEBASTIAN HOLDINGS INC
Nov 27, 2013 - 0161079/2013 - E-OTHER - Deutsche Bank Ag

DEUTSCHE BANK AG vs. URBI DESARROLLOS URBANOS
Oct 28, 2013 - 0651676/2013 - CD-ECONTRACT - Deutsche Bank

DEUTSCHE BANK AG vs. PARMAR, PAUL
Aug 13, 2010 - 0601317/2010 - E-CONTRACT - Deutsche Bank Ag

DEUTSCHE BANK AG vs. TRILOGY PORTFOLIO COMPANY,
Jun 30, 2009 - 0603302/2008 - CONTRACT - Deutsche Bank Ag; – New York

DEUTSCHE BANK AG vs. INTERNATIONAL BANKING
May 12, 2009 - 0601471/2009 - CD-ECONTRACT - Deutsche Bank Ag

DEUTSCHE BANK AG vs. VITRO ENVASES
Mar 09, 2009 - 0600612/2009 - E-CONTRACT - Deutsche Bank Ag

DEUTSCHE BANK AG vs. DAKOTAH TRAVEL
Oct 24, 2008 - 0602514/2008 - E-OTHER COMMERCIAL - Deutsche Bank Ag

DEUTSCHE BANK AG vs. 440 PARK AVENUE OWNER
Oct 24, 2008 - 0111870/2008 - E-OTHER COMMERCIAL - Deutsche Bank Ag

DEUTSCHE BANK AG vs. INTELIG TELECOMUNICACOES LTDA
Aug 01, 2008 - 0601683/2008 - CONTRACT - Deutsche Bank Ag

Lawsuits filed in federal court in New York in the past 15 years by Deutsche Bank AG as a plaintiff, asserting venue in NY.

Deutsche Bank Ag Et Al V. Sabal Limited Lp
New York Southern District Court - May 05, 2016 - 1:16cv3360 - Other Contract - Deutsche Bank AG - Diversity-Other Contract

Deutsche Bank Ag New York Branch V. Maxim Integrated Products, Inc.
New York Southern District Court - Oct 18, 2012 - 1:12cv7806 - Patent Deutsche Bank AG - New York Branch - Civil Action to Obtain Patent

Deutsche Bank AG v. 111 Debt Acquisition Mezz LLC
New York Southern District Court - Jan 28, 2010 - 1:10cv688 - Other Statutory Actions - Deutsche Bank AG New York Branch - Compel attendance at arbitration

Deutsche Bank Ag V. Bank Of America, N.A.
New York Southern District Court - Nov 25, 2009 - 1:09cv9784 - Other Contract - Deutsche Bank AG - Diversity-Breach of Contract

In Re: Worldcom, Inc
New York Southern District Court - Dec 05, 2005 - 1:05cv10198 - Appeal 28 USC 158 - Deutsche Bank AG London Branch - Notice of Appeal re Bankruptcy Matter

Deutsche Bank AG v. United States of America
New York Southern District Court - Aug 12, 2005 - 1:05cv7124 - Taxes - Deutsche Bank AG - IRS: Refund of Tax Penalty

Deutsche Investment Management Americas Inc v. United States of America

New York Southern District Court - Aug 11, 2005 - 1:05cv7120 - Taxes - Deutsche Bank AG - Refund of Income Tax

Gilbraltar Fund I, LP et al v. Beacon Hill Asset Management LLC Et A
New York Southern District Court - Oct 05, 2004 - 1:04cv7900 - Securities - Deutsche Bank AG - Securities Exchange Act

Deutsche Bank AG v. JP Morgan Chase Bank
New York Southern District Court - Sep 10, 2004 - 1:04cv7192 - Other Contract - Deutsche Bank AG - Constitutionality of State Statute(s)

Deutsche Bank Ag V. Ambac Credit Products, Llc Et Al
New York Southern District Court Jul 19, 2004 1:04cv5594 Other Contract Deutsche Bank AG; Diversity-Other

In Re: Genuity, Inc
New York Southern District Court - Jan 26, 2004 - 1:04cv591 - Appeal 28 USC 158 - Deutsche Bank AG - Notice of Appeal re Bankruptcy Matter

Deutsche Bank AG v. Kreusch
New York Northern District Court - May 29, 2003 - 3:03cv667 - Judgments - Deutsche Bank AG - Diversity-Notice of Removal

Taunus Corporation, et al v. City of New York
New York Southern District Court - May 02, 2003 - 1:03cv3104 - Product Liability - Deutsche Bank AG - Notice of Removal

Taunus Corporation, et al v. the City of New York
New York Southern District Court - Dec 10, 2002 - 1:02cv9762 - Personal Property - Deutsche Bank AG - Fed. Question: Other

Deutsche Bank AG v. Asarco Incorporated
New York Southern District Court - Feb 04, 2002 - 1:02cv849 - Other Contract - Deutsche Bank AG - Diversity-Breach of Contract

Deutsche Bank AG v. Garban Corporates GP, et al
New York Southern District Court - Jul 14, 1999 - 1:99cv5139 - Negotiable Instrument - Deutsche Bank AG - Diversity-Negotiable Instrument

Bankers Trust Corp, et al v. Credit Suisse First
New York Southern District Court - Jul 08, 1999 - 1:99cv4898 - Securities - Deutsche Bank, AG - Notice of Removal

Deutsche Bank v. Solow
New York Southern District Court - Jun 19, 1990 - 1:90cv4150 - Real Property - Deutsche Bank AG

Deutsche Bank AG et al v. Corporacion Andina De Fomento
New York Southern District Court - Jul 26, 2005 - 1:05cv6723 - Other Contract - Deutsche Bank AG - Diversity-Other Contract – Closed

EXHIBIT G-1

EXHIBIT G-1

JUDGMENT OF THE COURT (First Chamber)

2 October 2008 (*)

(Jurisdiction – Regulation (EC) No 44/2001 – Point 2 of Article 22 – Disputes as to the validity of decisions of organs of companies – Exclusive jurisdiction of the courts of the State where the company has its seat – Medical practitioners' mutual defence organisation)

In Case C-372/07,

REFERENCE for a preliminary ruling under Article 234 EC, from the Supreme Court (Ireland), made by decision of 30 July 2007, received at the Court on 6 August 2007, in the proceedings

Nicole Hassett

v

South Eastern Health Board,

in the presence of

Raymond Howard,

Medical Defence Union Ltd,

MDU Services Ltd,

and

Cheryl Doherty

v

North Western Health Board,

in the presence of

Brian Davidson,

Medical Defence Union Ltd,

MDU Services Ltd,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), A. Borg Barthet, M. Ilešič and J.-J. Kasel, Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 June 2008,

after considering the observations submitted on behalf of:

– Medical Defence Union Ltd and MDU Services Ltd, by R. Bourke, Solicitor, B. Murray, BL, and N. Travers, BL,

– R. Howard and B. Davidson, by D. McDonald, SC, and E. Regan, SC,

– Ireland, by D. O'Hagan, acting as Agent, assisted by J. O'Reilly, SC,

– the Commission of the European Communities, by A.-M. Rouchaud-Joët and M. Wilderspin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of point 2 of Article 22 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference was made in proceedings in which two doctors, R. Howard and B. Davidson ('the doctors'), claimed an indemnity and/or a contribution from their mutual defence organisations, the Medical Defence Union Ltd and MDU Services Ltd (collectively, 'the MDU'), in respect of any sum which – in the context of medical negligence actions brought by Nicole Hassett and Cheryl Doherty against the health boards for which those doctors worked – either doctor might be ordered to pay by way of indemnity to the health board concerned.

Legal framework

3 The 11th recital in the preamble to Regulation No 44/2001 states as follows:

'The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. …'

4 Article 2(1) of Regulation No 44/2001 provides:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

5 Article 5 of that regulation provides:

'A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

...

3. in matters relating to tort, *delict* or *quasi-delict*, in the courts for the place where the harmful event occurred or may occur;

...'.

6 Under Article 6 of Regulation No 44/2001:

'A person domiciled in a Member State may also be sued:

...

2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

...'.

7 Article 22 of that regulation provides:

'The following courts shall have exclusive jurisdiction, regardless of domicile:

...

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. ...;

...'.

The dispute in the case before the referring court and the question referred for a preliminary ruling

8 The order for reference indicates that the dispute before the referring court arises from two actions for damages, brought before the Irish courts by Nicole Hassett and Cheryl Doherty against two Irish health boards for serious personal injuries allegedly caused through the professional negligence of the doctors, who were employed by those health boards. In both actions, a settlement was reached under which an indemnity payment was made to the claimant.

9 In the context of those actions, the health boards in question applied to have the doctors joined as a third party in each case, in order to claim an indemnity or a contribution from them.

10 At the material time, the doctors were members of the MDU. The MDU is a professional association, established as a company incorporated under English law and having its registered office in the United Kingdom. The MDU's mission is inter alia to provide indemnity to its members in cases involving professional negligence on their part.

11 Accordingly, the doctors sought an indemnity and/or a contribution from the MDU in respect of any sum which either of them might be required to pay by way of indemnity to the relevant health board. The Board of Management of the MDU, relying on Articles 47 and 48 of the company's Articles of Association, under which any decision concerning a request for an indemnity comes within its absolute discretion, refused to grant their requests.

12 On the view that those refusals infringed their rights under the MDU's Articles of Association, the doctors applied to the High Court (Ireland) for leave to join the MDU as an additional third party. This was granted by order of the High Court of 22 June 2005.

13 The MDU thereupon sought to have that order set aside on procedural grounds. It maintained that, since the claims against it concerned in essence the validity of decisions adopted by its Board of Management, they fell within the scope of point 2 of Article 22 of Regulation No 44/2001, with the result that jurisdiction lay solely with the courts of England and Wales, not with the courts of Ireland.

14 The doctors argued, on the other hand, that, in view of the nature of their claims, the Irish courts had jurisdiction pursuant to points 1 and 3 of Article 5, and point 2 of Article 6, of Regulation No 44/2001. In particular, they maintained that the MDU had acted in breach of its contractual obligations by failing to consider properly the claims for indemnity submitted to it. Moreover, as the MDU had previously assisted the doctors with their defence against the action for professional negligence, it could not refuse to indemnify them at such a late stage in the proceedings.

15 The procedural objection raised by the MDU was rejected on the ground that the doctors' claims did not come within the scope of point 2 of Article 22 of Regulation No 44/2001. The MDU appealed to the Supreme Court, which stayed the proceedings and referred the following question to the Court for a preliminary ruling:

'Where medical practitioners form a mutual defence organisation taking the form of a company, incorporated under the laws of one Member State, for the purpose of providing assistance and indemnity to its members practising in that and another Member State in respect of their professional practice, and the provision of such assistance or indemnity is dependent on the making of a decision by the Board of Management of that company, in accordance with its Articles of Association, in its absolute discretion, are proceedings in which a decision refusing assistance or indemnity to a medical practitioner practising in the other Member State pursuant to that provision is challenged by that medical practitioner as involving a breach by the company of contractual or other legal rights of the medical practitioner concerned to be considered to be proceedings which have as their object the validity of a decision of an organ of that company for the purposes of Article 22, [point] 2, of [Regulation No 44/2001] so that the courts of the Member State in which that company has its seat have exclusive jurisdiction?'

The question referred for a preliminary ruling

16 By that question, the national court is essentially asking the Court whether point 2 of Article 22 of Regulation No 44/2001 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, concern the validity of the decisions of the organs of a company within the meaning of that provision.

17 In order to answer that question, it should be borne in mind that, according to settled case-law, the provisions of Regulation No 44/2001 must be interpreted independently, by reference to its scheme and

purpose (see, inter alia, Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 29).

18 Moreover, as is stated in the 11th recital in the preamble to Regulation No 44/2001, jurisdiction based on the defendant's domicile – in accordance with the general rule – must always be available, save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. Such situations must accordingly be interpreted strictly.

19 The Court adopted just such an interpretation in respect of the provisions of Article 16 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36; 'the Brussels Convention'), which are identical in essence to those of Article 22 of Regulation No 44/2001. The Court held in that regard that, as those provisions of the Brussels Convention introduce an exception to the general rule governing the attribution of jurisdiction, they must not be given an interpretation broader than is required by their objective, since their effect is to deprive the parties of the choice of forum which would otherwise be theirs and, in certain cases, they result in the parties being brought before a court which is not that of the domicile of any of them (see Case 73/77 *Sanders* [1977] ECR 2383, paragraphs 17 and 18; Case C-8/98 *Dansommer* [2000] ECR I-393, paragraph 21; and Case C-343/04 *ČEZ* [2006] ECR I-4557, paragraph 26).

20 Moreover, as was confirmed by the Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1), by introducing such an exception in the case of companies, whereby exclusive jurisdiction is attributed to the courts of the Member State in which the company has its seat, the essential objective pursued is one of centralising jurisdiction in order to avoid conflicting judgments being given as regards the existence of a company or as regards the validity of the decisions of its organs.

21 As that report also indicates, the courts of the Member State in which the company has its seat appear to be those best placed to deal with such disputes, inter alia because it is in that State that information about the company will have been notified and made public. Exclusive jurisdiction is thus attributed to those courts in the interests of the sound administration of justice (see, to that effect, *Sanders*, paragraphs 11 and 17).

22 Contrary to the MDU's submissions, however, it cannot be inferred from the principles referred to in the preceding paragraphs that, in order for point 2 of Article 22 of Regulation No 44/2001 to apply, it is sufficient that a legal action involve some link with a decision adopted by an organ of a company (see, by analogy, in relation to Article 16(1) of the Brussels Convention, Case C-294/92 *Webb* [1994] ECR I-1717, paragraph 14, and *Dansommer*, paragraph 22).

23 As submitted by the doctors, if all disputes involving a decision by an organ of a company had to be treated as coming within the scope of point 2 of Article 22 of Regulation No 44/2001, that would in reality mean that all legal actions brought against a company – whether in matters relating to a contract, or to tort or delict, or any other matter – would almost always come within the jurisdiction of the courts of the Member State in which the company has it seat.

24 However, such an interpretation of that provision would make the exceptional jurisdiction in question applicable in the case of disputes which would not give rise to conflicting judgments as regards the validity of the decisions of the organs of a company, in that their outcome would have no bearing on that validity, and also in the case of disputes which do not require any examination of the publication formalities applicable to a company.

25 Such an interpretation would thus extend the scope of point 2 of Article 22 of Regulation No 44/2001 beyond what is required by its objective, as referred to in paragraphs 20 and 21 of this judgment.

26 It follows that – as was rightly pointed out by the doctors and by the Commission of the European Communities – that provision must be interpreted as covering only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs, as laid down in its Articles of Association.

27 The order for reference does not indicate, however, that the doctors raised such challenges before the High Court.

28 In fact, in the case before the referring court, the doctors do not in any way challenge the fact that the MDU's Board of Management was empowered under that company's Articles of Association to adopt the decision rejecting their claim for indemnity.

29 What the doctors do challenge is the manner in which that power was exercised. They maintain that the MDU rejected their claim for indemnity automatically, without examining it in detail, thereby infringing their rights under the MDU's Articles of Association as members of that organisation.

30 Consequently, the disputes before the referring court between those doctors and the MDU do not fall within the scope of point 2 of Article 22 of Regulation No 44/2001.

31 In the light of the foregoing, the answer to the question referred must be that point 2 of Article 22 of Regulation No 44/2001 is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, do not concern the validity of the decisions of the organs of a company within the meaning of that provision.

Costs

32 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Point 2 of Article 22 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters is to be interpreted as meaning that proceedings, such as those at issue before the referring court, in the context of which one of the parties alleges that a decision adopted by an organ of a company has infringed rights that it claims under that company's Articles of Association, do not concern the validity of the decisions of the organs of a company within the meaning of that provision.

[Signatures]

** Language of the case: English.

EXHIBIT G-2

EXHIBIT G-2

BVG

JUDGMENT OF THE COURT (Third Chamber)

12 May 2011 *

In Case C-144/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Kammergericht Berlin (Germany), made by decision of 8 March 2010, received at the Court on 18 March 2010, in the proceedings

Berliner Verkehrsbetriebe (BVG),

v

JPMorgan Chase Bank NA, Frankfurt Branch,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, D. Šváby, E. Juhász, G. Arestis and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2011,

after considering the observations submitted on behalf of:

— Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts, by C. Stempfle and C. Volohonsky, Rechtsanwälte, and T. Lord, Barrister,

— JPMorgan Chase Bank NA, Frankfurt Branch, by K. Saffenreuther and C. Schmitt, Rechtsanwälte,

— the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

— the United Kingdom Government, by H. Walker, acting as Agent, and A. Henshaw, Barrister,

— the European Commission, by A.-M. Rouchaud-Joët, S. Grünheid and M. Wilderspin, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 22(2) and 27 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

2 The reference has been made in proceedings between Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts ('BVG'), and JPMorgan Chase Bank NA ('JPM'), Frankfurt Branch, concerning a financial derivative contract.

Legal context

3 Recital 11 in the preamble to Regulation No 44/2001 states:

'The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different

linking factor. The domicile of a legal person must be defined autonomously so as to make the ... rules more transparent ...'

4 Article 1(1) of Regulation No 44/2001 provides:

'This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.'

5 Article 2(1) of the regulation is worded as follows:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

6 Article 22(1), (2) and (4), which form part of Section 6 of Chapter II of the regulation, state:

'The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

...

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

...

4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

...'

7 Article 23 of the regulation provides:

'1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise....

...

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.'

8 Article 25 of the regulation is worded as follows:

'Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.'

9 Article 27 of the regulation states:

'1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.'

10 Article 33(1) of the regulation provides:

'A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.'

11 Article 35(1) of the regulation is worded as follows:

'Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.'

12 Article 38(1) of the regulation states:

'A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.'

13 Article 60(1) of the regulation provides:

'For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat, or

(b) central administration, or

(c) principal place of business.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 According to the order for reference, on 19 July 2007 JPM, an American investment bank whose company seat is in New York (United States) and which has various branches and subsidiaries in Europe, including in Germany and the United Kingdom, and BVG, a legal person governed by public law whose seat is in Berlin (Germany) and which provides public transport services in the *Land* of Berlin, concluded, by means of a trade confirmation, an 'Independent Collateral Enhancement Transaction'

involving, inter alia, a contract ('the JPM Swap Contract'). This contract contains a clause conferring jurisdiction on the English courts.

15 It is apparent from the documents before the Court that, under the terms of the JPM Swap Contract, BVG agreed inter alia to pay JPM sums of up to USD 220 million in the event of default on payment by certain third-party companies and that BVG received a premium of approximately USD 7.8 million in return.

The proceedings brought in England by JPM and its United Kingdom subsidiary

16 JPM submits that since September 2008 some of the third-party companies covered by the JPM Swap Contract have been unable to meet payments and it therefore demanded that BVG pay the sums due under that contract. Since BVG refused to pay those sums, on 10 October 2008 JPM's London branch and its United Kingdom subsidiary brought proceedings against BVG in England before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court) ('the High Court'), the court having jurisdiction under the terms of the JPM Swap Contract and therefore, in principle, under Regulation No 44/2001, by virtue of Article 23 thereof. That action sought the payment of approximately USD 112 million under BVG's payment obligations arising from the JPM Swap Contract, or the award of damages of the same amount, and the grant by the court of a series of declarations establishing, essentially, that the JPM Swap Contract had been freely entered into by BVG, without reliance on its part upon advice from JPM or its United Kingdom subsidiary, and that that contract was consequently valid and enforceable.

17 BVG opposed the action brought by JPM and its subsidiary by stating that it had no obligation to pay since JPM had given it poor advice as regards the JPM Swap Contract. BVG subsequently put forward other arguments in its defence, submitting that the JPM Swap Contract was not valid because it had acted *ultra vires* when that contract was concluded and that the decisions of its organs which had led to the conclusion of that contract were therefore null and void.

18 BVG also requested the High Court to decline jurisdiction in favour of the German courts, which, in its submission, have exclusive jurisdiction to adjudicate upon the case, under Article 22(2) of Regulation No 44/2001. By judgment of 7 September 2009 the High Court dismissed that application. Following an appeal brought before it by BVG, the Court of Appeal of England and Wales (Civil Division) upheld that judgment by a judgment of 28 April 2010, without awaiting the outcome of the present reference for a preliminary ruling. Leave was granted to appeal to the Supreme Court of the United Kingdom. By decision of 21 December 2010, received at the Court on 7 February 2011 and registered under number C-54/11, the Supreme Court made a reference for a preliminary ruling in those appeal proceedings.

The proceedings brought in Germany by BVG

19 On 9 March 2009, BVG brought an action against JPM's branch in Frankfurt-am-Main before the Landgericht Berlin (Regional Court, Berlin, Germany), asking that court (i) to declare that the JPM Swap Contract is void because its subject-matter is *ultra vires* in the light of BVG's statutes, (ii) in the alternative, to order JPM to release it from any obligation stemming from that contract, as compensation in respect of its right to damages by reason of the incorrect advice given by JPM, and (iii) to order JPM to pay it damages.

20 In this action BVG contends, in particular, that the Landgericht Berlin, the court seised second, has exclusive jurisdiction under Article 22(2) of Regulation No 44/2001. Thus, that court must conduct the proceedings brought before it without taking account of the proceedings brought in England and it is not entitled to stay the proceedings pursuant to Article 27(1) of Regulation No 44/2001. However, by order of 26 May 2009, the Landgericht Berlin decided to stay the proceedings. By a 'sofortige Beschwerde', BVG appealed against that decision to the Landgericht Berlin itself. Since that court did not grant the appeal, the case was brought automatically before the Kammergericht Berlin (Higher Regional Court, Berlin, Germany), in accordance with the applicable rules of German procedural law.

21 The Kammergericht Berlin took the view, like the Landgericht Berlin, that the proceedings brought in England and Germany have given rise to a situation of *lis pendens* for the purposes of Article 27(1) of Regulation No 44/2001. It was in those circumstances that the Kammergericht Berlin decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does the scope of Article 22(2) of [Regulation No 44/2001] also extend to proceedings in which a company or legal person objects, with regard to a claim made against it stemming from a legal transaction, that decisions of its organs which led to the conclusion of the legal transaction are ineffective as a result of infringements of its statutes?

2. If the [first question] is answered in the affirmative, is Article 22(2) of Regulation No 44/2001 also applicable to legal persons governed by public law in so far as the effectiveness of the decisions of its organs is to be reviewed by civil courts?

3. If the [second question] is answered in the affirmative, is the court of the Member State last seised in legal proceedings required to stay the proceedings pursuant to

Article 27 of Regulation No 44/2001 even if it is claimed that, because a decision of the organs of one of the parties is ineffective under its statutes, an agreement conferring jurisdiction is likewise ineffective?'

Consideration of the questions

22 It is to be observed at the outset that in the present case three questions have been asked relating to the interpretation of Regulation No 44/2001, in the context of main proceedings between BVG and JPM concerning the JPM Swap Contract, which is a financial derivative contract. After JPM brought an action before the English courts designed essentially to enforce the contract, on the basis of a clause conferring jurisdiction contained in the contract, BVG brought a parallel action asking the German courts to declare the same contract void on the basis, in particular, that its subject-matter is said to be *ultra vires* in the light of BVG's statutes.

Question 1

23 By its first question, the national court asks, in essence, whether Article 22(2) of Regulation No 44/2001 must be interpreted as applying to proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes.

24 The national court asks this question on the basis of the finding that BVG pleads that its own decisions are invalid as a collateral or preliminary issue. It states that the proceedings brought in England and Germany have given rise to a situation of *lis pendens* under Article 27(1) of Regulation No 44/2001 because both sets of proceedings concern the existence of the same right to payment alleged to result from the JPM Swap Contract, whose validity must therefore be examined in each of them.

25 Thus, according to the national court, the subject-matter of both of those sets of proceedings comprises the contractual claim based on that right to payment. The national court explains that its first question concerns the applicability of Article 22(2) of Regulation No 44/2001 in the context of 'a review, necessary only as a collateral question, of the effectiveness, under the statutes, of decisions of organs [of a company]'.

26 As regards the wording of Article 22(2) of Regulation No 44/2001, there is a certain divergence among the various language versions of that provision. According to some of the language versions, the courts where a company or other legal person or an association of natural or legal persons has its seat have exclusive jurisdiction 'in the matter of' the validity of its constitution, its nullity or its dissolution or of the validity of the decisions of its organs. By contrast, other language versions provide for such jurisdiction where proceedings have such a question as their 'object' or 'subject-matter'.

27 The second of those forms of wording suggests, unlike the first, that only proceedings in which the validity of a company's constitution or of a decision of a company's organs is raised as the primary issue are covered by that provision of Regulation No 44/2001.

28 However, it is well-established case-law that the various language versions of a text of European Union law must be given a uniform interpretation and hence, in the case of divergence between the language versions, the provision in question must

be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see, in particular, Case C-341/01 *Plato Plastik Robert Frank* [2004] ECR I-4883, paragraph 64, and Case C-340/08 *M and Others* [2010] ECR I-3913, paragraph 44).

29 Article 22(2) of Regulation No 44/2001 is therefore to be interpreted by taking account of matters other than its wording, in particular of the purpose and the general scheme of that regulation.

30 In this regard, it is to be recalled that the jurisdiction provided for in Article 2 of Regulation No 44/2001, namely that the courts of the Member State in which the defendant is domiciled are to have jurisdiction, constitutes the general rule. It is only by way of derogation from that general rule that the regulation provides for special rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another Member State (see Case C-103/05 *Reisch Montage* [2006] ECR I-6827, paragraph 22 and the case-law cited). The Court has thus adopted a strict interpretation in respect of Article 22 of Regulation No 44/2001 (Case C-372/07 *Hassett and Doherty* [2008] ECR I-7403, paragraphs 18 and 19). It has held that, as they constitute an exception to the general rule governing the attribution of jurisdiction, the provisions of Article 16 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36; 'the Brussels Convention'), which are identical in essence to those of Article 22 of Regulation No 44/2001, must not be given an interpretation broader than is required by their objective (see Case 73/77 *Sanders* [1977] ECR 2383, paragraphs 17 and 18; Case C-8/98 *Dansommer* [2000] ECR I-393, paragraph 21; and Case C-343/04 *ČEZ* [2006] ECR I-4557, paragraph 26).

31 That approach should be applied in the present context, in which the question of the applicability of Article 22(2) of Regulation No 44/2001 is raised (see, to this effect, *Hassett and Doherty*, paragraphs 18 and 19; Case C-167/08 *Draka NK Cables and Others* [2009] ECR I-3477, paragraph 20; and Case C-292/08 *German Graphics Graphische Maschinen* [2009] ECR I-8421, paragraph 27).

32 It is true that Article 23(5) of Regulation No 44/2001 provides that agreements conferring jurisdiction are to have no legal force if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22 of the regulation. However, this primacy of Article 22 cannot justify a broad interpretation of its provisions. On the contrary, a strict interpretation of Article 22(2) which does not go beyond what is required by the objectives pursued by it is particularly necessary because the jurisdiction rule which it lays down is exclusive, so that its application would deny the parties to a contract all autonomy to choose another forum.

33 A broad interpretation of Article 22(2) of Regulation No 44/2001, under which it would apply to any proceedings in which a question concerning the validity of a decision of a company's organs is raised, would be contrary, first, to one of the general aims of the regulation, laid down in recital 11 in its preamble, namely to seek to attain rules of jurisdiction that are highly predictable, and second, to the principle of legal certainty.

34 If all disputes relating to a decision by an organ of a company were to come within the scope of Article 22(2) of Regulation No 44/2001, that would in reality mean that legal actions brought against a company — whether in matters relating to a contract, or to tort or delict, or any other matter — could almost always come within the jurisdiction of the courts of the Member State in which the company has it seat (see, to this effect, *Hassett and Doherty*, paragraph 23). It would be sufficient for a company to plead as a preliminary issue that the decisions of its organs that led to the conclusion of a contract or to the performance of an allegedly harmful act are invalid in order for exclusive jurisdiction to be unilaterally conferred upon the courts where it has its seat.

35 The aforementioned objective of predictability would not be attained if the applicability of a jurisdiction rule founded on the nature of the dispute could thus vary — in the absence of an express provision to that effect in Regulation No 44/2001 — according

to whether a preliminary issue, capable of being raised at any time by one of the parties, exists, on the ground that this would alter the nature of the dispute.

36 It must also be stated that another aim of the jurisdiction rules which result from Article 22 of Regulation No 44/2001 is to confer exclusive jurisdiction on the courts of a Member State in specific circumstances where, having regard to the matter at issue, those courts are best placed to adjudicate upon the disputes falling to them, because there is a particularly close link between those disputes and the Member State.

37 Thus, Article 22(2) of Regulation No 44/2001 confers jurisdiction to adjudicate on disputes which relate to the validity of a decision of a company's organs upon the courts where the company has its seat. Those courts are best placed to adjudicate upon disputes which relate exclusively, or even principally, to such a question.

38 However, in a dispute of a contractual nature, questions relating to the contract's validity, interpretation or enforceability are at the heart of the dispute and form its subject-matter. Any question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies party to it, must be considered ancillary. While it may form part of the analysis required to be carried out in that regard, it nevertheless does not constitute the sole, or even the principal, subject of the analysis.

39 Thus, the subject-matter of such a contractual dispute does not necessarily display a particularly close link with the courts where the party which pleads that a decision of its own organs is invalid has its seat. It would therefore be contrary to the sound administration of justice to confer exclusive jurisdiction for such disputes upon the courts of the Member State in which one of the contracting companies has its seat.

40 Nor would a broad interpretation of Article 22(2) of Regulation No 44/2001 be consistent with the specific objective of that provision, which consists simply in centralising jurisdiction to adjudicate upon disputes concerning the existence of a company or the validity of the decisions of its organs, in order to avoid conflicting judgments being given (see, to this effect, *Hassett and Doherty*, paragraph 20). That objective is limited solely to disputes with this subject-matter and Article 22(2) is thus not designed to centralise jurisdiction to adjudicate upon all disputes concerning a contract involving a legal person which pleads as a ground of defence that the decisions of its own organs are invalid.

41 As has been observed in paragraph 38 of the present judgment, any question concerning the validity of a decision to enter into a contract taken by organs of one of the parties thereto must be considered ancillary in the context of a contractual dispute. Such a dispute is not, in principle, liable to give rise to conflicting judgments by courts of different Member States since counterclaims or parallel claims founded on the same contract involve, in principle, an instance of *lis pendens* covered by Article 27(1) of Regulation No 44/2001 and the judgments given by the court having jurisdiction must be recognised and enforced in all the Member States, in accordance with Articles 33(1) and 38(1) of Regulation No 44/2001.

42 It follows from all of the foregoing that a broad interpretation of Article 22(2) of Regulation No 44/2001, under which it would apply to any proceedings in which a question concerning the validity of a decision of a company's organs is raised, would extend the scope of that provision beyond what is required by the objectives pursued by it.

43 The Jenard Report on the Brussels Convention (OJ 1979 C 59, p. 1), which comments upon the provisions of the Brussels Convention and the conclusions of which are relevant, by analogy, for the purposes of interpreting the provisions of Regulation No 44/2001, confirms the appropriateness of a strict interpretation of Article 16(2) of the convention and, therefore, of Article 22(2) of the regulation. According to the

report, Article 16(2) of the convention provides for exclusive jurisdiction in proceedings which are 'in substance' concerned with the validity of the constitution, the nullity or the dissolution of the company, legal person or association, or with the validity of the decisions of its organs.

44 Thus, the divergence noted in paragraph 26 of the present judgment between the language versions of Article 22(2) of Regulation No 44/2001 is to be resolved by interpreting that provision as covering only proceedings whose principal subject-matter comprises the validity of the constitution, the nullity or the dissolution of the company, legal person or association or the validity of the decisions of its organs.

45 This conclusion is not contradicted by the judgment in Case C-4/03 *GAT* [2006] ECR I-6509, mentioned in the order for reference, where the Court held that Article 16(4) of the Brussels Convention, a provision essentially identical to Article 22(4) of Regulation No 44/2001, applies to any proceedings in which the validity of a patent is put in issue, be it by way of an action or a plea in objection, thereby conferring exclusive jurisdiction on the courts of the State in which the patent was registered.

46 That case-law cannot be applied to proceedings in which a question concerning the validity of a decision of a company's organs is raised. Since the validity of the patent concerned is an essential premiss, in particular in any infringement action, it is in the interests of the sound administration of justice that exclusive jurisdiction to adjudicate upon any dispute in which the patent's validity is contested is accorded to the courts of the Member State in which deposit or registration of the patent has been applied for or has taken place, they being best placed to adjudicate upon the dispute. As has been pointed out in paragraphs 37 to 39 of the present judgment, that is not so

in the case of the courts where a company party to a contractual dispute has its seat if it pleads that the decision to enter into the contract taken by its own organs is invalid.

47 In light of all the foregoing considerations, the answer to the first question is that Article 22(2) of Regulation No 44/2001 must be interpreted as not applying to proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes.

Questions 2 and 3

48 In light of the answer given to the first question, there is no need to answer the second and third questions referred.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 22(2) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as not applying to proceedings in which a company pleads that a contract cannot be relied upon against it because a decision of its organs which led to the conclusion of the contract is supposedly invalid on account of infringement of its statutes.

[Signatures]

EXHIBIT G-3

EXHIBIT G-3

Trinity Term
[2019] UKSC 40
On appeal from: [2017] EWCA Civ 1609

JUDGMENT

Akçil and others (Appellants) *v* Koza Ltd and another (Respondents)

before

Lord Reed, Deputy President
Lord Hodge
Lady Black
Lord Briggs
Lord Sales

JUDGMENT GIVEN ON

29 July 2019

Heard on 19 March 2019

Appellants	*Respondents*
Jonathan Crow QC	Lord Falconer of Thoroton
Adrian Briggs QC	Siward Atkins
David Caplan	Andrew Scott
(Instructed by Mishcon de Reya LLP)	(Instructed by Gibson Dunn & Crutcher UK LLP)

LORD SALES: (with whom Lord Reed, Lord Hodge, Lady Black and Lord Briggs agree)

1. This appeal is concerned with the interpretation of article 24(2) of the Brussels I Recast Regulation (Parliament and Council Regulation (EU) No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("the Recast Regulation")), which sets out a special regime to determine jurisdiction in relation to certain matters regarding the governance of corporations. Although the issue in the present case relates to where a Turkish company and certain Turkish-domiciled individuals may be sued, and Turkey is of course not an EU member state, it is common ground that article 24(2) of the Recast Regulation applies to determine the question of jurisdiction which arises in this case.

2. Article 24 is in Section 6 of the Recast Regulation, entitled "Exclusive jurisdiction". Article 24(2) provides as follows:

> "The following courts of a member state shall have exclusive jurisdiction, regardless of the domicile of the parties:
>
> ...
>
> (2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the member state in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law; ..."

3. The sixth appellant ("Koza Altin") is a publicly listed company incorporated in Turkey. It carries on a business specialising in gold mining. It is part of a group of Turkish companies known as the Koza Ipek Group ("the Group") which were formerly controlled by the second respondent ("Mr Ipek") and members of his family. Amongst other things, the Group has media interests in Turkey. The first respondent ("Koza Ltd") is a private company incorporated in England in March 2014. It is a wholly owned subsidiary of Koza Altin.

4. Mr Ipek says that he and the Group have been targeted unfairly by a hostile government in Turkey, including by making them the subject of an investigation into alleged criminal activity and taking steps against them in conjunction with that investigation. In order to defend himself as regards control of Koza Ltd, in September 2015 Mr Ipek caused a number of changes to be made to Koza Ltd's constitution and share structure. A new class of "A" shares was created and Koza Ltd's articles of association were amended to introduce a new article 26 ("article 26"), which purported to preclude any further changes to the articles of association or any change of directors save with the prior written consent of the holders of the "A" shares. Two "A" shares were issued, one to Mr Ipek and one to his brother.

5. The validity and effect of these changes is in issue in these proceedings. The respondents contend that they are valid and lawful. The appellants contend that they are invalid and unlawful attempts to entrench Mr Ipek and his associates in control of Koza Ltd.

6. In proceedings in Turkey relating to the criminal investigation in respect of Mr Ipek and the Group, on 26 October 2015 pursuant to article 133 of the Turkish Criminal Procedure Code the Fifth Ankara Criminal Peace Judge appointed certain individuals as trustees of Koza Altin and other companies in the Group, with power to control the affairs of those companies in place of the existing management. Pursuant to further decisions of the judge dated 13 January and 3 March 2016, the first to fifth appellants were appointed as the trustees in relation to Koza Altin. I refer to them together as "the trustees", although in further proceedings in Turkey in September 2016 they were replaced by the Tasarruf Mevduati Sigorta Fonu (the Savings Deposit Insurance Fund of Turkey) as trustee of Koza Altin. The trustees, with Koza Altin itself, are the relevant parties in the present proceedings in England and for this appeal.

7. On 19 July 2016, the trustees caused Koza Altin to serve a notice on the directors of Koza Ltd under section 303 of the Companies Act 2006, requiring them to call a general meeting to consider resolutions for their removal and replacement with three of the trustees.

8. The directors of Koza Ltd did not call such a meeting, so on 10 August 2016 Koza Altin served a notice pursuant to section 305 of the 2006 Act to convene a meeting on 17 August 2016 to consider those resolutions. The service of this notice prompted Mr Ipek and Koza Ltd to make an urgent without notice application on 16 August seeking an injunction to prevent the meeting taking place and, so far as required, orders for service out of the jurisdiction and for alternative service.

9. Injunctive relief as set out in the application was sought on two bases. It was contended that (i) the notices of 19 July and 10 August 2016 ("the notices") were void under section 303(5)(a) of the 2006 Act because at least one of the holders of the "A" shares (Mr Ipek) did not consent to the proposed resolutions and so, if passed, they would be ineffective as being passed in breach of article 26 (I refer to this claim as "the English company law claim"); and (ii) the notices were void on the basis that the English courts should not recognise the authority of the trustees to cause Koza Altin to do anything as a shareholder of Koza Ltd, because they were appointed on an interim basis only and in breach of Turkish law, the European Convention on Human Rights and natural justice, so that it would be contrary to public policy for the English courts to recognise the appointment (I refer to this claim as "the authority claim").

10. As regards jurisdiction, the primary submission for Mr Ipek and Koza Ltd was that permission to serve out of the jurisdiction was not required because the English courts had exclusive jurisdiction to deal with the whole claim pursuant to article 24(2) of the Recast Regulation. At the without notice hearing before Snowden J on 16 August 2016, the judge accepted this submission. He granted interim injunctive relief as sought by Mr Ipek and Koza Ltd and gave permission for alternative service at the offices of Mishcon de Reya LLP, the solicitors acting for Koza Altin and the trustees.

11. Mr Ipek and Koza Ltd issued their claim form on 18 August 2016 seeking a declaration that the notices were ineffective, an injunction to restrain Koza Altin and the trustees from holding any meeting pursuant to the notices and from taking any steps to remove the current board of Koza Ltd, a declaration that the English courts do not recognise any authority of the trustees to cause Koza Altin to call any general meetings of Koza Ltd or to do or permit the doing of anything else as a shareholder of Koza Ltd and an injunction to restrain the trustees from holding themselves out as having any authority to act for or bind Koza Altin as a shareholder of Koza Ltd and from causing Koza Altin to do anything or permit the doing of anything as a shareholder of Koza Ltd.

12. Koza Altin and the trustees filed an acknowledgement of service indicating their intention to contest jurisdiction and then issued an application to do that. At the same time, Koza Altin filed a Defence and Counterclaim to the English company law claim, impugning the validity and enforceability of article 26 and also impugning the validity and effectiveness of the board resolution of Koza Ltd pursuant to which the two "A" shares were issued.

13. In turn, Mr Ipek and Koza Ltd issued an application to strike out the acknowledgment of service, Koza Altin's Defence and Counterclaim and all other steps taken by Mishcon de Reya LLP purportedly on behalf of Koza Altin in the

proceedings, on the basis that the authority of those who had caused Koza Altin to take these steps should not be recognised in this jurisdiction.

14. The application of Koza Altin and the trustees to challenge jurisdiction was heard by Asplin J in December 2016. Their position was that (i) the English courts have no jurisdiction under article 24(2) of the Recast Regulation over the trustees in relation to any part of the claims; (ii) the English courts do have jurisdiction under that provision over Koza Altin in respect of the English company law claim, which relates to the affairs of Koza Ltd; and (iii) the English courts have no jurisdiction under that provision over Koza Altin in respect of the authority claim, which relates to the conduct of the business of Koza Altin.

15. Asplin J dismissed the application by order made on 17 January 2017. It was common ground that the English company law claim fell within article 24(2) of the Recast Regulation so that the English courts had jurisdiction in relation to it and in the judge's assessment the authority claim was inextricably linked with that claim, which she considered was the principal subject matter of the proceedings viewed as a whole.

16. Koza Altin and the trustees appealed on the grounds that Asplin J had erred in holding that article 24(2) conferred jurisdiction on the English courts to determine the authority claim and had erred in holding that article 24(2) conferred jurisdiction on the English courts to determine any of the claims against the trustees. The Court of Appeal dismissed the appeal. Like Asplin J, it held that the authority claim is inextricably linked with the English company law claim and it held that article 24(2) required the court to form an overall evaluative judgment as to what the proceedings are principally concerned with, which in this case is a challenge to the ability of Koza Altin to act as a shareholder of Koza Ltd in relation to Koza Ltd's internal affairs (see, in particular, paras 45-46 and 49-51). That was so even if certain parts of the relief sought, if viewed in isolation, appeared to go further than that, in that they related to the validity of decisions taken by the organs of Koza Altin. In the view of the Court of Appeal, therefore, by virtue of article 24(2) the English courts have jurisdiction in relation to the authority claim as well as in relation to the English company law claim. In addition, the Court of Appeal dismissed a distinct submission for the trustees that the English courts have no jurisdiction in relation to them under article 24(2), based on the fact that they are not necessary parties in the proceedings. Despite the court accepting that they are not necessary parties, it held that jurisdiction was established under article 24(2) in relation to the trustees because the subject matter of the proceedings involving them remained the same and the rationale of avoiding conflicting decisions in relation to the same subject matter applied, as did the rationale of ensuring that the proceedings are tried in the courts best placed to do so (paras 52-54).

17. The trustees and Koza Altin now appeal with permission granted by this court. They submit that in holding that the English courts have jurisdiction under article 24(2) in relation to the authority claim, which is concerned with the validity of decisions of the organs of Koza Altin, a Turkish company, the Court of Appeal has given that provision an impermissibly wide interpretation. On proper construction of article 24(2), it is the courts of Turkey which have the relevant close connection with the authority claim and the English courts could not be regarded as having relevant (putatively exclusive) jurisdiction under that provision in relation to that claim.

18. The issues on the appeal are (i) whether article 24(2) confers jurisdiction on the English courts to determine the authority claim as against Koza Altin and (ii) whether article 24(2) confers exclusive jurisdiction on the English courts to determine either the authority claim or the English company law claim as against the trustees. Each side maintains that the proper interpretation of article 24(2) is *acte clair* in their favour, but if it is not then a reference to the Court of Justice of the European Union is sought.

The Recast Regulation

19. The Recast Regulation is intended to lay down common rules governing jurisdiction assumed by member states. Insofar as relevant for present purposes, the basic scheme is encapsulated as relevant for present purposes in recitals (13)-(16) and (19):

> "(13) There must be a connection between proceedings to which this Regulation applies and the territory of the member states. Accordingly, common rules of jurisdiction should, in principle, apply when the defendant is domiciled in a member state.
>
> (14) A defendant not domiciled in a member state should in general be subject to the national rules of jurisdiction applicable in the territory of the member state of the court seised. However, in order to ensure the protection of consumers and employees, to safeguard the jurisdiction of the courts of the member states in situations where they have exclusive jurisdiction and to respect the autonomy of the parties, certain rules of jurisdiction in this Regulation should apply regardless of the defendant's domicile.

> (15) The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile. Jurisdiction should always be available on this ground save in a few well-defined situations in which the subject-matter of the dispute or the autonomy of the parties warrants a different connecting factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.
>
> (16) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a member state which he could not reasonably have foreseen ...
>
> ...
>
> (19) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, should be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation."

20. The scheme for allocation of jurisdiction under the Recast Regulation, therefore, is that persons domiciled in a member state should generally be sued in that member state (article 4), but pursuant to article 5 may also be sued in the courts of another member state in certain cases specified in sections 2 to 7 of Chapter II of the Recast Regulation. Section 2 is entitled "Special jurisdiction". Within it, article 7 sets out rules applicable in particular kinds of case, including contract, tort, unjust enrichment and certain other cases; and article 8 provides, among other things, that a person domiciled in a member state who is one of a number of related defendants may be sued in the courts of the place where any one of them is domiciled, provided the claims are closely connected. Section 3 deals with jurisdiction in matters relating to insurance; section 4 with jurisdiction over consumer contracts; and section 5 with jurisdiction over individual contracts of employment. Section 6 comprises article 24, dealing with cases of exclusive jurisdiction. Section 7, comprising articles 25 and 26, deals with prorogation of jurisdiction.

21. I set out here the full text of article 24:

"The following courts of a member state shall have exclusive jurisdiction, regardless of the domicile of the parties:

(1) in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the member state in which the property is situated. However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the member state in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same member state;

(2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the member state in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

(3) in proceedings which have as their object the validity of entries in public registers, the courts of the member state in which the register is kept;

(4) in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the member state in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place. Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each member state shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that member state;

> (5) in proceedings concerned with the enforcement of judgments, the courts of the member state in which the judgment has been or is to be enforced."

22. Article 25 provides in material part as follows:

> "1. If the parties, regardless of their domicile, have agreed that a court or the courts of a member state are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. ...
>
> ...
>
> 3. The court or courts of a member state on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between those persons or their rights or obligations under the trust are involved.
>
> 4. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to articles 15, 19 or 23, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of article 24.
>
> ..."

23. Article 26(1) provides:

> "1. Apart from jurisdiction derived from other provisions of this Regulation, a court of a member state before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of article 24."

24. These provisions indicate the priority given under the scheme of the Recast Regulation to the jurisdiction of the courts of a member state which have exclusive jurisdiction under article 24. The cases of exclusive jurisdiction within article 24 comprise situations where reasons exist to recognise an especially strong and fixed connection between the subject matter of a dispute and the courts of a particular member state.

25. For the cases falling within article 24, the principle of exclusive jurisdiction cuts across and takes priority over the other principles underlying the Recast Regulation, including the principle of jurisdiction for the courts of the member state where the defendant is domiciled and the principle of respect for party autonomy referred to in recital (19) and reflected in various provisions of the Regulation. The priority given to the jurisdiction of a member state within article 24 is underlined by departures from other general rules set out in the Recast Regulation. In particular, in section 8 of Chapter II, entitled "Examination as to jurisdiction and admissibility", article 27 provides for an exception to the usual rule in section 9 of Chapter II that it is the courts in a member state which are first seised with a matter which shall have jurisdiction in relation to it, so that the courts of other member states should decline jurisdiction accordingly. Article 27 provides:

> "Where a court of a member state is seised of a claim which is principally concerned with a matter over which the courts of another member state have exclusive jurisdiction by virtue of article 24, it shall declare of its own motion that it has no jurisdiction."

26. Also, in Chapter III, in section 3 (entitled "Refusal of recognition and enforcement"), article 45(1)(e) provides that the recognition of a judgment shall be refused if the judgment conflicts with Section 6 of Chapter II (ie with the provision for exclusive jurisdiction contained in article 24) and article 46 states that enforcement of a judgment shall be refused in cases falling within article 45.

Discussion

Issue (i): The application of article 24(2) in relation to the authority claim

27. Since article 24(2) of the Recast Regulation is a provision which creates exclusive jurisdiction for the courts of a member state in the circumstances specified, its proper interpretation can be tested on the hypothesis that Turkey stands in the position of a member state. If Koza Altin were a company which had its seat in a

member state, say Greece, article 24(2) would apply to allocate exclusive jurisdiction in relation to the authority claim either to Greece or to England. They could not both have exclusive jurisdiction under the Recast Regulation, since that would be contrary to the very idea of the jurisdiction being exclusive. The interpretation of article 24(2) does not change in the present case just because the other state in question (Turkey) happens not to be a member state.

28. The position in relation to article 24(2) is to be contrasted with that in relation to the general rule of jurisdiction in article 4 and the provisions contained in section 2 of Chapter II of the Recast Regulation. Under article 4 and those provisions, it is quite possible that the courts of two or more member states might have jurisdiction in relation to the same claim. This causes no difficulty under the scheme of the Recast Regulation. In all such cases it is the priority rules in section 9 of Chapter II which determine the jurisdiction where the claim should proceed, which generally depends on which court is first seised. But as noted above, those rules are disapplied where a claim falls within the exclusive jurisdiction provision in article 24. Accordingly, it is clear from the scheme of the Regulation that the interpretation and application of that provision cannot depend on the type of evaluative judgment in relation to which different courts could reasonably take different views. In principle, there should be only one correct application of article 24 in relation to a given claim. This tells strongly against the broad evaluative approach to the interpretation and application of article 24(2) adopted by the courts below.

29. As stated in recital (15) of the Recast Regulation, the objective of the Regulation is to set out rules governing the allocation of jurisdiction which are highly predictable. The desirability of having clear rules for allocation of jurisdiction is obvious, since parties who wish to bring claims and to defend them need to have a clear idea of which courts have jurisdiction so that they can decide how to proceed effectively and so as to minimise costs. Also, rules which are highly predictable in their effects serve the purpose of enabling different courts to determine with a minimum of effort whether they have jurisdiction in respect of any given claim. As is clear from the recitals and scheme of the Recast Regulation, a further objective of the regime is to avoid inconsistent judgments on the same issue being produced by the courts of different member states.

30. The case law of the Court of Justice of the European Union ("the Court of Justice", formerly called the European Court of Justice) regarding the interpretation of article 24 has reached an advanced stage. In my view it shows clearly that the interpretation of article 24(2) adopted by the courts below in these proceedings cannot be sustained.

31. An important early judgment was given in *Hassett v South Eastern Health Board* (Case C-372/07) [2008] ECR I-7403 regarding article 22(2) of Council

Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the predecessor of article 24(2) in the Recast Regulation. In proceedings in Ireland relating to a medical negligence claim against the Health Board, two doctors who had been involved in the incident in question were joined in a claim for contribution brought by the Health Board. The doctors in turn sought an indemnity or contribution from the Medical Defence Union in England ("the MDU"), of which they were members, to which they claimed they had an entitlement under the MDU's articles of association. The MDU's board decided to reject their claim, so the doctors sought to join the MDU in the Irish proceedings to claim in those proceedings the indemnity or contribution to which they maintained they were entitled. The MDU resisted this on the basis that the doctors' claim concerned the validity of the board's decision and so fell within article 22(2), with the result that the English courts had exclusive jurisdiction in relation to that claim. This issue was referred to the Court of Justice, which disagreed with the MDU. The court held that article 22(2) had to be interpreted "strictly" (that is to say, narrowly), since it was an exception to the general rule of jurisdiction under the Regulation based on domicile, and that it should "not be given an interpretation broader than is required by [its] objective" (paras 18-19); accordingly, the provision "must be interpreted as covering only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs, as laid down in its Articles of Association" (para 26). Since the doctors were not challenging the fact that the MDU's board was "empowered" under the articles to take the decision it did, but were challenging "the manner in which that power was exercised", the dispute between the doctors and the MDU did not fall within article 22(2) (paras 27-30). The court did not approach the application of article 22(2) by making an evaluative judgment about how the doctors' claim related to the proceedings in Ireland, but instead focused its analysis on the specific nature of the claim against the particular defendant, the MDU. In view of its strict approach to the interpretation of article 22(2), it held that it could not be said that, in order for that provision to apply, it is sufficient that a legal action involve merely some link with a decision adopted by an organ of a company (paras 22-25).

32. The Court of Justice adopted the same approach to the interpretation and application of article 22(2) of Regulation No 44/2001 in *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts v JP Morgan Chase Bank NA* (Case C-144/10) EU:C:2011:300; [2011] 1 WLR 2087 ("the *BVG* case"). JP Morgan and BVG, a local authority in Germany, entered into an interest rate swap contract which contained an English exclusive jurisdiction clause. JP Morgan brought proceedings in England claiming payments which it maintained were due under the contract. BVG argued that the swap contract was not valid because it had acted ultra vires in entering into it so that the decisions of its organs approving the making of the contract were null and void, with the result that the German courts had exclusive jurisdiction by virtue of article 22(2) of the Regulation. BVG also commenced proceedings in Germany for a declaration that the contract was void because the

decision to enter into it had been ultra vires. The German court referred the question of jurisdiction to the Court of Justice. The Court of Justice held that the German courts did not have exclusive jurisdiction under article 22(2). The court followed its judgment in the *Hassett* case to the effect that article 22(2) had to be given a strict interpretation (paras 30-32). It emphasised that a strict interpretation of article 22(2) which did not go beyond what was required by the objectives pursued by it was "particularly necessary" precisely because article 22(2) is a rule of exclusive jurisdiction which cuts across the usual expectation that parties to a contract have autonomy to choose their forum (para 32). It further observed that one of the aims of article 22(2) was to confer exclusive jurisdiction on the courts of a member state "in specific circumstances where, having regard to the matter at issue, those courts are best placed to adjudicate upon the disputes falling to them, because there is a particularly close link between those disputes and the member state" (para 36). Having identified a divergence between different language versions of article 22(2), the court held that this was "to be resolved by interpreting that provision as covering only proceedings whose principal subject matter comprises the validity of the constitution, the nullity or the dissolution of the company, legal person or association or the validity of the decisions of its organs" (para 44). It also held that "in a dispute of a contractual nature, questions relating to the contract's validity, interpretation or enforceability are at the heart of the dispute and form its subject matter", with the result that "[a]ny question concerning the validity of the decision to conclude the contract, taken previously by the organs of one of the companies party to it, must be considered ancillary" (para 38 and also paras 39-42). In other words, in relation to a claim based on a contract and brought in England pursuant to an exclusive jurisdiction clause in which an ultra vires defence was advanced, which was inextricably bound up with and hence ancillary to the underlying claim, a narrow interpretation of article 22(2) meant that the ultra vires defence did not have the effect of pulling the whole proceedings or any part thereof into the exclusive jurisdiction of the German courts. In that context it could not be said that the "principal subject matter" of the proceedings comprised "the validity of the decisions of [BVG's] organs" as would be required if article 22(2) was to have any application (para 44 of the judgment).

33. This point deserves emphasis, in light of the very different way in which the Court of Appeal in the present proceedings sought to draw guidance from the *BVG* case. Relying on the judgment in that case, the Court of Appeal held that article 24(2) of the Recast Regulation required the court to "form an overall evaluative judgment as to what the proceedings are principally concerned with" (para 46). But this approach had the effect of expanding the application of article 24(2) (ex article 22(2) of Regulation No 44/2001), contrary to the guidance in the *Hassett* case and the *BVG* case, rather than narrowing its application, as the Court of Justice had been at pains to do in its judgments in those cases. According to the Court of Appeal, article 24(2) of the Recast Regulation is to be read as having the effect of allowing a party which is able to bring one claim within that article (the English company law claim) to add on another claim (the authority claim) which is conceptually distinct

and is not inextricably bound up with the former claim, so that the latter claim is to be taken to fall within the scope of article 24(2) as regards the jurisdiction of the English courts as well. In my view, Mr Crow QC for Koza Altin and the trustees was right to criticise this step in the Court of Appeal's analysis as an illegitimate reversal of the approach indicated in the judgment of the Court of Justice in the *BVG* case.

34. Putting it another way, an evaluative assessment of proceedings relating to a specific claim, taken as a whole, may show that a particular aspect of the claim which involves an assessment of the validity of the decisions of a company's organs is so bound up with other features of the claim that it cannot be said that this is the "principal subject matter" of those proceedings, as would be required to bring the proceedings within the scope of article 24(2). This was the effect of the ruling of the Court of Justice in the *BVG* case. It does not follow from this that one can say the reverse, namely that where there are two distinct claims - one, taken by itself, falling within article 24(2) as regards the exclusive jurisdiction of the English courts and the other, taken by itself, not falling within article 24(2) as regards such jurisdiction - it is legitimate to maintain that by virtue of an overall evaluative judgment in relation to both claims taken together the second claim should be found also to fall within article 24(2) so that the English courts have exclusive jurisdiction in relation to it. In this sort of situation, it is the guidance in paras 22-25 of the *Hassett* judgment which is relevant, to the effect that a mere link between a claim which engages article 24(2) and one which does not is not sufficient to bring the latter within the scope of that provision.

35. In the present case the English company law claim and the authority claim can be said to be connected in a certain sense, but they are distinct claims which are not inextricably bound up together. Koza Altin is a shareholder in Koza Ltd and may act as such. The issue, so far as the authority claim is concerned, is whether it has done so validly, acting by relevant organs authorised according to the law of its seat. The English company law claim can be brought and made good on its own terms without any need to get into the merits of the authority claim. The authority claim likewise can be brought and made good on its own terms without any need to get into the merits of the English company law claim. Assessing the authority claim as a distinct set of proceedings, clearly their principal subject matter does not comprise the validity of the decisions of the organs of a company which has its seat in England. In fact, it is clear that their principal subject matter comprises the validity of the decisions of the organs of a company which has its seat in another country, so that if Koza Altin had had its seat in Greece (as a hypothesis to test the validity of the respondents' submissions) then, far from allocating exclusive jurisdiction to the English courts, article 24(2) of the Recast Regulation would have allocated exclusive jurisdiction to the Greek courts. It would not be tenable to suggest that the English courts had exclusive jurisdiction under article 24(2) in such a case.

36. This analysis fits with and is supported by the scheme and underlying objectives of the Recast Regulation. First, in such a hypothetical case, Koza Altin might have had subsidiaries in several EU member states all of which might potentially have been affected by actions taken by the trustees on its behalf as occurred with the decision to send the notices concerning Koza Ltd in the present case. The relevant issues regarding the validity of the decisions of the trustees acting on behalf, and as an organ, of Koza Altin would fall to be assessed in the light of circumstances in the place of its seat and would be governed by the law of that place (in the hypothetical example, Greece), which would indicate clearly that it should be sued there.

37. Secondly, requiring that Koza Altin and the trustees should be sued in the jurisdiction where it had its seat would ensure that one single authoritative judgment from the courts there would resolve the relevant disputes affecting subsidiary companies in all the other member states without any risk of inconsistent judgments based on evidence of Greek law (in the hypothetical example) being produced by the courts of each of those other member states.

38. These two points reflect the primary reasons for the introduction of what is now article 24(2) of the Recast Regulation in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as set out in the report dated 27 September 1968 on that Convention by Mr P Jenard. Mr Jenard explained the reasons for providing for exclusive jurisdiction in the form of what is now article 24(2) as follows:

> "It is important, in the interests of legal certainty, to avoid conflicting judgments being given as regards the existence of a company or association or as regards the validity of the decisions of its organs. For this reason, it is obviously preferable that all proceedings should take place in the courts of the state in which the company or association has its seat. It is in that state that information about the company or association will have been notified and made public …"

39. These reasons underlying what is now article 24(2) of the Recast Regulation have been treated by the Court of Justice as significant factors relevant to the interpretation of that provision. The Court of Justice emphasised the importance of arriving at an interpretation of the provision so as to avoid the risk of inconsistent decisions in its judgment in the *Hassett* case at para 20 and again in its judgment in the *BVG* case at para 40. In the *Hassett* judgment at para 21 the court drew on Mr Jenard's report to explain that it is the courts of the member state in which the company has its seat which are regarded as best placed to deal with disputes regarding the validity of decisions of its organs, "inter alia because it is in that state

that information about the company will have been notified and made public", hence "[e]xclusive jurisdiction is … attributed to those courts in the interests of the sound administration of justice".

40. The interpretation of article 24(2) above is further supported by the judgment of the Court of Justice in *Schmidt v Schmidt* (Case C-417/15) EU:C:2016:881; [2017] I L Pr 6. That case concerned the ground of exclusive jurisdiction set out in article 24(1) of the Recast Regulation, as regards rights *in rem* in immovable property. In reliance on article 24(1) the claimant brought proceedings in Austria seeking rescission of a gift of land located there and, in consequence, an order for rectification of the Austrian land register. The Court of Justice held that whilst the latter aspect of the proceedings fell within article 24(1), the rescission claim did not. The court rejected the claimant's contention that since there was plainly a link between the two claims, the whole proceedings should be regarded as falling within article 24(1) (paras 33 to 43). Contrary to that contention, article 24(1) had to be read narrowly and with a precise focus on each distinct claim in the proceedings to which it was said to apply. This was in line with the opinion of the Advocate General, in particular at paras 47 to 49. At para 48 of her opinion, Advocate General Kokott said that as article 24 is an exception to the general principles underlying the Recast Regulation, "the provision is to be interpreted narrowly, and the concept of 'proceedings' restricted to the claim that specifically has as its object a right *in rem*". The approach of the Advocate General and of the court is not compatible with the overall classification approach to the application of article 24(2) adopted by the Court of Appeal in the present case, according to which it concluded that the provision was applicable to the authority claim by reason of its being linked with the English company law claim.

41. The Court of Justice has recently reviewed the position regarding the interpretation and application of article 22(2) of Regulation No 44/2001, the predecessor of article 24(2) of the Recast Regulation, in *EON Czech Holding AG v Dědouch* (Case C-560/16) EU:C:2018:167; [2018] 4 WLR 94. The case concerned a resolution by the general meeting of a Czech company to transfer all the securities in the company, including minority shareholdings, to its principal shareholder, the defendant, a German company. The minority shareholders brought proceedings in the Czech courts seeking to review the reasonableness of the consideration for their shares set by that resolution. Under Czech law, a ruling that the consideration was unreasonable would not result in the resolution being declared invalid (but presumably could result in an order that additional consideration should be paid). The defendant raised a jurisdictional objection in those proceedings, maintaining that by reason of its seat the German courts alone had jurisdiction. The Czech Supreme Court referred to the Court of Justice the question whether the Czech courts had exclusive jurisdiction in relation to the dispute by virtue of article 22(2) of Regulation No 44/2001. The Court of Justice answered that question in the

affirmative. It reiterated and emphasised the key points which had emerged from its previous jurisprudence. The relevant passage merits being set out in full:

> "26. As regards the general scheme and context of Regulation No 44/2001, it should be recalled that the jurisdiction provided for in article 2 of that Regulation, namely that the courts of the member state in which the defendant is domiciled are to have jurisdiction, constitutes the general rule. It is only by way of derogation from that general rule that the Regulation provides for special and exclusive rules of jurisdiction for cases, which are exhaustively listed, in which the defendant may or must, depending on the case, be sued in the courts of another member state: the *Reisch Montage* case, para 22 and *Berliner Verkehrsbetriebe (BVG), Anstalt des öffentlichen Rechts v JP Morgan Chase Bank NA* (Case C-144/10) EU:C:2011:300; [2011] 1 WLR 2087; [2011] ECR I-3961, para 30.
>
> 27. Those rules of special and exclusive jurisdiction must accordingly be interpreted strictly. As the provisions of article 22 of Regulation No 44/2001 introduce an exception to the general rule governing the attribution of jurisdiction, they must not be given an interpretation broader than that which is required by their objective: *Hassett's* case, paras 18 and 19 and the *BVG* case, para 30.
>
> 28. As regards the objectives and the purpose of Regulation No 44/2001, it should be recalled that, as is apparent from recitals (2) and (11) thereof [which correspond with recitals (4) and (15) of the Recast Regulation], that Regulation seeks to unify the rules on conflict of jurisdiction in civil and commercial matters by way of rules of jurisdiction which are highly predictable. That Regulation thus pursues an objective of legal certainty which consists in strengthening the legal protection of persons established in the European Union, by enabling the applicant easily to identify the court in which he may sue and the defendant reasonably to foresee before which court he may be sued: *Falco Privatstiftung v Weller-Lindhorst* (Case C-533/07) EU:C:2009:257; [2010] Bus LR 210; [2009] ECR I-3327, paras 21-22, *Taser International Inc v SC Gate 4 Business SRL* (Case C-175/15) EU:C:2016:176; [2016] QB 887, para 32 and *Granarolo SpA v Ambrosi Emmi France SA* (Case C-196/15) EU:C:2016:559; [2017] CEC 473, para 16.

29. Furthermore, as is apparent from recital (12) of that Regulation [which corresponds with recital (16) of the Recast Regulation], the rules of jurisdiction derogating from the general rule of jurisdiction of the courts of the member state in which the defendant is domiciled supplement the general rule where there is a close link between the court designated by those rules and the action or in order to facilitate the sound administration of justice.

30. In particular, the rules of exclusive jurisdiction laid down in article 22 of Regulation No 44/2001 seek to ensure that jurisdiction rests with courts closely linked to the proceedings in fact and law (see, with regard to article 16 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1972 L299, p 32), the provisions of which are essentially identical to those of article 22 of Regulation No 44/2001, *Gesellschaft fur Antriebstechnik mbH & Co KG (GAT) v Lamellen und Kupplungsbau Beteiligungs KG* (Case C-4/03) EU:C:2006:457; [2006] ECR I-6509; [2007] ILPr 34, para 21), in other words, to confer exclusive jurisdiction on the courts of a member state in specific circumstances where, having regard to the matter at issue, those courts are best placed to adjudicate upon the disputes falling to them by reason of a particularly close link between those disputes and that member state: the *BVG* case, para 36.

31. Thus, the essential objective pursued by article 22(2) of Regulation No 44/2001 is that of centralising jurisdiction in order to avoid conflicting judgments being given as regards the existence of a company or as regards the validity of the decisions of its organs: *Hassett's* case [2008] ECR I-7403, para 20.

32. The courts of the member state in which the company has its seat appear to be those best placed to deal with such disputes, inter alia because it is in that state that information about the company will have been notified and made public. Exclusive jurisdiction is thus attributed to those courts in the interests of the sound administration of justice: *Hassett's* case, para 21.

33. However, the court has held that it cannot be inferred from this that, in order for article 22(2) of Regulation No 44/2001 to apply, it is sufficient that a legal action involve some link with a decision adopted by an organ of a company (*Hassett's* case, para 22), and that the scope of that provision covers only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or the provisions of its article of association governing the functioning of its organs: *Hassett's* case, para 26 and *flyLAL-Lithuanian Airlines AS (in liquidation) v Starptautiskā lidosta Rīga VAS* (Case C-302/13) EU:C:2014:2319; [2014] 5 CMLR 1277, para 40.

34. In the present case, while it is true that, under Czech law, proceedings such as those at issue in the main proceedings may not lead formally to a decision which has the effect of invalidating a resolution of the general assembly of a company concerning the compulsory transfer of the minority shareholders' shares in that company to the majority shareholder, the fact none the less remains that, in accordance with the requirements of the autonomous interpretation and uniform application of the provisions of Regulation No 44/2001, the scope of article 22(2) thereof cannot depend on the choices made in national law by member states or vary depending on them.

35. On the one hand, the origin of those proceedings lies in a challenge to the amount of the consideration relating to such a transfer and, on the other, their purpose is to secure a review of the reasonableness of that amount.

36. It follows that, having regard to article 22(2) of Regulation No 44/2001, legal proceedings such as those at issue in the main proceedings concern the review of the partial validity of a decision of an organ of a company and that such proceedings are, as a result, capable of coming within the scope of that provision, as envisaged by its wording.

37. Thus, in those circumstances, a court hearing such an application for review must examine the validity of a decision of an organ of a company in so far as that decision concerns the determination of the amount of the consideration, decide whether that amount is reasonable and, where necessary, annul

that decision in that respect and determine a different amount of consideration.

38. Furthermore, an interpretation of article 22(2) of Regulation No 44/2001 according to which that provision applies to proceedings such as those at issue in the main proceedings is consistent with the essential objective pursued by that provision and does not have the effect of extending its scope beyond what is required by that objective.

39. In that regard, the existence of a close link between the courts of the member state in which [the Czech company] is established, in the present case the Czech courts, and the dispute in the main proceedings is clear.

40. In addition to the fact that [the Czech company] is a company incorporated under Czech law, it is apparent from the file submitted to the court that the resolution of the general meeting that determined the amount of the consideration forming the subject of the main proceedings and the acts and formalities relating to it were carried out in accordance with Czech law and in the Czech language.

41. Likewise, it is not disputed that the court with jurisdiction must apply Czech substantive law to the dispute in the main proceedings.

42. Consequently, bearing in mind the close link between the dispute in the main proceedings and the Czech courts, the latter are best placed to hear that dispute relating to the review of the partial validity of that resolution and the attribution, pursuant to article 22(2) of Regulation No 44/2001, of exclusive jurisdiction to those courts is such as to facilitate the sound administration of justice.

43. The attribution of that jurisdiction to the Czech courts is also consistent with the objectives of predictability of the rules of jurisdiction and legal certainty pursued by Regulation No 44/2001, since, as Advocate General Wathelet observed in point 35 of his opinion, the shareholders in a company, especially the principal shareholder, must expect that the courts

> of the member state in which that company is established will be the courts having jurisdiction to decide any internal dispute within that company relating to the review of the partial validity of a decision taken by an organ of a company."

42. This reasoning again is not compatible with the decisions of the courts below in the present case. If one tests the application of article 24(2) of the Recast Regulation by reference to the hypothetical Greek case referred to above, it is clear by reference to the factors identified by the Court of Justice that it would be the courts in Greece which had exclusive jurisdiction under that provision in relation to the authority claim, not the courts in England. The non-applicability of article 24(2) according to its proper interpretation does not alter when one asks whether the English courts have jurisdiction under that provision in the present case. Article 24(2) does not apply in the present case by reason of the strict (ie narrow) interpretation to be given to that provision (para 27 of the *EON* judgment, above). It is not sufficient that there is a link between the authority claim and the English company law claim (para 33 of the *EON* judgment, above). There is an absence of any "particularly close link" between the authority claim and the English courts as would be required to bring the case within article 24(2) (para 30 of the *EON* judgment, above); on the contrary, the relevant "particularly close link" as regards the authority claim is with the courts in Turkey.

43. In my view, the EU law regarding the interpretation and application of article 24(2) of the Recast Regulation, as reiterated in the *EON* judgment, is clear. It is *acte clair* that this provision does not cover the authority claim in the present proceedings. This means that the English courts cannot assert jurisdiction over Koza Altin and the trustees in relation to that claim in the present proceedings on the basis of that provision, and their appeal in that regard should be allowed.

44. Before leaving this part of the case, however, it should be pointed out that there is an important consequence which flows from the fact that Turkey is not a member state of the EU. It means that the courts in Turkey do not enjoy exclusive jurisdiction in respect of the authority claim by virtue of the Recast Regulation. Therefore, even though the authority claim does not fall within the exclusive jurisdiction provision in article 24(2) as regards the courts in England, that does not prevent those courts from assuming jurisdiction in relation to the authority claim on some other basis, if one exists under the general English regime in the Civil Procedure Rules governing service of proceedings on persons outside the jurisdiction. It is not necessary to examine this possibility further, because in the present case it is solely on the basis of article 24(2) that the English courts have assumed jurisdiction over Koza Altin and the trustees in these proceedings in relation to the authority claim.

Issue (ii): The application of article 24(2) in relation to the trustees

45. Since on its proper interpretation article 24(2) of the Recast Regulation does not cover the authority claim, the English courts have no jurisdiction in relation to the trustees under that provision with respect to that claim. The proceedings against the trustees are principally concerned with the authority claim. It cannot be said that the fact that the English courts have jurisdiction under article 24(2) in relation to the English company law claim, as it concerns Koza Ltd, means that such jurisdiction extends to cover the trustees, who are not necessary parties to that claim and are more removed from it than they are in relation to the authority claim. Once it is appreciated that the application of article 24(2) to the authority claim and its application to the English company law claim are to be considered separately, a strict interpretation of article 24(2) as explained by the Court of Justice leads to the conclusion that it does not cover the trustees in relation to the latter claim. Further, the rationale underlying article 24(2) of avoiding conflicting decisions in relation to the relevant subject matter of each respective claim and the rationale that each respective claim should be tried in the courts best placed to do so both support that view.

Conclusion

46. I would allow the appeals by Koza Altin and the trustees and would accept their case that (i) the English courts have no jurisdiction under article 24(2) of the Recast Regulation over the trustees in relation to any part of the claims; (ii) the English courts have jurisdiction under that provision over Koza Altin in respect of the English company law claim, which is principally concerned with the affairs of Koza Ltd; and (iii) the English courts have no jurisdiction under that provision over Koza Altin in respect of the authority claim, which is principally concerned with the conduct of the business of Koza Altin.

EXHIBIT H

EXHIBIT H

Ms. Zahava Rosenfeld
1947 52nd Street
Brooklyn, NY 11204

October 21, 2020

BY FIRST CLASS MAIL

Deutsche Bank AG Share Register
C/o Computershare
211 Quality Circle, Suite 210
College Station, TX 77845

Deutsche Bank AG Investor Relations
Taunusanlage 12
60325 Frankfurt am Main
Germany

Re: Request to be listed as a registered shareholder in Deutsche Bank's share register

Dear Sirs,

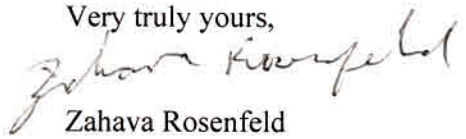
I own 60 shares of Deutsche Bank AG (NYSE ticker: DB) common stock. Enclosed is a copy of my recent account statement showing my ownership of Deutsche Bank shares. My date of birth is January 1, 1960. My home address is 1947 52nd Street Brooklyn, New York 11204.

Although I have received communications regarding dividends and other matters from Deutsche Bank over the years, the bank's lawyers have recently asserted that I am not a registered shareholder. Please immediately cause my name to be listed in Deutsche Bank's share register. *See* German Stock Corporation Act § 67(1).

If you need to further communicate with me on this matter, please direct all communications to my counsel, Albert Y. Chang, Esq., at:

Bottini & Bottini, Inc.
7817 Ivanhoe Avenue, Suite 102
La Jolla, CA 92037
U.S.A.
(858) 914-2001
achang@bottinilaw.com

Very truly yours,



Zahava Rosenfeld

Enclosure

cc: David B. Hennes, Esq.
Ropes & Gray LLP
1211 Avenue of the Americas
New York, NY 10036

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ZAHAVA ROSENFELD, derivatively as a shareholder of DEUTSCHE BANK AG and on behalf of DEUTSCHE BANK AG,

Plaintiff,

vs.

PAUL ACHLEITNER, JOSEF ACKERMANN, CLEMENS BÖRSIG, ANSHU JAIN, JÜRGEN FITSCHEN, JOHN CRYAN, CHRISTIAN SEWING, HENRY RITCHOTTE, GARTH RITCHIE, MARCUS SCHENCK, STEFAN KRAUSE, KARL VON ROHR, STUART LEWIS, SYLVIE MATHERAT, KIMBERLY L. HAMMONDS, JAMES VON MOLTKE, CHRISTIANA RILEY, HENNING KAGERMANN, DETLEF POLASCHEK, MARTINA KLEE, MICHELE TROGNI, HENRIETTE MARK, GABRIELE PLATSCHER, BERND ROSE, NORBERT WINKELJOHANN, GERD ALEXANDER SCHÜTZ, JOHN A. THAIN, LUDWIG BLOMEYER-BARTENSTEIN, LOUISE M. PARENT, CHRISTOF VON DRYANDER, FRANK BSIRSKE, MAYREE CARROLL CLARK, JAN DUSCHECK, DR. GERHARD ESCHELBECK, RICHARD MEDDINGS, KATHERINE GARRETT-COX, TIMO HEIDER, SABINE IRRGANG, DAGMAR VALCÁRCEL, JOHANNES TEYSSEN, WOLFGANG BÖHR, PETER LÖSCHER, STEPHAN SZUKALSKI, DINA DUBLON and DB USA CORPORATION,

Defendants,

- and -

DEUTSCHE BANK AG,

Nominal Defendant.

Index No. 651578/2020

DECLARATION OF PLAINTIFF ZAHAVA ROSENFELD IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

1. I, the undersigned Zahava Rosenfeld, declare the following upon personal knowledge.

2. I was born in Israel in 1960 to parents who survived the horrors of the Holocaust in multiple Nazi concentration camps, including Auschwitz, Ravensbrück, Bergen-Belsen, Mauthausen and Gusen Langestein. They fled the conflagration of Europe after World War II. I have lived in New York City since arriving on the shores of the United States in 1966, when I was six years old. I am a citizen of the United States and the State of New York. I am a teacher of special needs children. And I am a wife, mother, and grandmother.

3. Attached as Exhibit 1 is a true and correct copy of my most recent brokerage statement, demonstrating my ownership of 60 shares of Deutsche Bank stock. Attached as Exhibit 2 is a true and correct copy of my December 2000 brokerage statement, demonstrating my ownership of 20 of these Deutsche Bank shares as of at least that time. Attached as Exhibit 3 is a true and correct copy of my March 2017 trade confirmation, demonstrating my purchase of an additional 20 of these Deutsche Bank shares at that time. The final 20 shares were either (i) acquired without my retaining the documentation thereof or (ii) the result of a split of Deutsche Bank shares that I already owned, but which I cannot recall. I have lost money on this investment due to the Defendants' misconduct and their gross mismanagement of Deutsche Bank.

4. I decline to travel to Germany under any circumstances, including to meet with counsel in Germany and pursue the claims made in this lawsuit. First, as the child of Holocaust survivors, I would be extremely uncomfortable to be on German soil. In addition, in this era of the novel Coronavirus, such travel is fraught with danger. In any event, I cannot travel because my mother is very elderly, frail, and ill and I need to be close to her during this time.

that my derivative claims will not be treated fairly by the German courts, where I will not have the same rights that I have in the United States, including rights to discovery and trial by jury.

5. I believe shareholders have an obligation to hold fiduciaries responsible for breaching their fiduciary duties to their companies and shareholders where reasonable grounds exist to support those claims. That is precisely what I am attempting to do in this case.

6. I seek to prosecute this case in New York because it is where I live, it is where Deutsche Bank has significant operations, where I have been able to retain experienced counsel on a contingency basis, where I believe courts are fair, and where I believe that all parties to this litigation will be treated fairly.

I affirm under penalty of perjury under the laws of New York that the foregoing is true and correct, and that this document may be filed in an action or proceeding in a court of law. Executed on September 20, 2020.

Zahava Rosenfeld

Zahava Rosenfeld

EXHIBIT 1

EXHIBIT 1

CUSTOMER STATEMENT

Account Positions

	Account Type	Symbol Cusip	Quantity Long/Short	Current Price	Current Value	% of Portfolio	Est Annual Income	Total Cost	Unrealized Gain/(Loss)
Cash & Money Market									
Margin	RE				[redacted]			[redacted]	[redacted]
Total Cash & Money Market					RED				
Equities									
REDACTED									
DEUTSCHE BANK AG NAMEN AKT	Margin	DB	60.000	9.5300	571.80		7.38	Incomplete***	Incomplete***
REDACTED									

EXHIBIT 2

EXHIBIT 2

SIPC

CUSTOMER STATEMENT

Statement Period
November 30 to December 29, 2000

Edgetrade.com, Inc.
5 Hanover Square, 22nd Floor
New York, NY 10004 d Floor
(212) 271-6470

[redacted]

Your Account Executive

[redacted]

ZAHAVA ROSENFELD
[redacted]

This Package Includes Statements for the Following Accounts:

Old Account Number	Tax ID Number	Account Name	Cash & Money Markets	Securities	Account Totals
[redacted]659	[redacted]	ZAHAVA ROSENFELD	[redacted]	[redacted]	[redacted]
New Account Number					
[redacted]6bas1					
			[redacted]	[redacted]	[redacted]

Clearing agent for your account is:
Southwest Securities, Inc. Member NYSE/SIPC (214) 859-1770

[redacted]

Old Account Number: [redacted]659 New Account Number: [redacted]6bas1

ZAHAVA ROSENFELD

Statement Period
November 30 to December 29, 2000

Account Positions

	Account Type	Symbol/ Cusip	Quantity Long (Short)	Current Price	Current Value
Cash & Money Market Funds					
[redacted]	[redacted]				[redacted]
Total Cash & Money Market Funds					
Equities					
[redacted]					
DEUTSCHE BANK AG ADR	Margin	DTBKY	20	83.3690	1,667.38
[redacted]					
Total Equities					[redacted]

EXHIBIT 3

EXHIBIT 3

KENSINGTON CAPITAL CORP
4910 13TH AVENUE
BROOKLYN, NY 11219

TRADE CONFIRMATION

Zahava Rosenfeld
[redacted]

Account ending in: 1696
Account Executive: [redacted]
Telephone #: [redacted]

SUMMARY OF TRADES - THE FOLLOWING TRANSACTIONS POSTED ON 03/28/17

YOU	SYMBOL	DESCRIPTION	QUANTITY	PRICE	NET AMT.
BOT	.DB RT-EX	@@DEUTSCHE BANK RTS CONTRA FOR EXERCISE OF D1T769565	20	13.760000	-$325.20
			Total of Transactions		-$325.20

COMPLETE TRADE DETAILS AND DISCLOSURES

YOU	QUANTITY	PRICE	PRINCIPAL	FEES	INTEREST	COMMISSION	NET AMOUNT
BOT	20	13.760000	$275.20	50.00	0.00	0.00	-$325.20

SYMBOL	CUSIP	TRANS#	MKT	CAP	TRADE DATE	SETTLE DATE
.DB RT-EX	D1T769888	F83ON9	0	1	03/28/17	03/28/17

DESCRIPTION
@@DEUTSCHE BANK RTS CONTRA
FOR EXERCISE OF D1T769565
UNSOLICITED D1T769565 rights exercised /bw

ADDITIONAL INFORMATION

Miscellaneous Fee: $50.00

KENSINGTON CAPITAL CORP
4910 13TH AVENUE
BROOKLYN, NY 11219

TRADE CONFIRMATION

Account ending in : [redacted]696

Terms and Conditions

Thank you for letting us be of service to you. Your account is carried by Hilltop Securities Inc.(HTS), a member of FINRA, SIPC, and the New York Stock Exchange. If you have any questions regarding any of the transactions detailed on this confirmation, or if there are any errors found, please contact your financial advisor. Please retain this confirmation for your records and for tax purposes. Amounts due must be received in our office on or before the settlement date indicated on the confirmation. Your cancelled check is your receipt, and no receipt will be provided unless requested in writing. Please make all checks payable to Hilltop Securities Inc., and mail them to: 1201 Elm Street, Suite 3500, Dallas, Texas, 75270. HTS and your introducing broker, if applicable, confirm these listed transactions subject to the following terms and conditions. This trade confirmation should accurately reflect all transactions and the correct name and address of the account owner(s). You should report promptly any inaccuracy or discrepancy in your account to your brokerage firm. If you did not authorize this transaction, please contact your brokerage firm or HTS Compliance Department at 800-957-2999.

It is agreed among HTS, the introducing broker (your financial advisor), if any, and the customer (you) that:
(1) All transactions made for you are subject to the constitution, rules, regulations, customs, usages, rulings and interpretations of the exchange or market, and its clearing house, if any, where the transactions are executed, as well as the mandates of FINRA, the Securities Exchange Commission, and the Federal Reserve Board.
(2) If you are a customer of an introducing broker, and HTS is acting as agent for your financial advisor in performing certain execution and clearing functions, then HTS accepts no liability or responsibility for any acts or omissions on their part.
(3) The securities listed remain the property of HTS until we have been fully paid. Securities purchased by you on a cash or margin basis may be loaned, used in making deliveries or substitutions, or pledged without further notice to you. At those times these securities may be commingled with the securities of other customers. These securities will be withdrawn as soon as is practicable upon the receipt of customer payment. In addition, HTS or your broker may, whenever in the judgment of either it appears necessary for its protection, close your account, in whole or in part. This may be done without further notice to you, by selling the securities held and by buying securities to offset short positions or if you have failed to make delivery following a sale. The customer will be liable for any resulting losses, without limitation, including attorney fees, interest, and all other related expenses. Further, if payment is not received by the settlement date listed on this confirmation, interest may be charged at the margin interest rate. The actual receipt of securities purchased and the actual delivery of securities sold is contemplated by all parties.
(4) If this transaction is not entirely in accordance with your understanding and directions, you must report the error to your financial advisor in writing or by electronic mail within two (2) days after your receipt of the confirmation.
(5) All information given by HTS or its representatives regarding the responsibilities of individuals, firms or corporations, or appraisals offered as to the value or potential of stocks, bonds or other properties, is based on opinion only and is not the responsibility of HTS.
(6) The name of the party with whom this transaction was made, as well as the time of execution and compensation will be provided to you upon written request.
(7) You agree to promptly pay or deliver to HTS any dividend, interest, or distribution after a sale of your stocks or bonds is completed.
(8) American style option positions are liable for assignment at any time, while European style option positions are subject to assignment only upon their expiration.
(9) HTS, your introducing broker, or their officers, directors, and representatives may at times engage in transactions in the same securities as those noted on this confirmation.
(10) This agreement shall be construed in accordance with the laws of the State of Texas.
(11) If the number of shares transacted is less than a round lot (usually 100 shares) or if all of the shares transacted cannot be transacted in round number lots, an odd lot differential may be reflected in your transaction costs, and is available upon request.
(12) HTS receives compensation, known as payment for order flow, for directing some orders in securities to particular financial advisors/dealers or market centers for execution. The source and amounts of such payments is available to you upon written request.
(13) If this transaction involves when-issued securities, payment and delivery of those securities will be made in accordance with the terms of a later confirmation, to be delivered to you when the securities are issued.
(14) An open or Good-'Til-Cancelled (GTC) order will remain in effect until executed, or canceled and acknowledged by the executing market center. Customers may attempt to cancel such orders at any time prior to their execution. We reserve the right to cancel such orders when the limit price becomes unrealistic in relation to market price or when the order has been open for an extended time. A cancellation notice will be mailed to you in this event. Limits on open orders to "Buy" and "Stop orders to sell", are subject to the rules of the exchange or association where the securities are traded, and may be automatically adjusted on the date the security trades "ex-dividend", "ex-rights", "ex-distribution" or "ex-interest". Unexecuted portions of an open order that are executed on subsequent days are treated as separate orders for commission purposes, in accordance with industry practices.
(15) Certificates of deposit(CDs) and certain securities, including bonds, preferred stocks, and common stocks, may be subject to call or redemption prior to maturity, in whole or in part. Call features may exist in addition to those on this confirmation. Early call or redemption could affect yield, with additional information available upon request. In addition, there are no periodic payments on zero coupon debt instruments, and such securities are callable below maturity value without notice by mail to the holder, unless those instruments are registered. Yields on collateralized mortgage obligations (CMOs) are subject to fluctuation depending on the speed of prepayment. Specific information is available upon written request. Bond ratings are subject to change and are based upon a good faith inquiry of selected sources.
(16) Transactions in no-load mutual funds through HTS may include fees based upon the value of the transaction. Such shares may be purchased and sold directly through the respective fund companies by you without incurring these fees. As a buyer or seller of mutual funds or unit investment trusts (UIT) you may be subject to certain front-end and back-end loads (sales charges). If you are selling certain mutual fund or UIT shares you may be subject to contingent deferred sales charges (CDSC) and/or short term redemption fees if sold during the defined holding period. You may be eligible for breakpoint discounts based on the size of your purchase, current holdings or future purchases. The sales charge you paid may differ slightly from the Prospectus disclosed rate due to rounding calculations. Please refer to the Prospectus, Statement of Additional Information or contact your financial advisor for further information.
(17) Your order may have been executed in more than one transaction, at different prices and different times, resulting in an average share price. Actual individual prices and/or times are available upon written request.
(18) If this transaction is part of a registered underwriting. The prospectus will be delivered to you separately.
(19) HTS or your financial advisor, and their associated officers or directors, may have a direct or indirect interest in the subject security which you bought or sold. This interest may include a directorship, officer position, stock ownership, or a common affiliate.
(20) "Other Fees" include expenses calculated to offset predetermined third-party transaction costs.
(21) We reserve the right to amend this confirmation.
(22) HTS is a subsidiary of the parent, Hilltop Holdings Inc., a publically traded company (NYSE: HTH).
(23) Official Statements are available at http://emma.msrb.org Hard copy Official Statements are available upon request.
(24) Interest on tax-free municipal bonds purchased in qualified accounts may be taxable at the time of distribution.
(25) Transactions in certain foreign securities may be subject to a Financial Transaction Tax imposed by the issuer's country of origin and will be included in the net amount. The exact amount will be shown on the reverse side of this confirmation, if applicable.
(26) Corporate Bonds, Preferred Stocks and Equity Securities prospectuses are available at http://sec.gov/edgar/searchedgar/companysearch.html. Hard copy prospectuses are available upon request.
(27) The quantity of securities being sold is below the minimum denomination for the issue. This may adversely affect the liquidity of the position unless you have other securities from the issue that may be combined to reach the minimum denomination.

MARKET IN WHICH THE TRANSACTION WAS EXECUTED
1 & 8- New York Stock Exchange, Inc. 3- Other Markets (available upon request)
2 & 9- American Stock Exchange, Inc. 4- NYSE ARCA Exchange
A- NASDAQ Exchange 5- CBOE
N, Q, 0 & 6- Over-The-Counter 7 - Boston Options Exchange
S- International Securities Exchange

KEY: CAPACITY IN WHICH HTS OR YOUR FINANCIAL ADVISOR ACTED
1. As agent for you, we bought or sold this security.
2. As a principal, we have sold to you or bought from you this security.
3. As agent for another party, we bought or sold this security on your behalf.
4. As agent for both buyer and seller, we are charging each a commission. The parties, transaction details, and fees received are available to you upon written request.
5. This is a principal transaction and the price is "The Trade Price Reported" as required. The amount shown as our commission represents the amount of any mark-up, mark-down or fees.
6. As principal, our firm maintains a primary market in this security as a market-maker.
7. As a principal we have sold to you or bought from you this security. This security trades on the Over-the-Counter National Market System. The amount of mark-up/mark-down relative to the best bid or offer price at the time of the execution has been indicated.
8. As both principal and agent in the transaction. Details are available upon written request.

In compliance with FINRA Rule 2340 which requires us to provide valuations and disclosures relating to direct participation program (DPP) and real estate investment trust (REIT) securities on customer statements, we have chosen to provide an estimated value for each security from one of the following sources: 1) annual report 2) outside service or 3) other source. These estimated values have been developed from data that is as of a date no more than 18 months prior to the date of this statement. Further, please note that DPP or REIT securities are generally illiquid, and that the estimated value may not be realized when the investor seeks to liquidate the security.

If you received a trade confirmation categorized as Non-Transferable Liquidation Program it was processed in accordance with the SECURITIES AND EXCHANGE COMMISSION - Release No. 34-49930; File No. SR-DTC-2003-09. For more information please refer to http://hilltopsecurities.com/media/1554/NTLP.pdf.

To obtain electronic copies of notices, offering documents, and other information pertaining to Government-Sponsored Agency securities, visit the web sites below. Hard copy prospectuses are available upon request.

Federal Farm Credit Bank (FFCB): http://www.farmcredit-ffcb.com
Federal Home Loan Bank (FHLB): http://www.fhlb-of.com
Federal Home Loan Mortgage Corporation (FHLMC):
Debt securities: http://www.freddiemac.com/debt
Mortgage securities: http://www.freddiemac.com/mbs
Federal National Mortgage Association (FNMA):
Debt securities: http://www.fanniemae.com/portal/funding-the-market/debt/index.html
Mortgage securities: http://www.fanniemae.com/portal/funding-the-market/mbs
Government National Mortgage Association (GNMA): http://www.ginniemae.gov
SLM Corporation (Sallie Mae): http://www.salliemae.com

If the security is a TBA (To Be Announced) status, further pool information is available by contacting the issuer as follows: 1-800-237-8627 for Fannie Mae and 1-800-336-3672 for Freddie Mac and 1-800-234-4662 for Ginnie Mae or by emailing Fannie Mae at bestmbs@fanniemae.com or Freddie Mac at Investor_Inquiry@FreddieMac.com

KENSINGTON CAPITAL CORP
4910 13TH AVENUE
BROOKLYN, NY 11219

Trade Date: 03/28/17

Account ending in: [redacted]696

Account Executive: [redacted]

Telephone: [redacted]

Amount due excluding funds on deposit:* $325.20

Amount Enclosed: _____

PLEASE MAKE CHECKS PAYABLE TO HILLTOP SECURITIES INC. AND MAIL TO: HilltopSecurities, Attn: Receipts, 1201 Elm Street, Suite 3500, Dallas, Texas 75270-2180
*You may have sufficient funds on deposit to cover this trade - if in doubt, please contact your financial advisor.