

COMPANY LAW AND CORPORATE GOVERNANCE

Current Developments in German National Law

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Prof. Dr. Matthias Schüppen

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1. LEGISLATION

Law on Equal Participation of Women and Men in Private-Sector and Public-Sector Management Positions (Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst vom 24. April 2015, "FüpoTeiG"; BGBl. I, 642)¹

	Explanations / Consequences / Comments
<ul style="list-style-type: none">▪ All listed or codetermined (representatives of employees in Supervisory Board) companies are obliged to define a women minimum quota for the management board, the supervisory board (competent is supervisory board) and the top management (two levels beyond management board; competent is management board) up to September 30th, 2015 at the latest (sec. 76 para 4, 111 para. 5 AktG, 36, 52 para. 2 GmbHG). The target has to be reached within a period of 5 years at the maximum. <p>The women minimum quota can basically be elected free (might be 0 %) and can be different for each body.</p>	<ul style="list-style-type: none">▪ If the women minimum quota is less than 30 % this quota has to match with the quota actually is achieved (Logic of Status Quo). <p>Insofar "room to manoeuvre" exists.</p>
<ul style="list-style-type: none">▪ Listed and (quasi) equally codetermined companies have to observe a fixed gender quota of at least 30 % within the supervisory board (sec. 96 para 2 AktG,	<ul style="list-style-type: none">▪ Elections of supervisory board members not complying with the fixed gender quota are void ("empty chair").

¹ See Amendments to DCGK: 4.1.5 s.2, 5.4.1 s. 2 and 3.

<p>17 para 2 SEAG). This quota has to be respected in all elections to the supervisory board taking place after January 1st, 2016.</p>	<p>The fixed gender quota may refer to the overall supervisory board or the representatives of the shareholders and the employees each.</p> <p>Societas Europaea features specialities and “room to manoeuvre”.</p> <ul style="list-style-type: none"> ■ The companies are obliged to report about the handling of the quotas in their annual financial statements (management report; sec. 289a para. 2 No. 5 German Commercial Code, HGB).
<p>2. GERMAN CORPORATE GOVERNANCE CODE (DCGK) as of May 5th, 2015 (eBAnz AT June 12th 2015 B1), www.corporate-governance-code.de (English full version)</p>	
<p>Amendments to the German Corporate Governance Code (DCGK) as of May 5th, 2015</p>	<p>Explanations / Consequence / Comments</p>
<ul style="list-style-type: none"> ■ The Supervisory Board shall specify concrete objectives regarding its composition which, whilst considering the specifics of the enterprise, take into account the international activities of the enterprise, potential conflicts of interest, the number of independent Supervisory Board members within the meaning of number 5.4.2, an age limit to be specified <u>and a regular limit of length of membership to be specified</u> for the members of the Supervisory Board as well as diversity 5.4.1 para. 2 s. 1). ■ <u>When making its proposals to the General Meeting concerning the election of new members of the Supervisory Board, the Supervisory Board should satisfy itself that the respective candidates can devote the expected amount of time required (5.4.1 para. 4).</u> 	<ul style="list-style-type: none"> ■ Recommendation! Taking into account that the Codex recommends an age limit anyway and the usual age of entry, the limit of length is not necessary. In particular because it is possible to establish a very long period without obligation to explain. Furthermore it would have been better to suggest an average limit of length of membership to reach a mixture between fresh outlook and new impulses with experience. ■ Recommendation (mistake of translation). In contrast to a general restriction of the number of mandates the new recommendation enables a case-by-case-consideration to avoid an overboarding Insofar the Codex however settles a matter of course.

<ul style="list-style-type: none"> ▪ If a member of the Supervisory Board took part in <u>only less than half or less</u> of the meetings of the Supervisory Board <u>and the committees to which he belongs</u> in a financial year, this shall be noted in the Report of the Supervisory Board. <u>Participation by telephone or video conference shall also apply as participation, but this should not be the rule</u> (5.4.7 s. 1 and 2). 	<ul style="list-style-type: none"> ▪ Recommendation containing an aggravation relating to number and committees and an upsetting clarification.
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3. DECISIONS OF THE FEDERAL HIGH COURT OF JUSTICE (BGH)

General Meeting of a German Stock Company / Societas Europaea abroad? (BGH, Decision dated October 21st, 2014, II ZR 330/13)	Explanations / Consequences / Comments
<ul style="list-style-type: none"> ▪ According to Sec. 121 para. 5 of German Stock Corporation Act (AktG) the general meeting shall be held at the company's domicile, unless the articles provide otherwise. If the company's shares are listed on a German stock exchange for trading in the regulated market, the general meeting may also be held at the domicile of such stock exchange, unless the articles provide otherwise. <p>Sec. 121 para. 5 AktG basically allows provisions in the articles establishing another place of the general meeting. Following the BGH such a provision has to contain an appropriate specification reflecting the shareholders' interest to attend the general meeting. A provision reading: The general meeting takes place at the company's domicile, the domicile of a stock exchange in the EU or any other city in the EU with more than 500.000 inhabitants does not fulfil these</p>	<ul style="list-style-type: none"> ▪ Consent has to be given to this decision. The options of the person calling a general meeting relating to the place of the general meeting have to be reduced. <p>Provisions of the articles declaring as possible place of the general meeting a city with more than 100.000 or 50.000 inhabitants might be ineffective and could be cancelled of the commercial register by order of the court (§ 398 FamFG).</p>

<p>requirements of the BGH. Such a provision makes too many places with great distances possible. Especially minority shareholders could be prevented from attention because of the costs and efforts of the voyage.</p> <p>The decision is of fundamental importance because BGH declared that the articles of can basically (taking the above mentioned demands into account) provide a place of the general meeting abroad.</p>	
<p>(Regular) Delisting without Cash Compensation, without Resolution of the General Meeting and without Mandatory Bid – Abandonment of Jurisdiction “Macrotron” (BGH, Decision dated October 8th, 2013, II ZB 26/12 – “Frosta”)</p>	<p>Explanations / Consequences / Comments</p>
<ul style="list-style-type: none"> ■ According to sec. 39 Abs. 2 German Stock Exchange Act (BörsenG) on application of the management board of a listed company the management of a stock exchange can withdraw the listing unless there is no contradiction to investor protection. Of course BörsenG contains no provisions relating to corporate law. In 2002 BGH decided that such a delisting requires a cash compensation, a resolution of the general meeting and a mandatory bid, since the right of property granted by German constitution (Art. 14 GG) would be violated. ■ Now referring to a decision of the German Constitutional Court concerning a downgrading (BVerfGE 132, 99) BGH does an U-turn: Non of these is necessary. The delisting does not affect the substance of the shareholders’ property right (membership and financial rights). The 	<p>There may be doubts if the protection suggested by BGH is sufficient for the shareholders. One has to be aware that the Rules of the German stock exchanges contain so called period solutions. BörsenO gibt es in Englisch Perhaps legislative will react.</p>

<p>actual marketability of shares is not more than a chance. The shareholder has the right to contest the decision of the management of the stock exchange (recourse to the administrative courts).</p>	
<p>The Auditor's Report has not to be Forwarded to the Limited Partners of a Public Limited Partnership with a GmbH as General Partner – GmbH & Co. KG (BGH, Decision dated February 3rd, 2015 – II ZR 105/13)-</p>	
<ul style="list-style-type: none"> ▪ BGH decided that the resolution of a public GmbH & Co. KG concerning the approval of the annual financial statements is not void although the auditors report is not forwarded to the limited partners before the meeting even if the articles provide the audit by an external auditor. ▪ There is no legal provision requiring this forwarding. Sec. 166 para 1 German Commercial Code (HGB) grants inspection only. ▪ Sec. 42a German Limited Liability Company Act (GmbHG) is not applied analogously, if the limited partner is not shareholder of the general partner-GmbH since the participation rights of limited partners are less than these rights of GmbH-shareholders. ▪ For confidentiality reasons the auditor's report and the draft of the annual financial statements (was forwarded) are not treated equally. 	<ul style="list-style-type: none"> ▪ Whether this decision is appropriate may be discussed, especially if a closed i.e. a family company is concerned.

- However the limited partners have to be informed about the audit, i.e. by inspection before the meeting.

4. LEGISLATIVE PROJECTS

Draft Bill for the Amendment of German Stock Corporation Act (Entwurf eines Gesetzes zur Änderung des Aktiengesetzes - Aktienrechtsnovelle 2014 ("AktG-E"); Draft Bill of the Government (Regierungsentwurf), BT-Drucks. 18/4349 dated March 18th, 2015)

	Explanations / Consequences / Comments
<ul style="list-style-type: none"> ▪ Share certificates shall be in registered form. Share certificates may be in bearer form if <ol style="list-style-type: none"> 1. the company is listed or 2. the right to demand individual certificates for the shares is excluded and the collective certificate is collected... (sec. 10 para 1 AktG-E). ▪ The preference for non-voting preferred shares has not to be cumulative anymore. The preference may be a higher dividend. The holders of non-cumulative preferred shares get a voting right when the preference cannot be paid or not be paid in full. Holders of cumulative shares have a voting right in the second year of payment (sec. 139 para 1, 140 para 2 AktG-E). ▪ It is declared that the company has a conversion right with regard to convertible or warrant bonds ("Forced Convertible or Warrant Bonds"; sec. 192 para 1, 221 para 1 s. 1 AktG-E). No limitation of the par value of conditional capital if it is for the purpose to grant conversion rights to holders of forced convertible or warrant bonds to avert imminent illiquidity or overindebtedness. 	<ul style="list-style-type: none"> ▪ Registered form will be the rule but the option to bearer form remains under special conditions. ▪ Advantage for banks: non-cumulative preferred shares are instruments qualifying as Common Equity Tier 1 ("Kernkapital"). How does transformation from cumulative into non-cumulative preferred shares work (requirements of company law)? ▪ There is no definition of imminent illiquidity and overindebtedness. Consequently there is "room to manoeuvre". Still open issue: Contribution in kind if authorised capital is used?

<p>Such conditional capital can be resolved on additional to other (sec. 192 para 3 s. 3, 4 AktG-E). The conversion of convertible or warrant bonds by changing conditional capital is not a contribution in kind (sec. 192 para 3 s.5 AktG-E).</p> <ul style="list-style-type: none"> Furthermore AktG-E contains provisions relating to the calling and conduct of the general meeting, maturity of dividends, defective resolutions of the general meeting (sec. 58 para 4, 122, 123 para 2, 3, 5, 6, 124 para 2 s. 1, 125 para 2 s. 1, 130 para 2, 249 para 2 s. 3 AktG-E). 	
<p>Draft Bill to Transform the Rules governing the Profession and the Supervision of Auditors of the Directive 2014/56/EU² and to Conduct the Corresponding Requirements of the Regulation (EU) No 537/2014 on Specific Requirements regarding Statutory Audit of Public-Interest Entities (Entwurf eines Gesetzes zur Umsetzung der aufsichts- und berufsrechtlichen Regelungen der Richtlinie 2014/56/EU sowie zur Ausführung der entsprechenden Vorgaben der Verordnung (EU) Nr. 53/2014 im Hinblick auf die Abschlussprüfung bei Unternehmen von öffentlichem Interesse – Abschlussprüferaufsichtsreformgesetz, APAREG; Referentenentwurf BMWi dated May 29th, 2015, download pdf)</p>	
<ul style="list-style-type: none"> Establishment of an auditors' supervision department at "Bundesamt für Wirtschaft und Ausfuhrkontrolle" ("BaFa") as independent authority (special new law). Recognition and supervision of EU / EEA-audit firms (sec. 131, 131a and 131b German Public Account Act, "WPO") 	<p>Explanations / Consequences / Comments</p> <ul style="list-style-type: none"> BaFa has the power to impose on members of the management or the supervisory board of PIE having violated duties with regard to the statutory audit process a temporary prohibition, of up to five years' duration, banning these persons from functions in PIE (sec. 71 para 3 WPO).

² Transposition Date: June 17th, 2016.

<ul style="list-style-type: none"> ▪ Audit firms may be established in EU and EEA legal forms (sec. 27 para 1 WPO) 	
<p>Draft Bill to Transform the Rules Concerning the Audit of the Directive 2014/56/EU³ and to Conduct the Corresponding Requirements of the Regulation (EU) No 537/2014 on Specific Requirements regarding Statutory Audit of Public-Interest Entities (Entwurf eines Gesetzes zur Umsetzung der prüfungsbezogenen Regelungen der Richtlinie 2014/56/EU sowie zur Ausführung der entsprechenden Vorgaben der Verordnung (EU) Nr. 537/2014 im Hinblick auf die Abschlussprüfung bei Unternehmen von öffentlichem Interesse – Abschlussprüfungsreformgesetz – AReG; Referentenentwurf BMJV, dated March 27th, 2015, download pdf)</p>	
<p>Explanations / Consequences / Comments</p>	
<ul style="list-style-type: none"> ▪ Statutory auditor is inhabile, if he provides to the audited entity tax services or valuation services which have separately or in the aggregate direct and material effect on the audited financial statements and are documented in the audit report (sec 319a para 1 s. 1 No. 2 and 3, s. 3 HGB). ▪ The financial expert of the supervisory board has not to be independent anymore. The members of the supervisory board have to be familiar with the sector the PIE is operating (sec. 100 para. 5 AktG). ▪ The Audit Committee has the following additional duties: (i) has to grant the propriety performance of the accounting process and (ii) is responsible for the procedure for the selection of statutory auditor (sec 107 para 3 s. 2, 171 para 2 s. 3 AktG) and, if implemented, has to report to the general meeting how the statutory audit and the role of audit committee contributed to the integrity of the accounting process (sec. 171 para 2 s. 3 AktG). 	<ul style="list-style-type: none"> ▪ Maximum of derogation with regard to the prohibition of non-audit services (Art. 5 para 3 R 537/2014). Aside from check by government. ▪ Directive requires members “as a whole”.

³ Transposition Date: June 17th, 2016.

