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Gesetzes vom 24. April 2015 (BGBl. I S. 642)  
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the Act of 24 April 2015 (Federal Law Gazette I page 642)

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## Transformation Act

Transformation Act of 28 October 1994 (Federal Law Gazette I p. 3210; 1995 I p. 428), last  
amended by Article 22 of the Act of 24 April 2015 (Federal Law Gazette I page 642)

This Act serves to transpose into national law the following directives of the European  
Community, inasmuch as it includes provisions on transformations involving stock  
corporations:

1. Article 13 of the Second Council Directive 77/91/EEC of 13 December 1976 on  
coordination of safeguards which, for the protection of the interests of members and  
others, are required by Member States of companies within the meaning of the second  
paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability  
companies and the maintenance and alteration of their capital, with a view to making  
such safeguards equivalent (Official Journal EEC no. L 26 p. 1 of 31 January 1977);
2. Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g)  
of the Treaty concerning mergers of public limited liability companies (Official Journal  
EEC no. L 295 p. 36 of 20 October 1978);
3. Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article  
54(3)(g) of the Treaty, concerning the division of public limited liability companies (Official  
Journal EEC no. L 378 p. 47 of 31 December 1982).

The Act was passed as Article 1 of the Act dated 28 October 1994 (Federal Law Gazette I  
p. 3210 (Act on the Reform of the Laws Governing Transformations (*Gesetz zur Bereinigung  
des Umwandlungsrechts*, UmwBerG)) by the Bundestag with the consent of the Bundesrat.  
Pursuant to Article 20 of said Act, it entered in force on 1 January 1995.

### Book 1

#### Eligibility for a transformation

##### Section 1

#### Types of transformation; statutory restrictions

(1) Legal entities having their registered seat in Germany may be transformed

1. by way of a merger;
2. by way of a division into several enterprises (split-up, spin-off, hive-down);
3. by way of an asset transfer;

4. by way of a change of legal form.

(2) A transformation in the sense of subsection (1) shall be possible, in cases besides those governed by the present Act, only if it has been expressly provided for by a different federal law or *Land* law.

(3) Any deviations from the regulations of the present Act must have been expressly declared permissible in same. Supplementary determinations in contracts, by-laws, or declarations of intent are permissible unless the present Act has provided conclusively for the matter.

## **Book 2 Merger**

### **Part 1 General regulations**

#### **Chapter 1 Eligibility for a merger**

##### **Section 2 Types of mergers**

Legal entities may be merged, whereby they are dissolved without being wound up

1. by way of absorption, through the transfer of the assets of one legal entity or several legal entities (legal entity being acquired), as a whole, to some other existing legal entity (acquiring legal entity), or

2. by way of newly forming a legal entity, through allotment of the assets of two (2) or more legal entities (legal entity being acquired), in each case as a whole, to a newly formed legal entity that they have formed in this way,

whereby shares in the acquiring legal entity or newly formed legal entity are allotted, or memberships in same are granted, to the owners of shares (shareholders, partners, stockholders, or members) of the legal entities being acquired.

##### **Section 3 Legal entities eligible for mergers**

(1) The following legal entities may be involved in mergers as legal entities being acquired, acquiring legal entities, or newly formed legal entities:

1. commercial partnerships (unlimited partnerships, limited partnerships) and professional partnerships;

2. companies limited by shares (limited liability companies, stock corporations, partnerships limited by shares);

3. registered cooperative societies;

4. registered associations (Section 21 of the Civil Code (BGB));

5. confederations responsible for auditing cooperative societies;

6. mutual insurance companies.

(2) Furthermore, the following also may be involved in mergers:

1. commercial associations (Section 22 of the Civil Code (BGB)), insofar as they are the legal entity being acquired;

2. natural persons who, as the sole shareholders of a company limited by shares, assume its assets.

(3) Legal entities that have been dissolved may also be involved in the merger as the legal entity being acquired if it were possible to adopt a resolution to continue these legal entities.

(4) Unless stipulated otherwise, the merger may entail both the concurrent involvement of legal entities having the same legal form and the concurrent involvement of legal entities having different legal forms.

## **Chapter 2 Merger by absorption**

### **Section 4 Merger agreement**

(1) The representative bodies of the legal entities involved in the merger shall conclude a merger agreement. Section 311b (2) of the Civil Code (BGB) does not apply to said merger agreement.

(2) Where said agreement is to be concluded pursuant to one of the resolutions required in accordance with section 13, then a written draft of the agreement is to be prepared prior to this resolution.

### **Section 5 Substance of the merger agreement**

(1) The agreement, or its draft, at a minimum must set out the following information:

1. the names or the firm names and the registered seats of the legal entities involved in the merger;
2. the agreement as to the transfer of the entire assets of each legal entity being acquired, in return for shares in the acquiring legal entity being allotted, or memberships in same being granted;
3. the ratio applicable to the exchange of shares and, as the case may be, the amount of the additional cash payment, or information on the membership in the acquiring legal entity;
4. the details regarding the allotment of the shares in the acquiring legal entity, or concerning the acquisition of membership in the acquiring legal entity;
5. the date from which said shares or memberships will grant an entitlement to a portion of the net income for the year, as well as any special conditions affecting that entitlement;
6. the date from which the actions taken by the legal entity being acquired will be deemed to have been taken for the account of the acquiring legal entity (merger cut-off date);
7. the rights conferred by the acquiring legal entity upon individual owners of shares as well as upon the holders of special privileges, such as shares without voting rights, preferred stock, multiple voting stock, debt securities, and participatory rights, or the measures intended for these persons;
8. any special advantage granted to a member of a representative body, or of a supervisory body, of the legal entities involved in the merger, to a managing shareholder, a partner, an auditor, or a merger auditor;
9. the repercussions of the merger on the employees and the bodies representing them, as well as the measures intended to be taken in that regard.

(2) Where all shares in a legal entity being acquired are held by the acquiring legal entity, the information regarding the exchange of the shares (subsection (1) nos. 2 through 5) shall not be required insofar as such information concerns the absorption of this legal entity.

(3) The agreement, or its draft, is to be forwarded to the responsible works councils of the legal entities involved in the merger not less than one (1) month prior to the day on which the respective assembly of the owners of shares in each legal entity involved convenes that is to adopt a resolution, pursuant to section 13 (1), consenting to the merger agreement.

#### **Section 6**

##### **Form of the merger agreement**

The merger agreement must be recorded by a notary.

#### **Section 7**

##### **Termination of the merger agreement**

Where the merger agreement has been concluded subject to a condition and this condition has not been met within five (5) years following conclusion of the agreement, each party may terminate the agreement after five (5) years, observing a period of notice of half a year; the merger agreement may provide for a period shorter than five (5) years. In all cases, the termination may be declared only as per the end of the fiscal year of the legal entity to which such notice is given.

#### **Section 8**

##### **Merger report**

(1) The representative bodies of each of the legal entities involved in the merger are to submit a detailed written report explaining and justifying in legal and economic terms the details of the merger, the merger agreement, or its draft, and in particular the ratio applicable to the exchange of shares, or the information as to the membership, in the acquiring legal entity, as well as the amount of the cash compensation that may be offered (merger report); the representative bodies may also submit a common report. The report is to note any particular difficulties encountered in valuing the legal entities and the consequences the merger will have for the ownership interest held by the owners of shares. Where a legal entity involved in the merger is an affiliated enterprise in the sense of section 15 of the Stock Corporation Act (AktG), the report shall also include information on all matters of the other affiliated enterprises that are relevant for the merger. The disclosure obligations of the representative bodies extend to include these matters as well.

(2) The report need not address facts that, if they were to become known, would be suited to cause a greater than insignificant disadvantage to one of the legal entities involved or to an affiliated enterprise. In such event, the reasons are to be set out for which the facts were not included in the report.

(3) The report shall not be required if all owners of shares in all legal entities involved waive its being prepared, or if all shares in the legal entity being acquired are held by the acquiring legal entity. The declarations of waiver are to be recorded by a notary.

#### **Section 9**

##### **Audit of the merger**

(1) Insofar as this is stipulated by the present Act, the merger agreement, or its draft, is to be audited by one or several expert auditors (merger auditors).

(2) Where all shares in a legal entity being acquired are held by the acquiring legal entity, an audit of the merger pursuant to subsection (1) shall not be required, inasmuch as it concerns the absorption of this legal entity.

(3) Section 8 (3) shall apply *mutatis mutandis*.

#### **Section 10**

##### **Appointment of the merger auditors**

(1) The court will select and appoint the merger auditors upon a corresponding petition having been filed by the representative body. Upon a corresponding common petition being filed by the representative bodies, the merger auditors may be appointed for several of the legal entities involved or for all of them together. Section 318 (5) of the Commercial Code

(HGB) shall apply to the reimbursement of expenses incurred by the court-appointed auditors and to their remuneration.

(2) Any regional court in the judicial district of which a legal entity being acquired has its registered seat shall have jurisdiction. Where a division for commercial matters has been instituted at the regional court, the presiding judge of that division shall take decisions instead of the civil division.

(3) Unless stipulated otherwise in the subsections hereinbelow, the Law on the Proceedings regarding Family Matters and Voluntary Jurisdiction (FamFG) is to be applied to the proceedings.

(4) A complaint may be lodged against the decision taken. It may be so lodged only by submitting a writ of complaint signed by a lawyer.

(5) Where this serves to ensure uniform adjudication, the *Land* government may transfer the decision regarding the complaint, by an ordinance having the force of law for the judicial districts of several higher regional courts (*Oberlandesgerichte*), to one of the higher regional courts or to the highest *Land* court (*Oberstes Landesgericht*). The *Land* government may transfer the corresponding authorisation to the *Land* department of justice.

## **Section 11**

### **Position and responsibilities of the merger auditors**

(1) Section 319 subsections (1) through (4), section 319a (1), section 319b (1), section 320 (1), second sentence, and subsection (2), first and second sentences, of the Commercial Code (HGB) shall apply *mutatis mutandis* to the selection of the merger auditors and their right to demand information. Inasmuch as legal entities are concerned that are not under obligation to have their annual financial statements audited, the first sentence shall apply *mutatis mutandis*. In this context, section 267 subsections (1) through (3) of the Commercial Code (HGB) shall apply *mutatis mutandis* to any allocations of the legal entities to size categories. The right to demand information exists vis-à-vis all of the legal entities involved in the merger and vis-à-vis an affiliate company in the group, as well as vis-à-vis a controlled and a controlling enterprise.

(2) Section 323 of the Commercial Code (HGB) shall apply *mutatis mutandis* to the responsibilities of the merger auditors, their agents, and the legal representatives of an auditing firm cooperating and assisting with the audit. Such responsibilities exist vis-à-vis the legal entities involved in the merger and the owners of their shares.

## **Section 12**

### **Audit report**

(1) The merger auditors are to report in writing on the results of their audit. They may also submit a common audit report.

(2) The audit report is to be concluded by a declaration as to whether or not the proposed ratio applicable to the exchange of shares and, as the case may be, the amount of the additional cash payment or the membership in the acquiring legal entity is a fair equivalent. In this context, the following information is to be provided:

1. the methods based on which the proposed ratio that is to apply to the exchange has been established;
2. the reasons for which the application of these methods is appropriate;
3. in the event that several methods have been applied: the ratio applicable to the exchange or the equivalent that would result in each instance of different methods being applied; concurrently, the report is to present how the various methods have been weighted in determining the proposed ratio that is to apply to the exchange, or the equivalent, and the values on which they are based, as well as any particular difficulties encountered in valuing the legal entities.

(3) Section 8 subsections (2) and (3) shall apply *mutatis mutandis*.

### **Section 13**

#### **Resolutions adopted as to the merger agreement**

- (1) The merger agreement shall enter into force only if the owners of shares in the legal entities involved consent to same by a resolution (merger resolution). Said resolution may only be adopted at an assembly of the owners of shares.
- (2) Where the assignment of the shares in a legal entity being acquired is contingent on certain individual owners of shares approving it, their consent shall be a pre-requisite for the validity of any merger resolution adopted by this legal entity.
- (3) The merger resolution and the declarations of consent to be made by individual owners of shares as required by the present Act, including the required declarations of consent to be made by owners of shares who have not attended the assembly, must be recorded by a notary. The agreement, or its draft, is to be attached to the resolution as an annex. Upon a corresponding demand being made, the legal entity is to issue to each owner of shares, at the latter's costs and without undue delay, a copy of the agreement, or of its draft, as well as a copy of the record of the resolution.

### **Section 14**

#### **Period for filing actions against the merger resolution; court actions that are not an available remedy against the merger resolution**

- (1) An action brought against the entry into force of a merger resolution must be filed within one (1) month following the adoption of said resolution.
- (2) An action brought against the entry into force of the merger resolution adopted by a legal entity being acquired cannot be based on the fact that the ratio applicable to the exchange of shares has been specified at too low a value, or that the membership in the acquiring legal entity does not suffice as consideration for the shares in the legal entity being acquired, or for the membership in same.

### **Section 15**

#### **Improvement of the ratio applicable to the exchange**

- (1) Where the ratio applicable to the exchange of shares has been specified at too low a value, or the membership in the acquiring legal entity does not suffice as consideration for the share of a legal entity being acquired, or the membership in same, each of the owners of shares in this legal entity being acquired who is prohibited by section 14 (2) from exercising his right to file an action against the entry into force of the merger resolution may demand that the acquiring legal entity provide compensation by an additional cash payment; such additional payments may be in excess of one tenth of the amount of the nominal capital or share capital allocable to the shares allotted. Upon a corresponding petition having been made, the court shall determine which additional payment is appropriate pursuant to the regulations of the Act on Valuation Proceedings under Corporate Law (SpruchG).
- (2) The additional cash payment shall accrue interest from midnight of that day onwards on which the entry of the merger in the register kept at the registered seat of the acquiring legal entity has been published by notice pursuant to section 19 (3), such interest amounting to five (5) percentage points above the respective basic rate of interest per annum pursuant to section 247 of the Civil Code (BGB). The assertion of further-reaching damages is not ruled out.

### **Section 16**

#### **Application for entry of the merger in the register**

- (1) The representative bodies of each of the legal entities involved in the merger are to file an application for entry of the merger in the register (commercial register, register of partnerships, register of cooperative societies, or register of associations) kept at the registered seat of their respective legal entity. The representative body of the acquiring legal entity is entitled to apply for entry in the register of the merger also with the register kept at the registered seat of each of the legal entities being acquired.

(2) In filing the application for entry in the register, the representative bodies are to declare that no action has been brought against the entry into force of a merger resolution, or that any action brought was not filed in due time or was dismissed by a ruling that has become final and conclusive, or that such action has been retracted; the representative bodies are to notify the court maintaining the register of these circumstances also after they have filed the application for entry. Where no such declaration is available, the merger may not be entered in the register unless the share owners who are entitled to bring an action declare, by a notarised declaration of waiver, that they waive bringing an action against the entry into force of the merger resolution.

(3) It shall be equivalent to the declaration pursuant to subsection (2), first sentence, if, once an action has been brought against the entry into force of a merger resolution, the court has established by a court order, upon the petition filed by that legal entity against whose merger resolution the action is directed, that the fact of the action having been filed does not contravene the merger's entry in the register. Unless stipulated otherwise, section 247 of the Stock Corporation Act (AktG), sections 82, 83 (1) and section 84 of the Code of Civil Procedure (ZPO) as well as the regulations of the Code of Civil Procedure (ZPO) applicable to proceedings of first instance before the regional courts shall apply *mutatis mutandis* to the proceedings. A court order pursuant to the first sentence shall be delivered if

1. the action is impermissible or manifestly unfounded, or
2. the plaintiff has failed to provide evidence by submitting the corresponding deeds, within one (1) week of having served the petition, that he has been holding a pro-rated amount of at least EUR 1,000 since the notice convening the assembly was published, or
3. the prompt entering into force of the merger appears to take precedence because the court holds, at its discretion and conviction, that the significant disadvantages for the legal entities involved in the merger and the owners of their shares as presented by the petitioner outweigh the disadvantages the respondent stands to suffer; this shall not apply if the violation of the law is particularly grave.

In urgent cases, the court order may be delivered without a hearing for oral argument being held. The court order is to be delivered not later than three (3) months after the petition has been filed; the reasons for any delays to the decision shall be provided in a court order that is not contestable. The facts and circumstances brought before the court, by reason of which the court order pursuant to the third sentence may be delivered, are to be demonstrated to the satisfaction of the court. A division of the higher regional court in the judicial district of which the company has its registered seat shall rule on the petition. Transferring the matter to a judge sitting alone is ruled out; no conciliation hearing is required. The court order shall be incontestable. Should good cause have been shown for the action, then that legal entity that has obtained the court order shall be under obligation to compensate the respondent for the damages that the latter has suffered as a result of the merger having been entered in the register based on the court order; no demand may be made for compensation of the damages by way of removing the effects of entering the merger in the register kept at the registered seat of the acquiring legal entity.

## **Section 17**

### **Annexes to the application for entry in the register**

(1) The following are to be attached to the application for entry in the register, as execution copies or publicly certified copies or, insofar as they need not be recorded by a notary, as the original or a copy thereof: the merger agreement, the records of the merger resolutions, the declarations of consent required by the present Act to be given by individual owners of shares, including the declarations of consent by those owners of shares who have not attended the assembly, the merger report, the audit report, or the declarations of waiver pursuant to section 8 (3), section 9 (3), section 12 (3), section 54 (1), third sentence, or

section 68 (1), third sentence, as well as proof of the merger agreement, or its draft, having been forwarded in due time to the works council responsible.

(2) Furthermore, a balance sheet (closing balance sheet) of each of the legal entities being acquired is to be attached to the application for entry in the register kept at the registered seat of each of said legal entities being acquired. The regulations governing the annual balance sheet and its audit shall apply *mutatis mutandis* to this balance sheet. It need not be published by notice. The court maintaining the register may enter the merger in the register solely if the balance sheet has been prepared as per a cut-off date preceding the application for entry in the register by no more than eight (8) months.

### **Section 18**

#### **Firm name or name of the acquiring legal entity**

(1) The acquiring legal entity may continue to use the firm name of one of the legal entities being acquired, the commercial enterprise of which it is acquiring by way of the merger, either with or without attaching an addendum indicating this succession.

(2) Where a natural person holds an ownership interest in a legal entity being acquired, and such natural person will not hold any ownership interest in the acquiring legal entity, the acquiring legal entity may use the name of this owner of shares in the firm name that it continues to use pursuant to subsection (1), or that it has newly formed, solely if the affected owner of shares or his heirs have expressly agreed to such use.

(3) Where a professional partnership is involved in the merger, subsections (1) and (2) shall apply *mutatis mutandis* to the continued use of the firm name or name. A firm name may continue to be used as the name of a professional partnership solely subject to the pre-requisites set out in section 2 (1) of the Professional Partnership Act (PartGG). Section 1 (3) and section 11 of the Professional Partnership Act shall apply *mutatis mutandis*.

### **Section 19**

#### **Entry in the register of the merger and publication by notice of same**

(1) The merger may be entered in the register kept at the registered seat of the acquiring legal entity only once it has been entered in the register kept at the registered seat of each of the legal entities being acquired. The entry in the register kept at the registered seat of each of the legal entities being acquired is to include the note that the merger shall enter into force only upon its being entered in the register kept at the registered seat of the acquiring legal entity; this shall not apply if the entries are made on the same day in the registers of all legal entities involved.

(2) The court having jurisdiction at the registered seat of the acquiring legal entity is to notify, *ex officio*, the court having jurisdiction at the registered seat of each of the legal entities being acquired of the date on which the merger is entered in the register. Following receipt of such notification, the court having jurisdiction at the registered seat of each of the legal entities being acquired is to note, *ex officio*, in the register kept at the registered seat of the respective legal entity being acquired, the date on which the merger has been entered in the register kept at the registered seat of the acquiring legal entity and is to forward the documents on file with it to the court having jurisdiction at the registered seat of the acquiring legal entity for the latter to keep safe.

(3) The court having jurisdiction at the registered seat of each of the legal entities involved in the merger is to publish by notice, *ex officio*, pursuant to section 10 of the Commercial Code (HGB), the full and complete content of each of the entries it has made of the merger.

### **Section 20**

#### **Effects of the entry in the register**

(1) The entry of the merger in the register kept at the registered seat of the acquiring legal entity will have the following effects:

1. The assets of the legal entity being acquired and its liabilities will devolve to the acquiring legal entity.



2. The legal entities being acquired will cease to exist. This shall not require any separate cancellation to be made.

3. The owners of shares in the legal entities being acquired will become owners of shares in the acquiring legal entity; this shall not apply insofar as the acquiring legal entity or a third party acting in its own name, but for the account of this legal entity, owns shares in the legal entity being acquired or insofar as the legal entity being acquired holds treasury shares or insofar as a third party acting in its own name, but for the account of said legal entity, owns shares in that legal entity. Rights of third parties to the shares in the legal entity being acquired, or to memberships in same, shall continue in existence, then having as their object the shares in the acquiring legal entity, or the memberships in same, instead of the shares in the legal entity being acquired, or the memberships in same.

4. It will remedy the circumstances that the merger agreement has not been recorded by a notary and, as the case may be, that no declarations of consent or declarations of waiver have been made by individual owners of shares.

(2) Defects of the merger will not have repercussions on the effects of its entry in the register pursuant to subsection (1).

#### **Section 21**

##### **Effect on contracts imposing reciprocal obligations**

Where a merger results in purchase / delivery obligations, or similar obligations under contracts imposing reciprocal obligations, coinciding that, at the time of the merger, had not been completely performed by either of the parties and that are irreconcilable with each other, or the performance of each of which would impose an inequitable hardship on the acquiring legal entity, the scope of the obligations shall be determined in an equitable manner, following an evaluation of the contractual rights of all parties involved.

#### **Section 22**

##### **Protection of creditors**

(1) Inasmuch as the creditors of the legal entities involved in the merger cannot demand satisfaction of their claims, security is to be provided to them, provided they file their claim in writing, citing the merits and the amount of such claim, within six (6) months of the day on which the entry of the merger in the register kept at the registered seat of that legal entity whose creditors they are has been published by notice pursuant to section 19 (3). However, the creditors shall be entitled to this right only if they demonstrate satisfactorily that the merger will jeopardise the performance of the claim they hold. This right is to be indicated to the creditors in the publication by notice of the respective entry.

(2) Those creditors who are entitled to preferred satisfaction of their claims, in the event of insolvency, shall not be entitled to demand the provision of security out of cover funds that were created for their protection pursuant to the stipulations of the law and that are monitored by the state.

#### **Section 23**

##### **Protection of holders of special privileges**

The holders of rights in a legal entity being acquired that do not confer any voting rights, in particular the holders of shares without voting rights, of convertible bonds, of profit participating bonds, and of participatory rights, are to be granted equivalent rights in the acquiring legal entity.

#### **Section 24**

##### **Valuation procedures used by the acquiring legal entity**

The acquiring legal entity may carry in its annual balance sheets, as acquisition costs in the sense of section 253 (1) of the Commercial Code (HGB), also the values itemised in the closing balance sheet of a legal entity being acquired.

## **Section 25**

### **Obligation of the administrative bodies of the legal entities being acquired to provide compensation for damages**

(1) The members of the representative body and, where a supervisory body exists, the members of such supervisory body of a legal entity being acquired are under obligation, jointly and severally, to provide compensation for those damages suffered by this legal entity, the owners of its shares, or its creditors as a result of the merger. Those members of said bodies who complied with their duty to exercise skill and care in reviewing the legal entities' financial position and in concluding the merger agreement shall be exempted from this obligation to provide compensation.

(2) Where these claims are concerned, as well as further claims that may result from the merger, pursuant to general regulations, for and against the legal entity being acquired, said legal entity shall be deemed to continue in existence. Insofar, the merger does not have the effect of amalgamating the receivables and liabilities.

(3) The claims set out in subsection (1) shall become statute-barred after five (5) years following the day on which the entry of the merger in the register kept at the registered seat of the acquiring legal entity has been published by notice pursuant to section 19 (3).

## **Section 26**

### **Assertion of the claim to compensation of damages**

(1) The claims pursuant to section 25 subsections (1) and (2) may only be asserted by a special representative. The court having jurisdiction at the registered seat of a legal entity being acquired is to appoint such a representative upon a corresponding petition having been filed by an owner of shares or by a creditor of said legal entity. Creditors shall be entitled to file such a petition only if they are unable to obtain satisfaction of their claims from the acquiring legal entity. A complaint may be lodged against the decision taken.

(2) The representative, while making reference to the purpose of his appointment, is to demand that the owners of shares in the affected legal entity being acquired and the creditors of same file their claims pursuant to section 25 subsections (1) and (2) within a reasonable period of time amounting to at least one (1) month. Such demand is to be published by notice in the Official Gazette (*Bundesanzeiger*) and, if the articles of association, the partnership agreement, or the by-laws have determined that the public notices of the legal entity being acquired are to be made in other publications, the demand shall be published in these publications as well.

(3) The representative is to use the amount obtained from the assertion of the claims of a legal entity being acquired to satisfy the claims of the creditors of this legal entity, unless the claims of the creditors have been satisfied by the acquiring legal entity or unless the acquiring legal entity has provided security to said creditors. The distribution regulations applying to the winding-up of a legal entity having the legal structure of the legal entity being acquired shall apply *mutatis mutandis* to the distribution. Creditors and owners of shares who have failed to file their claims in due time will not be considered in the distribution.

(4) The representative is entitled to reimbursement of his reasonable cash expenditures and to remuneration for his activities. The court shall determine the expenditures and the remuneration. At its sole discretion and based on the overall circumstances of the individual case concerned, the court shall determine the scope in which the expenditures and the remuneration are to be borne by the owners of shares and the creditors respectively involved. A complaint may be lodged against the decision taken; complaints on points of law are ruled out. Compulsory enforcement in accordance with the Code of Civil Procedure (ZPO) may be pursued upon the ruling having become final and conclusive.

## **Section 27**

### **Obligation of the administrative bodies of the acquiring legal entity to provide compensation of damages**

Claims to compensation of damages arising as a result of the merger against a member of the representative body of the acquiring legal entity or, if a supervisory body exists, against a

member of the supervisory body of same, shall become statute-barred after five (5) years from the date on which the entry of the merger in the register kept at the registered seat of the acquiring legal entity has been published by notice pursuant to section 19 (3).

#### **Section 28**

##### **Invalidity of the merger resolution adopted by a legal entity being acquired**

Once the merger has been entered in the register kept at the registered seat of the acquiring legal entity, any action to be brought against the entry into force of the merger resolution adopted by a legal entity being acquired is to be brought against the acquiring legal entity.

#### **Section 29**

##### **Offer of compensation in the merger agreement**

(1) Where a legal entity merges, by way of absorption by a legal entity having a different legal form, or where a stock corporation listed on the stock exchange merges onto an unlisted stock corporation, the acquiring legal entity is to offer, in the merger agreement or in the draft of same, to each of the owners of shares recording an objection against the merger resolution adopted by the legal entity being acquired, to acquire that owner's shares or memberships in return for appropriate cash compensation; section 71 (4), second sentence, of the Stock Corporation Act (AktG) and section 33 (2), third sentence, second half-sentence, first alternative of the Limited Liability Companies Act (GmbHG) shall have no application in this regard. The same shall apply if, in the case of a merger of legal entities having the same legal form, restrictions govern the disposition over the shares in the acquiring legal entity or memberships in same. Where the acquiring legal entity is unable, due to its legal form, to acquire its own shares or memberships in itself, the cash compensation is to be offered for the case that the owner of shares declares his withdrawal from the legal entity. Any required publication by notice of the merger agreement or its draft, as the subject matter of the resolution to be adopted, must set out the wording of this offer. The acquiring legal entity is to bear the costs of a transfer.

(2) It shall be equivalent to the objection recorded in the sense of subsection (1) if an owner of shares who has not attended the assembly of the owners of shares was not admitted to said assembly, without this refusal to admit him being justified, or if the assembly has not been properly convened, or if no proper notice has been published of the subject matter of the resolution to be adopted.

#### **Section 30**

##### **Substance of the claim to cash compensation and review of the cash compensation**

(1) The cash compensation must be in keeping with the circumstances of the legal entity being acquired as given at the time the merger resolution is adopted. Section 15 (2) shall apply *mutatis mutandis* to the cash compensation.

(2) In all cases, merger auditors are to review whether the cash compensation intended to be offered is a fair equivalent. Sections 10 through 12 shall apply *mutatis mutandis*. The parties entitled to the compensation may waive having the review performed or the audit report prepared; such declarations of waiver are to be recorded by a notary.

#### **Section 31**

##### **Acceptance of the offer**

The offer pursuant to section 29 may be accepted only within two (2) months following the day on which the entry of the merger in the register kept at the registered seat of the acquiring legal entity has been published by notice pursuant to section 19 (3). Where a petition has been filed pursuant to section 34 to have the court determine the cash compensation, the offer may be accepted within two (2) months following the day on which the decision has been published by notice in the Official Gazette (*Bundesanzeiger*).

#### **Section 32**

##### **Actions that are not an available remedy against the merger resolution**

An action brought against the entry into force of the merger resolution adopted by a legal entity being acquired cannot be based on the offer pursuant to section 29 having been specified at too low a value, or no cash compensation having been offered in the merger agreement, or the cash compensation not having been offered in a proper manner.

### **Section 33**

#### **Disposition in other ways**

Any restrictions in place with the legal entities involved concerning dispositions do not prevent the owners of shares from disposing over the shares in any other way once the merger resolution has been adopted, this until the period stipulated in section 31 has lapsed.

### **Section 34**

#### **Court review of the compensation**

Where an owner of shares asserts that cash compensation that was to be offered to him pursuant to section 29 has been specified in the merger agreement, or in its draft, at too low a value, the court is to determine the appropriate cash compensation, upon that owner's petition, in accordance with the regulations set out in the Act on Valuation Proceedings under Corporate Law (SpruchG). The same shall apply if the cash compensation was not offered, or not offered in a proper manner.

### **Section 35**

#### **Designation of unknown stockholders; suspension of voting right**

Inasmuch as the law stipulates that the acquiring legal entity must identify the owners of its shares, those of the stockholders of a stock corporation being acquired, or of a partnership limited by shares being acquired, who are unknown are to be designated in the merger agreement, in applications for entry in a register, or when they are entered in a list of owners of shares, by setting out the aggregate portion of the company's nominal capital allocable to them and the shares allocable to them following the merger; designating them in this form is permissible only for owners of shares whose shares, in the aggregate, do not exceed one twentieth of the nominal capital of the company being acquired. Where such owners of shares become known at a later time, the register entries or lists are to be corrected *ex officio*. Until such point in time, the voting right attaching to the corresponding shares in the acquiring legal entity may not be exercised.

## **Chapter 3**

### **Merger by new formation**

### **Section 36**

#### **Applicable regulations**

(1) The regulations set out in Chapter 2, to the exception of section 16 (1) and of section 27, shall apply *mutatis mutandis* to the merger by new formation. The newly formed legal entity shall take the stead of the acquiring legal entity and the entry of the newly formed legal entity in the register shall take the stead of the entry of the merger in the register kept at the registered seat of the acquiring legal entity.

(2) Unless otherwise provided for in the present Book, the company formation rules as applying to the respective legal structure of the legal entity concerned are to be applied to the formation of the newly formed legal entity. The legal entities being acquired shall be equivalent to the founders. Regulations stipulating a minimum number of founders for the formation shall have no application.

### **Section 37**

#### **Substance of the merger agreement**

The merger agreement must include the articles of association, the partnership agreement, or the by-laws of the newly formed legal entity or must establish them.

### **Section 38**

#### **Application for entry in the register of the merger and of the newly formed legal entity**

(1) The representative bodies of each of the legal entities being acquired are to file an application for the merger to be entered in the register kept at the registered seat of their legal entity.

(2) The representative bodies of all legal entities being acquired are to file an application with the court, within the jurisdiction of which the newly formed legal entity is to have its registered seat, for entry of said legal entity in the register.

## **Part 2 Special regulations**

### **Chapter 1 Merger involving partnerships**

#### **Subchapter 1 Merger involving commercial partnerships**

##### **Section 39 Ineligibility for a merger**

A commercial partnership that has been dissolved may not be involved in a merger as the legal entity being acquired if the shareholders have agreed pursuant to section 145 of the Commercial Code (HGB) that a different manner of distributing the assets is to be pursued than winding up or merging the partnership.

##### **Section 40 Substance of the merger agreement**

(1) The merger agreement, or its draft, is to additionally determine, for each owner of shares in a legal entity being acquired, whether the position of personally liable shareholder or limited partner is to be granted to said owner in the acquiring commercial partnership or in the newly formed commercial partnership. In this context, the amount of the capital contribution to be made by each shareholder is to be specified.

(2) Owners of shares in a legal entity being acquired who are not personally liable without limitation, as joint and several debtors, for that legal entity's liabilities, are to be granted the position of a limited partner. Any determinations deviating herefrom shall be valid only if the owners of shares affected consent to the merger resolution that has been adopted by the legal entity being acquired.

##### **Section 41 Merger report**

No merger report shall be required for a commercial partnership involved in the merger if all shareholders of this company are entitled to manage its affairs.

##### **Section 42 Notification of the shareholders**

The merger agreement, or its draft, and the merger report are to be forwarded to the shareholders who are not eligible to manage the company's affairs; this shall be done at the latest together with the invitation convening the meeting of shareholders that is to adopt a resolution approving the merger agreement pursuant to section 13 (1).

##### **Section 43 Resolution adopted by the meeting of shareholders**

(1) The merger resolution to be adopted by the meeting of shareholders shall require the consent of all shareholders present; those shareholders not in attendance must also consent to this resolution.

(2) The articles of association may stipulate that the decision is to be taken by the majority of the shareholders. The majority must consist of at least three quarters of the votes cast. Where an owner of shares in a legal entity being acquired, who is personally liable, without limitation, for that legal entity's liabilities, objects to the merger, the position of limited partner

is to be granted to said owner in the acquiring commercial partnership or in the newly formed commercial partnership; the same shall apply to an owner of shares in the acquiring commercial partnership who is personally liable, without limitation, for that legal entity's liabilities, should he object to the merger.

#### **Section 44** **Audit of the merger**

In the case governed by section 43 (2), the merger agreement for a commercial partnership, or the draft of such merger agreement, is to be audited pursuant to sections 9 through 12 should one of the commercial partnership's shareholders so demand within a period of one (1) week after having received the documents set out in section 42. The company shall bear the costs of the audit.

#### **Section 45** **Limitation in time of the liability of personally liable shareholders**

(1) Where a commercial partnership transfers its assets, by way of a merger, to a legal entity having a different legal form, whose owners of shares are not liable, without limitation, for the liabilities of this latter legal entity, a shareholder of the commercial partnership will be liable for its obligations if they are due prior to five (5) years lapsing after the merger and, on their basis, claims have been established against him in a manner as set out in section 197 (1) nos. 3 through 5 of the Civil Code (BGB), or if a court enforcement action or an enforcement action by the authorities has been taken or applied for; where public-law liabilities are concerned, it shall suffice for an administrative decision to be issued.

(2) The period shall commence running on the day on which the entry of the merger in the register kept at the registered seat of the acquiring legal entity has been published by notice pursuant to section 19 (3). Sections 204, 206, 210, 211 and 212 subsections (2) and (3) of the Civil Code (BGB) applying to limitations shall apply *mutatis mutandis*.

(3) The establishment of claims in a manner as set out in section 197 (1) nos. 3 through 5 of the Civil Code (BGB) shall not be required should the shareholder have acknowledged the claim in writing.

(4) Subsections (1) through (3) are to be applied also if the shareholder takes up management activities in the legal entity having a different legal form.

### **Subchapter 2** **Merger involving professional partnerships**

#### **Section 45a** **Eligibility for a merger**

A merger onto a professional partnership is possible only if, at the point in time at which it enters into force, all owners of shares in the legal entities being acquired are natural persons engaged in a liberal profession (Section 1 subsections (1) and (2) of the Professional Partnership Act (PartGG)). Section 1 (3) of the Professional Partnership Act shall remain unaffected.

#### **Section 45b** **Substance of the merger agreement**

(1) Additionally, the merger agreement, or its draft, is to set out the family name and first name of each owner of shares in a legal entity being acquired, as well as the profession pursued in the acquiring professional partnership and the residential address of each partner.

(2) Section 35 shall have no application.

#### **Section 45c** **Merger report and notification of the partners**

A merger report shall be required for a professional partnership involved in the merger only if a partner is prohibited by section 6 (2) of the Professional Partnership Act (PartGG) from

managing the affairs of the partnership. Partners prohibited from managing the affairs of the partnership are to be notified pursuant to section 42.

#### **Section 45d**

##### **Resolution adopted by the meeting of shareholders**

(1) The merger resolution adopted by the meeting of shareholders shall require the consent of all partners in attendance; all of the partners not in attendance must likewise consent to this resolution.

(2) The partnership agreement may stipulate that the decision be taken by the majority of the partners. The majority must consist of three quarters of the votes cast.

#### **Section 45e**

##### **Applicable regulations**

Sections 39 and 45 shall apply *mutatis mutandis*. In the cases governed by section 45d (2), section 44 likewise shall apply *mutatis mutandis*.

### **Chapter 2**

#### **Merger involving limited liability companies**

##### **Subchapter 1**

##### **Merger by absorption**

#### **Section 46**

##### **Substance of the merger agreement**

(1) The merger agreement, or its draft, shall additionally determine, for each owner of shares in a legal entity being acquired, the nominal value of the business shares that the acquiring limited liability company is to allot to that owner of shares. The nominal value may be specified as an amount deviating from that amount allocable to the shares of stock in a stock corporation, or partnership limited by shares, being acquired as a pro-rated amount of its nominal capital. The nominal value must be denominated in full euros.

(2) Where the business shares to be allotted are to be created by way of a capital increase and are to be endowed with other rights and obligations than the other business shares in the acquiring limited liability company, these deviations are likewise to be established in the merger agreement or in its draft.

(3) Where owners of shares in a legal entity being acquired are to be allotted pre-existing business shares in the acquiring company, the owners of shares and the nominal values of the business shares to be allotted to them must be separately identified in the merger agreement or in its draft.

#### **Section 47**

##### **Notification of the shareholders**

The merger agreement, or its draft, and the merger report are to be sent to the shareholders at the latest together with the invitation convening the meeting of shareholders that is to adopt a resolution as to the approval pursuant to section 13 (1).

#### **Section 48**

##### **Audit of the merger**

The merger agreement for a limited liability company, or its draft, is to be audited pursuant to sections 9 through 12 should one of the limited liability company's shareholders so demand, doing so within a period of one (1) week of having received the documents set out in section 47. The company shall bear the costs of the audit.

#### **Section 49**

##### **Preparations for the meeting of shareholders**

(1) In the invitation convening the meeting of shareholders that is to adopt a resolution approving the merger agreement pursuant to section 13 (1), the managing directors are to give notice that the merger will be the subject matter of a resolution to be adopted.

(2) From the time onwards at which the meeting is convened, the annual financial statements and the management reports for the last three (3) fiscal years of the legal entities involved in the merger are to be kept available for inspection by the shareholders at the company's business premises.

(3) The managing directors are to inform each shareholder, upon the latter's corresponding demand, also about all of the matters of the other legal entities involved that are relevant to the merger, and are to do so at any time.

#### **Section 50**

##### **Resolution adopted by the meeting of shareholders**

(1) The merger resolution adopted by the meeting of shareholders shall require a majority of at least three quarters of the votes cast. The articles of association may stipulate a greater majority ratio and may impose further requirements.

(2) Where the merger impairs the minority rights protected by the articles of association that an individual shareholder of a company being acquired enjoys, or the special privileges to which the individual shareholders of such a company are entitled, pursuant to the articles of association, as regards the management of the company, the appointment of managing directors, or the nomination of candidates for the management, the merger resolution to be adopted by this company being acquired shall require the consent of these shareholders.

#### **Section 51**

##### **Consents required in special circumstances**

(1) Where a limited liability company, regarding the business shares of which not all capital contributions to be paid in have been so paid in in the full amount, is involved in the merger as the acquiring legal entity, the merger resolution adopted by a legal entity being acquired shall require the consent of all of the owners of shares in this legal entity in attendance at the time the resolution is adopted. Where the legal entity being acquired is a commercial partnership, a professional partnership, or a limited liability company, the merger resolution shall require the consent also of the shareholders who were not in attendance. Where a limited liability company, regarding the business shares of which not all capital contributions to be paid in have been so paid in in the full amount, is absorbed by way of a merger by a limited liability company, the merger resolution shall require the consent of all shareholders of the acquiring company.

(2) Where the nominal value of the business shares is specified, pursuant to section 46 (1), second sentence, as an amount deviating from the amount allocable to the stock, each stockholder must consent to this specification who cannot participate with his full share.

#### **Section 52**

##### **Application for entry in the register of the merger**

In filing an application for entry in the register of the merger, the representative bodies of the legal entities involved in the merger are to additionally declare, in the case governed by section 51 (1), that the merger resolution adopted by each of the legal entities being acquired was consented to by all of the owners of shares in the respective legal entity who were in attendance when the merger resolution was adopted, and that, insofar as the legal entity being acquired is a commercial partnership, a professional partnership, or a limited liability company, those of the shareholders of this company who were not in attendance likewise consented to said resolution. Where a limited liability company, regarding the business shares of which not all capital contributions to be paid in have been so paid in in the full amount, is absorbed by a limited liability company by way of a merger, this shall require the additional declaration that all shareholders of this company have consented to the merger resolution being adopted.

#### **Section 53**

##### **Entry in the register in the event of a share capital increase**



Where the acquiring company increases its share capital in order to implement the merger, the merger may be entered in the register only after the increase of the share capital has been entered in the register.

#### **Section 54**

##### **Merger without an increase of capital**

(1) The acquiring company may not increase its share capital in order to implement the merger in any of the following cases:

1. it holds shares in a legal entity being acquired;
2. a legal entity being acquired holds treasury shares; or
3. a legal entity being acquired holds business shares in this company, regarding which not all capital contributions to be paid in have been so paid in in the full amount.

The acquiring company need not increase its share capital in either of the following cases:

1. it holds business shares of its own as treasury shares; or
2. a legal entity being acquired holds business shares in this company, regarding which the capital contributions have already been paid in in the full amount.

The acquiring company may refrain from allotting business shares if all owners of shares in a legal entity being acquired waive this being done; the declarations of waiver are to be recorded by a notary.

(2) Subsection (1) shall apply *mutatis mutandis* if the holder of the shares designated therein is a third party acting on his own behalf, but who is acting, in a case governed by subsection (1), first sentence, no. 1 or by subsection (1), second sentence, no. 1, for the account of the acquiring company, or who is acting, in any one of the other cases governed by subsection (1), for the account of the legal entity being acquired.

(3) Insofar as, in order to implement the merger, business shares in the acquiring company must be partitioned, which shares are held by the acquiring company itself or by a legal entity being acquired, so as to allow them to be allotted to the owners of shares in a legal entity being acquired, the stipulations of the articles of association prohibiting or impeding the partitioning of the acquiring company's business shares shall have no application; however, the nominal value of each fraction of the business shares must be denominated in full euros. The first sentence shall apply *mutatis mutandis* if a third party holds the business shares who is acting in his own name, but for the account of the acquiring company or of a legal entity being acquired.

(4) Additional cash payments specified in the merger agreement may not exceed one tenth of the aggregate nominal value of the business shares in the acquiring company that have been allotted.

#### **Section 55**

##### **Merger with an increase of capital**

(1) Where, in order to implement the merger, the acquiring company increases its share capital, section 55 (1), section 56a, and section 57 subsections (2), (3) no. 1 of the Limited Liability Companies Act (GmbHG) shall have no application.

(2) Besides the documents designated in section 57 (3) nos. 2 and 3 of the Limited Liability Companies Act (GmbHG), the merger agreement and the records of the merger resolutions are to be attached, as execution copies or as publicly certified copies, to the application for entry in the register of the capital increase.

#### **Subchapter 2**

##### **Merger by new formation**

#### **Section 56**

##### **Applicable regulations**

The regulations set out in Subchapter 1 of this Act, to the exception of sections 51 through 53, section 54 subsections (1) through (3), and section 55, shall apply *mutatis mutandis* to the merger by new formation.

#### **Section 57**

##### **Substance of the articles of association**

The articles of association are to include any stipulations as to special benefits, formation expenses, contributions in kind, and acquisitions of assets, as have been made in the various articles of association, partnership agreements, or by-laws of the legal entities being acquired.

#### **Section 58**

##### **Report on company formation on the basis of contributions in kind**

(1) The report on company formation on the basis of contributions in kind (Section 5 (4) of the Limited Liability Companies Act (GmbHG)) is to also present the development taken by the business of the legal entities being acquired and their economic status.

(2) No report on company formation on the basis of contributions in kind need be prepared insofar as the legal entity being acquired is a company limited by shares or a registered cooperative society.

#### **Section 59**

##### **Merger resolutions**

The articles of association of the newly formed company shall enter into force only if the owners of shares in each of the legal entities being acquired consent to such articles by adopting the merger resolution. This shall apply *mutatis mutandis* to the appointment of the managing directors and the members of the supervisory board of the newly formed company, inasmuch as they are to be elected by the owners of shares in the legal entities being acquired.

### **Chapter 3**

#### **Merger involving stock corporations**

##### **Subchapter 1**

##### **Merger by absorption**

#### **Section 60**

##### **Audit of the merger; appointment of the merger auditors**

The merger agreement, or its draft, is to be audited for each stock corporation pursuant to sections 9 through 12.

#### **Section 61**

##### **Publication by notice of the merger agreement**

The merger agreement, or its draft, is to be filed with the register prior to the general meeting being convened that is to adopt a resolution as to the approval pursuant to section 13 (1). In its publication by notice pursuant to section 10 of the Commercial Code (HGB), the court is to provide notification that the agreement, or its draft, has been filed with the commercial register.

#### **Section 62**

##### **Group mergers**

(1) Where at least nine tenths of the share capital or of the nominal capital of a company limited by shares that is being acquired are held by an acquiring stock corporation, no merger resolution need be adopted by the acquiring stock corporation where the absorption of this company being acquired is concerned. Treasury shares in the company being acquired and shares belonging to another party for the account of this company are to be set off from the share capital or the nominal capital.

(2) Subsection (1) shall have no application if stockholders of the acquiring company, the aggregate of whose shares makes up one twentieth of the nominal capital of this company, demand that a general meeting be convened in which to adopt a resolution consenting to the merger. The by-laws may tie the right to demand that a general meeting be convened to possession of a smaller portion of the nominal capital of the acquiring company.

(3) One (1) month prior to the day of the meeting of shareholders, or the general meeting, of the company being acquired that is to adopt a resolution approving the merger agreement pursuant to section 13 (1), the documents designated in section 63 (1) are to be kept available for inspection by the stockholders at the business premises of the acquiring company. Concurrently, the management board of the acquiring company is to publish a notification of the impending merger in the publications of record designated by the acquiring company and is to file the merger agreement, or its draft, with the register having jurisdiction for the acquiring company; section 61, second sentence, shall apply *mutatis mutandis*. Stockholders are to be notified of their right pursuant to subsection (2) in the notification published pursuant to the first half-sentence of the second sentence. Proof of this notification having been published is to be attached to the application for entry in the commercial register of the merger. In filing the application for entry in the register, the management board is to declare whether or not an application pursuant to subsection (2) has been filed. Upon a corresponding demand being made, each stockholder of the acquiring company is to be provided, without undue delay and at no charge, with a copy of the documents designated in the first sentence. Subject to the stockholder's consent, the documents may be transmitted to him by means of electronic communication. The obligations pursuant to the first and sixth sentences shall not be applicable if the documents designated in the first sentence are kept accessible, for the same period of time, on the company website.

(4) Where the entire share capital, or nominal capital, of a company limited by shares that is being acquired is held by an acquiring stock corporation, no merger resolution shall be required to be adopted by the owner of the shares in the company limited by shares that is being acquired. Likewise, no such resolution shall be required in cases in which, pursuant to subsection (5), first sentence, a resolution as to a transfer has been adopted and entered in the commercial register with a note pursuant to subsection (5), seventh sentence.

Subsection (3) shall apply subject to the proviso that the obligations set out therein are to be fulfilled, following the conclusion of the merger agreement, for the duration of one (1) month. At the latest upon commencement of this period, the obligation to forward documents set out in section 5 (3) is to be fulfilled.

(5) In the cases governed by subsection (1), the general meeting of a stock corporation being acquired may adopt a resolution pursuant to section 327a (1), first sentence, of the Stock Corporation Act (AktG) within three (3) months following the conclusion of the merger agreement if the acquiring company (principal stockholder) owns stock amounting to nine tenths of the nominal capital. Should it be intended to exclude the minority stockholders of the company being acquired in the context of the merger, the merger agreement, or its draft, must include the corresponding information. Subsection (3) shall apply subject to the proviso that the obligations set out therein are to be fulfilled for the duration of one (1) month following the conclusion of the merger agreement. At the latest upon commencement of this period, the obligation to forward documents set out in section 5 (3) is to be fulfilled. The merger agreement, or its draft, is to be kept available for inspection by the stockholders as stipulated by section 327c (3) of the Stock Corporation Act. The merger agreement, or its draft, is to be included as an execution copy or as a publicly certified copy with the application for entry in the register of the resolution as to the transfer (Section 327e (1) of the Stock Corporation Act). The entry in the register of the resolution as to the transfer is to include the note that it shall enter into force only concurrently with the entry of the merger in the register kept at the registered seat of the acquiring stock corporation. In all other regards, sections 327a through 327f of the Stock Corporation Act (AktG) shall remain unaffected.

### **Section 63**

#### **Preparations for the general meeting**

(1) From the time onwards at which the general meeting is convened that is to adopt a resolution approving the merger agreement pursuant to section 13 (1), the following documents are to be kept available for inspection by the stockholders at the company's business premises:

1. the merger agreement, or its draft;
2. the annual financial statements and the management reports for the last three (3) fiscal years of the legal entities involved in the merger;
3. in the event that the last annual financial statement refers to a fiscal year that expired more than six (6) months prior to the conclusion of the merger agreement, or the preparation of its draft, a balance sheet as per a cut-off date that is not earlier than the first day of the third month preceding the conclusion of the merger agreement or the preparation of its draft (interim statement of accounts);
4. the merger reports provided in accordance with section 8;
5. the audit reports provided in accordance with section 60 in conjunction with section 12.

(2) The interim statement of accounts (subsection (1) no. 3) is to be prepared in accordance with the regulations that had been applied in preparing the last annual balance sheet of the legal entity. No physical inventory need be taken. The valuation procedures used in the last annual balance sheet may be applied. However, depreciations, value adjustments, and reserves as given up until the cut-off date of the interim statement of accounts are to be taken into account, as well as any changes to the actual value of the assets that cannot be ascertained from the books but may have occurred by said cut-off date. Section 8 (3), first sentence, first alternative and the second sentence of said subsection shall apply *mutatis mutandis*. An interim statement of accounts need not be prepared either if the company has published a mid-year interim financial report pursuant to section 115 of the Securities Trading Act (WpHG) since the last annual financial statement. For the purposes of preparing for the general meeting, the mid-year interim financial report shall take the stead of the interim statement of accounts.

(3) Upon a corresponding demand being made, copies of the documents designated in subsection (1) are to be provided to each stockholder without undue delay and at no charge. Subject to the stockholder's consent, the documents may be transmitted to him by means of electronic communication.

(4) The obligations pursuant to subsections (1) and (3) shall not be applicable if the documents designated in subsection (1) are kept accessible, for the same period of time, on the company website.

### **Section 64**

#### **Conduct of the general meeting**

(1) The documents designated in section 63 (1) are to be made available at the general meeting. At the outset of the meeting, the management board is to give an oral presentation of the merger agreement, or its draft, and is to advise of any significant change undergone by the company's assets since the merger agreement was concluded or its draft prepared. The management board is to advise also the representative bodies of the other legal entities involved of such changes; they in turn are to advise the owners of shares in the legal entity they represent prior to the resolution being adopted. Section 8 (3), first sentence, first alternative, and the second sentence of said subsection shall apply *mutatis mutandis*.

(2) Should any stockholder so demand at the general meeting, he is to be provided also with information about any and all matters of the other legal entities involved that are relevant to the merger.

## **Section 65**

### **Resolution by the general meeting**

(1) The merger resolution adopted by the general meeting shall require a majority comprising at least three quarters of the nominal capital represented at the time the resolution is adopted. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements.

(2) Where several classes of stock exist, the stockholders of each class of stock who have voting rights must consent to the resolution to be adopted by the general meeting in order for it to be effective. The stockholders of each class of stock are to adopt a special resolution as to this consent. Subsection (1) shall apply to this special resolution.

## **Section 66**

### **Entry in the register in the event of an increase of the nominal capital**

Where the acquiring company increases its nominal capital in order to implement the merger, the merger may be entered in the register only after the implementation of the increase of the nominal capital has been entered in the register.

## **Section 67**

### **Application of the regulations concerning post-formation agreements**

Where the merger agreement is concluded in the first two (2) years since entry in the register of the acquiring company, section 52 subsections (3), (4), (6) through (9) of the Stock Corporation Act (AktG) concerning post-formation agreements shall apply *mutatis mutandis*. These stipulations shall have no application if the stock to be allotted makes up no more than one tenth of the nominal capital of this company, or if this company has obtained its current legal form by changing its prior legal form, which was that of a limited liability company, and has been entered in the commercial register with that legal form for at least two (2) years. Where the nominal capital is increased in order to implement the merger, the increased nominal capital is to be used as a basis for the calculations.

## **Section 68**

### **Merger without an increase of capital**

(1) The acquiring company may not increase its nominal capital in order to implement the merger in any of the following cases:

1. it holds shares in a legal entity being acquired;
2. a legal entity being acquired holds treasury shares; or
3. a legal entity being acquired holds stock in this company, regarding which the issue price has not been paid in the full amount.

The acquiring company need not increase its nominal capital in either of the following cases:

1. it holds treasury stock; or
2. a legal entity being acquired holds stock in this company, regarding which the issue price has already been paid in the full amount.

The acquiring company may refrain from allotting shares of stock if all owners of shares in a legal entity being acquired waive having this done; the declarations of waiver are to be recorded by a notary.

(2) Subsection (1) shall apply *mutatis mutandis* if the holder of the shares designated therein is a third party who is acting on his own behalf, but who is acting, in a case governed by subsection (1), first sentence, no. 1 or by subsection (1), second sentence, no. 1, for the account of the acquiring company, or who is acting, in any one of the other cases governed by subsection (1), for the account of the legal entity being acquired.

(3) Additional cash payments specified in the merger agreement may not exceed one tenth of the pro-rated amount of its nominal capital allocable to the shares of stock in the acquiring company that have been allotted.

### **Section 69**

#### **Merger with capital increase**

(1) Where the acquiring company increases its nominal capital in order to implement the merger, section 182 (4), section 184 (1), second sentence, sections 185, 186, 187 (1), and section 188 subsections (2) and (3) no. 1 of the Stock Corporation Act (AktG) shall have no application; the contribution in kind shall be audited pursuant to section 183 (3) of the Stock Corporation Act only – where the legal entities being acquired have the legal form of a commercial partnership, of a professional partnership, or of an association having legal personality – if assets were itemised in the closing balance sheet of a legal entity being acquired at a higher value than in its last annual balance sheet, if the values carried in a closing balance sheet are not itemised as acquisition costs in the annual balance sheets of the acquiring company, or if the court harbours doubts as to whether the value of the contribution in kind will in fact amount to the lowest issue price of the shares of stock to be allotted in return for said contribution in kind. This shall apply also in those cases in which the nominal capital is increased by the issuance of new shares of stock on the basis of the authorisation pursuant to section 202 of the Stock Corporation Act. In such event, moreover, section 203 (3) of the Stock Corporation Act shall have no application. The merger auditor may be appointed as auditor.

(2) Besides the documents designated in section 188 (3) nos. 2 and 3 of the Stock Corporation Act (AktG), the merger agreement and the records of the merger resolutions are to be attached, as execution copies or as publicly certified copies, to the application for entry in the register of the capital increase.

### **Section 70**

#### **Assertion of a claim to compensation of damages**

Solely those stockholders of a company being acquired who have already exchanged their shares of stock for shares in the acquiring legal entity may apply to have a special representative appointed pursuant to section 26 (1), second sentence.

### **Section 71**

#### **Appointment of a trustee**

(1) Each legal entity being acquired is to appoint a trustee responsible for receiving the shares of stock to be allotted and the additional cash payments to be made. The merger may be entered in the register only if the trustee has given notice to the court that he has possession of the shares of stock and the additional cash payments specified in the merger agreement.

(2) Section 26 (4) shall apply *mutatis mutandis*.

### **Section 72**

#### **Exchange of stock**

(1) Section 73 subsections (1) and (2) of the Stock Corporation Act (AktG) shall apply *mutatis mutandis* to the exchange of the shares of stock in a company being acquired; in the event of shares of stock in this company being merged, section 226 subsections (1) and (2) of the Stock Corporation Act governing the cancellation of stock shall apply *mutatis mutandis*. No approval by the court shall be required.

(2) Where the acquiring legal entity is likewise a stock corporation, section 73 (3) of the Stock Corporation Act (AktG) shall furthermore apply *mutatis mutandis*, as shall, in the case of shares of stock being merged, section 73 (4) and section 226 (3) of the Stock Corporation Act.

## **Subchapter 2**

### **Merger by new formation**

### **Section 73**

#### **Applicable regulations**

The regulations set out in Subchapter 1, to the exception of sections 66, 67, section 68 subsections (1) and (2), and section 69, shall apply *mutatis mutandis* to mergers by new formation.

### **Section 74**

#### **Substance of the by-laws**

The by-laws shall be established such that they include any stipulations as to special benefits, formation expenses, contributions in kind, and acquisitions of assets, as may have been made in the various articles of association, partnership agreements, or by-laws of the legal entities being acquired. Section 26 subsections (4) and (5) of the Stock Corporation Act (AktG) shall remain unaffected.

### **Section 75**

#### **Formation report and audit of the formation**

(1) The formation report (Section 32 of the Stock Corporation Act (AktG)) is to also present the development taken by the business of the legal entities being acquired and their economic status. The merger auditor may be appointed as formation auditor (Section 33 (2) of the Stock Corporation Act).

(2) Should the legal entity being acquired be a company limited by shares or a registered cooperative society, no formation report shall be required, nor any audit of same.

### **Section 76**

#### **Merger resolutions**

(1) A stock corporation being acquired may adopt a merger resolution only if it and each of the other stock corporations being acquired has already been entered in the register for two (2) years.

(2) The by-laws of the newly formed company shall enter into force only if the owners of shares in each of the legal entities being acquired consent to such by-laws by adopting the merger resolution. This shall apply *mutatis mutandis* to the appointment of the members of the supervisory board of the newly formed company, inasmuch as they are to be elected pursuant to section 31 of the Stock Corporation Act (AktG). Section 124 (2), third sentence, and subsection (3), first and third sentences, of the Stock Corporation Act shall apply *mutatis mutandis* to a stock corporation being acquired.

### **Section 77**

**(repealed)**

### **Chapter 4**

#### **Merger involving partnerships limited by shares**

### **Section 78**

#### **Applicable regulations**

The regulations set out in Chapter 3 shall apply *mutatis mutandis* to mergers involving partnerships limited by shares. The partnership limited by shares and the personally liable shareholders authorised to represent it shall take the stead of the stock corporation and its management board. The merger resolution shall require the consent also of the personally liable shareholders; the by-laws of the partnership limited by shares may stipulate that the decision must be taken by the majority of these shareholders. In their relationship to each other, stock corporations and partnerships limited by shares shall not be deemed legal entities having a different legal form in the sense of sections 29 and 34.

### **Chapter 5**

#### **Merger involving registered cooperative societies**

## **Subchapter 1 Merger by absorption**

### **Section 79 Eligibility for a merger**

A legal entity having a different legal form may be merged with a registered cooperative society by way of absorption only if any modification of the acquiring cooperative society's by-laws that may be required is resolved upon concurrently with the merger.

### **Section 80 Substance of the merger agreement in the case of absorption by a cooperative society**

(1) The merger agreement for mergers by way of absorption by a registered cooperative society, or its draft, is to set out the following in specifying the ratio applicable to the exchange of shares (Section 5 (1) no. 3):

1. that each member of a cooperative society being acquired will obtain an ownership interest of one (1) business share in the acquiring cooperative society, provided that the by-laws of said cooperative society do not allow ownership interests to comprise more than one (1) business share; or
2. that each member of a cooperative society being acquired will obtain an ownership interest of at least one (1) business share in the acquiring cooperative society and in all other cases will obtain an ownership interest comprising as many business shares in the acquiring cooperative society as are to be regarded as having been fully paid in when the amount of the member's capital contribution to the cooperative society being acquired is credited, provided that the by-laws of the acquiring cooperative society allow a member to obtain an ownership interest comprising several business shares or obligate the members to assume several business shares; the merger agreement, or its draft, may provide for a different calculation of the number of the business shares to be allotted.

In the case of mergers by way of a legal entity having a different legal form being absorbed by a registered cooperative society, the merger agreement, or its draft, is to additionally cite, for each owner of shares in such legal entity, the amount of the respective business share and the number of business shares comprising his ownership interest in the cooperative society.

(2) The merger agreement, or its draft, is to cite the cut-off date of the closing balance sheet for each cooperative society being acquired.

### **Section 81**

#### **Expert report of the confederation responsible for auditing cooperative societies**

(1) Prior to the general assembly being convened that is to adopt a resolution approving the merger agreement pursuant to section 13 (1), an expert opinion is to be obtained from the confederation responsible for auditing cooperative societies regarding each of the cooperative societies involved, said expert opinion determining whether or not the merger is reconcilable with the interests of the respective cooperative society's members and creditors (audit opinion). The audit opinion may be drawn up also as a common audit opinion for several cooperative societies involved.

(2) Where the pre-requisites set out in Article 25 (1) of the Introductory Act of the Commercial Code (EGHGB) in the version of Article 21 section 5 (2) of the Law of 25 July 1988 (published in the Federal Law Gazette (BGBl.) I p. 1093) are met, the audit of the merger (Sections 9 through 12) regarding the legal entities set out therein may also be performed by the confederation responsible for auditing cooperative societies that has jurisdiction.



## **Section 82**

### **Preparations for the general assembly**

- (1) From the time onwards at which the general assembly is convened that is to adopt a resolution approving the merger agreement pursuant to section 13 (1), the documents designated in section 63 (1) nos. 1 through 4 as well as the audit opinions prepared pursuant to section 81 are to be kept available for inspection by the members also at the business premises of each cooperative society involved. Any interim statements of accounts required for this purpose are to be prepared pursuant to section 63 (2), first through fourth sentences.
- (2) Upon a corresponding demand being made, each member is to be provided with a copy of the documents designated in subsection (1) without undue delay and at no charge.
- (3) The obligations pursuant to subsection (1), first sentence, and pursuant to subsection (2) shall not be applicable if the documents designated in subsection (1), first sentence, are kept accessible, for the same period of time, on the website of the cooperative society.

## **Section 83**

### **Conduct of the general assembly**

- (1) At the general assembly, the documents designated in section 63 (1) nos. 1 through 4 as well as the audit opinions prepared pursuant to section 81 are to be kept available for inspection. At the outset of the meeting, the management board is to give an oral presentation of the merger agreement, or its draft. Section 64 (2) shall apply *mutatis mutandis*.
- (2) The audit opinion prepared regarding the cooperative society that is to adopt the resolution is to be read out to the general assembly. The confederation responsible for auditing cooperative societies is entitled to participate in the general assembly in an advisory capacity.

## **Section 84**

### **Resolution adopted by the general assembly**

The merger resolution adopted by the general assembly shall require a majority of three quarters of the votes cast. The by-laws may stipulate a greater majority ratio and may impose further requirements.

## **Section 85**

### **Improvement of the ratio applicable to the exchange**

- (1) Where cooperative societies merge with one another, section 15 shall be applicable only if and insofar as the amount of a member's capital contribution in the acquiring cooperative society is lower than the amount of the member's capital contribution in the cooperative society being acquired.
- (2) The claim pursuant to section 15 may also be fulfilled by correspondingly crediting the amount of the member's capital contribution, insofar as the aggregate amount of the member's business shares in the acquiring cooperative society is not exceeded.

## **Section 86**

### **Annexes to the application for entry in the register**

- (1) Besides the documents usually required for this purpose, the original or a publicly certified copy of the audit opinion prepared for the cooperative society filing the application is to be attached to the application for entry in the register of the merger.
- (2) Furthermore, the original or a publicly certified copy of any other audit opinion prepared for a cooperative society being acquired is to be attached to the application for entry in the register kept at the registered seat of the acquiring legal entity.

## **Section 87**

### **Exchange of shares**

- (1) As a result of the merger, each member of a cooperative society being acquired will hold an ownership interest in the acquiring legal entity in accordance with the merger agreement. Any obligation to assume further business shares in an acquiring cooperative society shall

remain unaffected. Any rights third parties may have to the amounts of the members' capital contributions in a cooperative society being acquired shall continue in force and shall have as their object the shares in the acquiring legal entity having a different legal form, or the memberships in same, instead of the business shares in the cooperative society being acquired. Any rights third parties may have to the shares in the legal entity being acquired, or to memberships in same, shall continue in force and shall have as their object the amounts of the members' capital contributions obtained in the acquiring cooperative society.

(2) Where the amount of the capital contribution that a given member held in a cooperative society being acquired exceeds the aggregate amount of business shares comprising that member's ownership interest in an acquiring cooperative society pursuant to subsection (1), the surplus is to be disbursed to the member after six (6) months have lapsed since the day on which the entry of the merger in the register kept at the registered seat of the acquiring cooperative society has been published by notice pursuant to section 19 (3); however, no such disbursement may be effected before the creditors who have filed their claims pursuant to section 22 have been satisfied or have had security provided to them. Additional cash payments specified in the merger agreement may not exceed one tenth of the aggregate nominal value of the business shares in the acquiring cooperative society that have been allotted.

(3) The closing balance sheet of the cooperative society being acquired shall govern in calculating the amount of the capital contribution to which a given member of said cooperative society being acquired was entitled.

#### **Section 88**

##### **Amounts of the members' capital contributions where companies limited by shares or associations having legal personality are absorbed**

(1) Where a company limited by shares is involved in the merger as the legal entity being acquired, each of the owners of shares in this company is to be credited with the value of the business shares, or shares of stock, comprising his ownership share in the company being acquired as the amount of his capital contribution, as a member, to the acquiring cooperative society. The closing balance sheet of the company being acquired shall govern in determining the value of this ownership interest. Where the amount of the capital contribution that a given member has obtained as a result of the merger exceeds the aggregate amount of the business shares comprising that member's ownership interest in the acquiring cooperative society, the surplus is to be disbursed to the member after six (6) months have lapsed since the day on which the entry of the merger in the register kept at the registered seat of the acquiring cooperative society has been published by notice pursuant to section 19 (3); however, no such disbursement shall be effected before the creditors who have filed their claims pursuant to section 22 have been satisfied or have had security provided to them.

(2) Where an association having legal personality is involved in the merger as a legal entity being acquired, the maximum amount that may be credited to each member of said association as the amount of his capital contribution, as a member, to the acquiring cooperative society is the aggregate nominal value of the business shares comprising that member's ownership interest in the acquiring cooperative society.

#### **Section 89**

##### **Entry in the list of members of the cooperative society's members; notification**

(1) Following entry of the merger in the register kept at the registered seat of the acquiring cooperative society, the acquiring cooperative society is to register each new member in the list of members without undue delay and is to notify said members of this fact without undue delay. Furthermore, the acquiring cooperative society is to enter in said list the number of business shares held by the respective member wherever a member holds an ownership interest comprising more than one (1) business share.

(2) The acquiring cooperative society is to notify each owner of shares in a legal entity being acquired, and in the case of unknown stockholders the trustee of the company being acquired, of the following, doing so without undue delay and in text form:

1. the amount of the respective member's capital contribution to the acquiring cooperative society;
2. the amount of the respective member's business share in the acquiring cooperative society;
3. the number of business shares comprising the ownership interest held by the owner of shares in the acquiring cooperative society;
4. the amount that, after the amount of the member's capital contribution has been credited, the member is to pay in, or the amount that is to be disbursed to the member pursuant to section 87 (2) or pursuant to section 88 (1); as well as
5. the liability amount of the acquiring cooperative society, should its members have to provide additional funding up to a liability amount.

#### **Section 90**

##### **Rejection of shares or memberships by individual owners of shares**

(1) Sections 29 through 34 shall have no application to members of a cooperative society being acquired.

(2) Shares of the acquiring legal entity, and memberships therein, resulting from the effects of the merger shall be deemed as not having been acquired if a given member rejects them.

(3) Each member of a cooperative society being acquired shall have the right to reject shares or memberships in the general assembly or, if he is a representative, in the assembly of representatives, which is to adopt a resolution approving the merger pursuant to section 13 (1) in the following events:

1. he appears at such assembly and states for the record that he objects to the merger resolution; or
2. he does not appear because he has not been admitted to the assembly, without this refusal to admit him being justified, or because the assembly has not been properly convened, or because no proper notice has been published regarding the subject matter of the resolution to be adopted.

Where the merger resolution of a cooperative society being acquired is adopted by an assembly of representatives, any other member of said cooperative society that is not a representative at the time the resolution is adopted likewise shall be entitled to the right of rejection.

#### **Section 91**

##### **Formal requirements and deadlines applying to the rejection**

(1) The rejection is to be declared in writing to the acquiring legal entity.

(2) The rejection may be declared only within six (6) months following the day on which the entry of the merger in the register kept at the registered seat of the acquiring legal entity has been published by notice pursuant to section 19 (3).

(3) The rejection may not be declared subject to a condition being met or subject to a period of time elapsing.

#### **Section 92**

##### **Entry of the rejection in the list of members**

(1) The acquiring cooperative society is to enter each instance in which shares or memberships are rejected in the list of members without undue delay and is to notify the member of such entry without undue delay.

(2) The rejection shall enter into force at that point in time at which the declaration of rejection is received by the acquiring legal entity.

### **Section 93** **Distribution of assets**

(1) The acquiring legal entity is to distribute the assets between itself and any former member whose participation in the acquiring legal entity is deemed to not have been acquired pursuant to section 90 (2). The closing balance sheet of the cooperative society being acquired shall govern.

(2) This member may demand that the capital contribution thus far comprising his ownership interest as a member of the cooperative society being acquired be disbursed to him; subject to the stipulations of section 73 (3) of the Act on Cooperative Societies (GenG), such member shall not participate in the reserves and the other assets of the cooperative society being acquired even if, in the course of the merger, such reserves and other assets are attributed to the amounts of the capital contributions made by other members who have not exercised their right of rejection.

(3) Where the amounts of the members' capital contributions and the reserves itemised in the closing balance sheet of a cooperative society being acquired are not sufficient to cover a loss itemised in this balance sheet, the acquiring legal entity may demand of the former member, whose participation is deemed to not have been acquired, that such member pay a pro-rated portion of the deficiency, if and insofar as this member were obligated to provide additional funding to the cooperative society being acquired were this cooperative society to become insolvent. Unless the by-laws of the cooperative society being acquired stipulate otherwise, the pro-rated portion of the deficiency shall be calculated based on the number of members that the cooperative society being acquired has.

(4) (repealed)

### **Section 94**

#### **Disbursement of the credit balance resulting from the distribution of assets**

Claims to disbursement of the amount of a member's capital contribution pursuant to section 93 (2) shall be satisfied within six (6) months of the rejection; however, no such disbursement may be effected before the creditors who have filed their claims pursuant to section 22 have been satisfied or have had security provided to them, nor may it be effected before six (6) months have lapsed since the day on which the entry of the merger in the register kept at the registered seat of the acquiring legal entity has been published by notice pursuant to section 19 (3).

### **Section 95**

#### **Continuance of the obligation to provide additional funding**

(1) Where the liability amount of an acquiring cooperative society is lower than it was for a cooperative society being acquired, or where the owners of shares in the acquiring legal entity are not all liable, without limitation, to the creditors of said acquiring legal entity, those of the owners of shares who were members of the cooperative society being acquired are to provide, in order to satisfy the creditors of the cooperative society being acquired, further additional funding up to the liability amount of the cooperative society being acquired, if the creditors who have filed their claims pursuant to section 22 cannot obtain satisfaction or security from the additional funding called from the members and thus must rely on the further additional funding to be so provided. Sections 105 through 115a of the Act on Cooperative Societies (GenG) shall apply *mutatis mutandis* to the calls for additional funding.

(2) Subsection (1) shall be applicable only if insolvency proceedings are opened against the assets of the acquiring legal entity within two (2) years of the day on which the entry of the merger in the register kept at the registered seat of this legal entity has been published by notice pursuant to section 19 (3).

## **Subchapter 2 Merger by new formation**

### **Section 96 Applicable regulations**

The regulations set out in Subchapter 1 shall apply *mutatis mutandis* to the merger by new formation.

### **Section 97**

#### **Obligations of the representative bodies of the legal entity being acquired**

(1) The by-laws of the new cooperative society are to be established by the entirety of the members of the representative body of each of the legal entities being acquired, who shall all sign it.

(2) The representative bodies of all legal entities being acquired are to appoint the initial supervisory board of the new cooperative society. The same shall apply to the appointment of the initial management board, unless the by-laws of the newly formed cooperative society stipulate a different form of appointing the board of directors than the election by the general assembly.

### **Section 98 Merger resolutions**

The by-laws of the new cooperative society shall enter into force only if the owners of shares in each of the legal entities being acquired consent to it by adopting the merger resolution. This shall apply *mutatis mutandis* to the appointment of the members of the management board and of the supervisory board of the new cooperative society; however, it shall apply to the appointment of the management board only if said management board has been appointed by the representative bodies of all legal entities being acquired.

## **Chapter 6 Merger involving associations having legal personality**

### **Section 99 Eligibility for a merger**

(1) An association having legal personality may be involved in a merger only if this is not contravened by the by-laws of the association or by the regulations of *Land* law.

(2) A registered association may not absorb any legal entities having a different legal form by way of a merger, nor may a registered association be established by way of such legal entities merging.

### **Section 100 Audit of the merger**

The merger agreement for a commercial association, or its draft, is to be audited pursuant to sections 9 through 12. For a registered association, this audit shall be required only if a minimum of ten percent of the members demands in writing that such an audit be performed.

### **Section 101 Preparations for the meeting of members**

(1) From the time onwards at which the meeting of members is convened that is to adopt a resolution approving the merger agreement pursuant to section 13 (1), the documents designated in section 63 (1) nos. 1 through 4, as well as any audit report that may be required pursuant to section 100, are to be kept available for inspection by the members at the business premises of the association. Any interim statements of accounts required for this purpose are to be prepared pursuant to section 63 (2), first through fourth sentences.

(2) Upon a corresponding demand being made, each member is to be provided with a copy of the documents designated in subsection (1) without undue delay and at no charge.

## **Section 102**

### **Conduct of the meeting of members**

At the meeting of members, the documents designated in section 63 (1) nos. 1 through 4 as well as the audit report that may be required pursuant to section 100 are to be kept on display. Section 64 (1), second sentence, and subsection (2) shall apply *mutatis mutandis*.

## **Section 103**

### **Resolution adopted by the meeting of members**

The merger resolution adopted by the meeting of members shall require a majority of three quarters of the votes cast. The by-laws may stipulate a greater majority ratio and may impose further requirements.

## **Section 104**

### **Publication by notice of the merger**

(1) Where a commercial association being acquired has not been entered in a commercial register, its management board is to publish the impending merger by notice in the Official Gazette (*Bundesanzeiger*). Such publication by notice in the Official Gazette shall take the stead of an entry being made in the register. It is to include the note that the merger shall enter into force only upon its being entered in the register kept at the registered seat of the acquiring legal entity. Sections 16 and 17 (1) as well as section 19 subsection (1), second sentence, and subsection (2), and subsection (3) shall have no application inasmuch as these provisions concern the application for entry in the register of an association being acquired and its entry in same.

(2) The closing balance sheet of such association being acquired is to be attached to the application for entry in the register kept at the registered seat of the acquiring legal entity.

## **Section 104a**

### **Ineligibility for cash compensation in certain cases**

Sections 29 through 34 shall have no application to the merger of a registered association that is released, pursuant to section 5 (1) no. 9 of the Corporation Income Tax Act (KStG), from the obligation to pay corporation income tax.

## **Chapter 7**

### **Merger of confederations responsible for auditing cooperative societies**

## **Section 105**

### **Eligibility for a merger**

Confederations responsible for auditing cooperative societies may merge only with one another. Furthermore, a confederation responsible for auditing cooperative societies may absorb, as an acquiring confederation, an association having legal personality, provided that the latter meets the pre-requisites set out in section 63b (2) of the Act on Cooperative Societies (GenG) and furthermore provided that the authority named in section 107 (2) has consented to the merger agreement.

## **Section 106**

### **Preparations for the meeting of members, conduct of same, and adoption of resolutions by same**

Sections 101 through 103 shall apply *mutatis mutandis* to the preparations for the meeting of members, the conduct of said meeting of members, and the adoption of resolutions by same.

## **Section 107**

### **Obligations of the management boards**

(1) The management boards of both confederations are to apply jointly and without undue delay, insofar as their respective confederation has been entered in a register, for the merger to be entered in the register kept at the registered seat of each confederation. Where the confederation being acquired has not been entered in a register, section 104 shall apply *mutatis mutandis*.

(2) Furthermore, the management boards are to jointly notify the supreme authorities at the *Land* level competent for conferring the right to perform audits that the merger has been entered in the register, and shall do so without undue delay.

(3) The management board of the acquiring confederation is to notify the members of the entry in the register without undue delay.

#### **Section 108**

##### **Resignation by members of the confederation being acquired**

Where a former member of the confederation being acquired resigns from the acquiring confederation pursuant to section 39 of the Civil Code (BGB), any stipulations of the acquiring confederation's by-laws requiring, in accordance with section 39 (2) of the Civil Code (BGB), a period of notice that is longer than until the end of the fiscal year shall have no application.

#### **Chapter 8**

##### **Merger of mutual insurance companies**

##### **Subchapter 1**

##### **Eligibility for a merger**

#### **Section 109**

##### **Legal entities eligible for merger**

Mutual insurance companies may merge only with one another. Furthermore, they may be absorbed by way of a merger by a stock corporation that has at its business purpose the implementation of insurance transactions (insurance stock corporation).

##### **Subchapter 2**

##### **Merger by absorption**

#### **Section 110**

##### **Substance of the merger agreement**

Where solely mutual insurance companies are involved in the merger, the merger agreement, or its draft, need not set out the information required by section 5 (1) nos. 3 through 5 and 7.

#### **Section 111**

##### **Publication by notice of the merger agreement**

The merger agreement, or its draft, is to be filed with the register prior to the most senior representative committee being convened that is to adopt a resolution as to the approval of the merger agreement pursuant to section 13 (1). In its publication by notice pursuant to section 10 of the Commercial Code (HGB), the court is to provide notification of the fact that the agreement, or its draft, has been filed with the commercial register.

#### **Section 112**

##### **Preparations for the assembly of the most senior representative committee, conduct of same, and adoption of resolutions by same**

(1) From the time onwards at which the assembly of the most senior representative committee is convened that is to adopt a resolution approving the merger agreement pursuant to section 13 (1), the documents designated in section 63 (1) are to be kept available for inspection by the members at the business premises of the mutual insurance company. Any interim statements of accounts required for this purpose are to be prepared pursuant to section 63 (2), first through fourth sentences.

(2) At the assembly of the most senior representative committee, the documents designated in section 63 (1) are to be kept on display. Section 64 (1), second sentence, and subsection (2) shall apply *mutatis mutandis*.

(3) The merger resolution adopted by the most senior representative committee shall require a majority of three quarters of the votes cast. The by-laws may stipulate a greater majority ratio and may impose further requirements.

**Section 113**  
**No court review**

Where solely mutual insurance companies are involved in the merger, no court review shall be performed of the ratio applicable to the exchange of the memberships.

**Subchapter 3**  
**Merger by new formation**

**Section 114**  
**Applicable regulations**

Unless otherwise provided for by the following regulations, the regulations set out in Subchapter 2 shall apply *mutatis mutandis* to mergers by new formation.

**Section 115**

**Appointment of the representative bodies of the mutual insurance companies**

The management boards of the mutual insurance companies being acquired are to appoint the initial supervisory board of the newly formed legal entity and the auditor for the first fiscal year, be this a complete or incomplete fiscal year. The appointment must be recorded by a notary. The supervisory board shall appoint the initial management board.

**Section 116**

**Resolutions adopted by the most senior representative committees**

(1) The by-laws of the newly formed legal entity and the appointment of the members of its supervisory board require the mutual insurance companies being acquired to consent to them by merger resolution. Section 76 (2) and section 112 (3) shall apply *mutatis mutandis*.  
(2) The notice publishing the agenda of a mutual insurance company is to include a notice outlining the substance of the merger agreement. In said notice, the management board and the supervisory board are to submit their proposals for resolutions to be adopted; where members of the supervisory board and auditors are to be elected, the supervisory board alone shall submit such proposals. Where the supervisory board is to include members delegated by the employees, any resolutions adopted by the supervisory board concerning nominations for the election of members of the supervisory board shall require solely the majority of the votes cast by the members of the supervisory board delegated by the members of the mutual insurance company.

**Section 117**

**Inception of the new mutual insurance company; publication by notice**

Prior to entry in the register, a mutual insurance company shall not exist as such. Anyone acting in the name of the mutual insurance company prior to its having been entered in the register shall be personally liable; where several individuals act in this way, they shall be jointly and severally liable.

**Subchapter 4**  
**Merger of smaller mutual insurance companies**

**Section 118**  
**Applicable regulations**

The regulations of Subchapters 2 and 3 shall apply *mutatis mutandis* to the merger of smaller mutual insurance companies in the sense of section 210 of the Act on the Supervision of Insurance Companies (VAG). Where smaller mutual insurance companies are concerned, the application filed with the supervisory authority for approval shall take the stead of the application for entry in the register, while the publication by notice in the Official



Gazette (*Bundesanzeiger*) pursuant to section 119 shall take the stead of the entry in the register and its publication by notice.

**Section 119**  
**Publication by notice of the merger**

As soon as the merger has been approved by all of the supervisory authorities involved, the supervisory authority having jurisdiction for the acquiring smaller mutual insurance company shall publish the merger and its approval by a corresponding notice in the Official Gazette (*Bundesanzeiger*); where the merger took place by way of new formation of a smaller mutual insurance company, the supervisory authority having jurisdiction for the newly formed mutual insurance company shall so publish the merger and its approval by a corresponding notice in the Official Gazette.

**Chapter 9**  
**Merger of companies limited by shares with the assets of a sole shareholder**

**Section 120**  
**Eligibility for a merger**

(1) Where it is not possible to implement a merger pursuant to the regulations of Chapters 1 through 8, a company limited by shares may be merged, by way of absorption, with the assets of a shareholder or of a stockholder, provided that all business shares or all shares of stock in the company are held by the shareholder or stockholder.

(2) Where the company limited by shares holds treasury shares, they shall be attributed to the shareholder or stockholder in establishing whether or not the pre-requisites for the merger are met.

**Section 121**  
**Applicable regulations**

The regulations of Part 1 and Part 2 governing companies having the legal form of the company limited by shares are to be applied to same.

**Section 122**  
**Entry in the commercial register**

(1) A sole shareholder or sole stockholder not yet entered in the commercial register is to be entered in the commercial register pursuant to the regulations of the Commercial Code (HGB); section 18 (1) shall remain unaffected.

(2) Where an entry in the register is not an available measure, the effects set out in section 20 shall be achieved by the merger being entered in the register kept at the registered seat of the company limited by shares that is being acquired.

**Chapter 10**  
**Cross-border merger of companies limited by shares**

**Section 122a**  
**Cross-border merger**

(1) A cross-border merger is a merger in which at least one of the companies involved is subject to the laws of another Member State of the European Union or of another contracting party of the Agreement creating the European Economic Area.

(2) Unless otherwise provided for in the present Chapter, the regulations of Part 1 and those of Chapters 2, 3, and 4 of Part 2 shall apply *mutatis mutandis* to the involvement of a company limited by shares (Section 3 (1) no. 2) in a cross-border merger.

**Section 122b**  
**Companies eligible for mergers**

(1) Solely companies limited by shares in the sense of Article 2 no. 1 of the Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies (Official Journal no. L 310 p. 1) may be involved

in a cross-border merger as companies being acquired, acquiring companies, or newly formed companies that have been established pursuant to the laws of a Member State of the European Union or of some other contracting party of the Agreement creating the European Economic Area and that have their registered seat as recorded in the by-laws, their central administration, or their principal place of business in a Member State of the European Union or some other contracting party of the Agreement creating the European Economic Area.

(2) The following may not be involved in a cross-border merger:

1. cooperative societies, even in the cases where they would fall within the definition laid down in Article 2 no. 1 of the Directive in accordance with the laws of some other Member State of the European Union or some other contracting party of the Agreement creating the European Economic Area;
2. companies the object of which is the collective investment, in keeping with the principle of risk diversification, of capital provided to them by the public, the shares of which companies may be repurchased or redeemed, at the request of the owners of shares, directly or indirectly out of the assets of that company. Actions taken by such a company to ensure that the stock exchange value of its shares does not vary significantly from its net asset value shall be regarded as equivalent to these repurchases or redemptions.

#### **Section 122c**

##### **Draft terms of merger**

(1) The representative body of a company involved shall prepare, together with the representative bodies of the other companies involved, common draft terms of merger.

(2) The draft terms of merger, or their initial outline, must provide the following information at a minimum:

1. the legal form, firm name, and registered seats, respectively, of the company being acquired and the acquiring or newly formed company,
2. the ratio applicable to the exchange of shares in the company and, as the case may be, the amount of the additional cash payments,
3. the details regarding the allotment of the shares in the acquiring or newly formed company,
4. the likely repercussions of the merger on employment by the company,
5. the date from which the shares in the company will entitle their holders to participate in the profits, as well as any special conditions affecting that entitlement,
6. the date from which the actions taken by the companies being acquired will be deemed, for accounting purposes, as having been taken for the account of the acquiring or newly formed company (merger cut-off date),
7. the rights conferred by the acquiring or newly formed company on the shareholders enjoying special privileges and on holders of securities other than shares in the company, or the measures proposed concerning such shareholders and holders of securities,
8. any special advantages granted to the experts auditing the draft terms of merger or the members of the administrative, management, supervisory, or controlling bodies of the companies involved in the merger,
9. the by-laws of the acquiring or newly formed company,

10. as the case may be, information on the procedures by which arrangements are determined for the involvement of employees in the definition of their co-determination rights in the company resulting from the cross-border merger,

11. information on the valuation of the assets and liabilities that are to be transferred to the acquiring or newly formed company,

12. the cut-off date of the balance sheets of the companies involved in the cross-border merger, based on which the terms of the cross-border merger are determined.

(3) Where all shares in a company being acquired are held by the acquiring company, the information regarding the exchange of the shares (subsection (2) nos. 2, 3 and 5) shall not be required inasmuch as it concerns the absorption of this company.

(4) The draft terms of merger must be recorded by a notary.

#### **Section 122d**

##### **Publication by notice of the draft terms of mergers**

The draft terms of merger, or their initial outline, are to be filed with the register not less than one (1) month prior to the assembly of owners of shares who are to adopt a resolution consenting to the draft terms of merger pursuant to section 13. The court is to provide notification of the following information in the publication by notice pursuant to section 10 of the Commercial Code (HGB), and shall do so without undue delay:

1. an indication as to the draft terms of merger, or their initial outline, having been filed with the commercial register,

2. the legal form, firm name and registered seats of the respective companies involved in the cross-border merger,

3. the registers in which the companies involved in the cross-border merger have been entered, as well as the respective number under which they have been entered,

4. an indication of the arrangements made for the exercise of the rights of creditors and of any minority shareholders of the companies involved in the cross-border merger, along with the address at which full and complete information on those arrangements may be obtained free of charge.

The information that is to be published by notice is to be provided to the register when filing the draft terms of merger, or their initial outline.

#### **Section 122e**

##### **Report on the cross-border merger**

The report on the cross-border merger drawn up in accordance with section 8 is to include an explanation of the repercussions that the cross-border merger will have on the creditors and employees of the company involved in the merger. The report on the cross-border merger is to be made available, pursuant to section 63 (1) no. 4, to the owners of shares as well as the works council responsible or, in the event no works council exists, to the employees themselves of the company involved in the cross-border merger; this shall be done not less than one (1) month prior to the assembly of owners of shares who are to adopt a resolution consenting to the draft terms of merger pursuant to section 13. Section 8 (3) shall have no application.

#### **Section 122f**

##### **Audit of the cross-border merger**

The draft terms of merger, or their initial outline, are to be audited in accordance with sections 9 through 12; section 48 shall have no application. The audit report must be made available not less than one (1) month prior to the assembly of owners of shares who are to adopt a resolution consenting to the draft terms of merger pursuant to section 13.

### **Section 122g**

#### **Consent by the owners of shares**

(1) The owners of shares may make their consent pursuant to section 13 contingent on their express ratification of the arrangements made for the co-determination rights of the employees of the acquiring or newly formed company.

(2) Where all shares in a company being acquired are held by the acquiring company, the owners of shares in the company being acquired need not adopt a merger resolution.

### **Section 122h**

#### **Improvement of the ratio applicable to the exchange**

(1) If the companies involved in the cross-border merger are governed by the laws of some other Member State of the European Union or some other contracting party of the Agreement creating the European Economic Area and these laws do not provide for a procedure to scrutinise and amend the ratio applicable to the exchange of shares, Section 14 (2) and section 15 shall apply to the owners of shares in a company being acquired only if the owners of shares in the companies involved in the cross-border merger expressly consent, in the merger resolution, to the application of said provisions.

(2) Section 15 shall also apply to owners of shares in a company being acquired that is governed by the laws of some other Member State of the European Union or some other contracting party of the Agreement creating the European Economic Area, if the laws of this state provide for a procedure to scrutinise and amend the ratio applicable to the exchange of shares and German courts have international jurisdiction for the implementation of such a procedure.

### **Section 122i**

#### **Compensation offer in the draft terms of merger**

(1) Where the acquiring or newly formed company is not governed by German law, the company being acquired is to offer, in the draft terms of merger, or their initial outline, to each owner of shares recording an objection against the merger resolution adopted by the company, to acquire that owner's shares in return for appropriate cash compensation. The regulations of the Stock Corporation Act (AktG) regarding the acquisition of treasury stock as well as those of the Limited Liability Companies Act (GmbHG) regarding the acquisition of own business shares shall apply *mutatis mutandis*; however, section 71 (4), second sentence, of the Stock Corporation Act and section 33 (2), third sentence, second half-sentence, first alternative of the Limited Liability Companies Act shall have no application in this regard. Section 29 (1), fourth and fifth sentences, as well as subsection (2) of said section and sections 30, 31, and 33 shall apply *mutatis mutandis*.

(2) If the companies involved in the cross-border merger are governed by the laws of some other Member State of the European Union or some other contracting party of the Agreement creating the European Economic Area and these laws do not provide for a procedure to compensate minority shareholders, Sections 32 and 34 shall apply to the owners of shares in a company being acquired only if the owners of shares in the companies involved in the cross-border merger expressly consent, in the merger resolution, to the application of said provisions. Section 34 shall also apply to owners of shares in a company being acquired that is governed by the laws of some other Member State of the European Union or some other contracting party of the Agreement creating the European Economic Area if the laws of this state provide for a procedure to compensate minority shareholders and German courts have international jurisdiction for the implementation of such a procedure.

### **Section 122j**

#### **Protection afforded to the creditors of the company being acquired**

(1) Where the acquiring or newly formed company is not governed by German law, the creditors of a company being acquired are to be provided security insofar as they cannot demand satisfaction of their claims. However, the creditors shall be entitled to this right only

if they assert their claim in writing, citing its merits and its amount, within two (2) months of the date on which the draft terms of merger, or their initial outline, have been published by notice, and if they satisfactorily demonstrate that the cross-border merger will jeopardise the performance of the claim they hold.

(2) Creditors shall be entitled to obtain security pursuant to subsection (1) only with regard to such claims that have arisen before the date on which the draft terms of merger, or their initial outline, have been published by notice, or not later than fifteen (15) days after such date.

#### **Section 122k Merger certificate**

(1) The representative body of a company being acquired is to file an application with the register kept at the registered seat of the company for entry in same of the fact that the pre-requisites for the cross-border merger relevant to said company have been met. Section 16 subsections (2) and (3) and section 17 shall apply *mutatis mutandis*. The members of the representative body shall affirm that all creditors entitled to provision of security pursuant to section 122j have been provided such security in an appropriate measure.

(2) The court shall review whether the pre-requisites for a cross-border merger by the company have been met and shall issue a certificate regarding this fact (merger certificate), doing so without undue delay. The notification as to the cross-border merger having been entered in the register shall be deemed a merger certificate. The entry in the register is to include the note that the cross-border merger shall enter into force subject to the pre-requisites stipulated by the laws of the state governing the acquiring or newly formed company. The merger certificate may only be issued if an affirmation pursuant to subsection (1), third sentence, has been given. Where valuation proceedings under corporate law are pending, this is to be recorded in the merger certificate.

(3) The representative body of the company is to submit the merger certificate within six (6) months of its having been issued, together with the draft terms of merger, to the competent authority of that state the laws of which govern the acquiring or newly formed company.

(4) Upon the court receiving a notice from the register, in which the acquiring or newly formed company has been entered, as to the cross-border merger having entered into force, the court having jurisdiction at the registered seat of the company being acquired is to note the date on which the cross-border merger so entered into force and is to transmit to that register the electronic documents it has been keeping safe.

#### **Section 122l Entry in the register of the cross-border merger**

(1) In the case of a cross-border merger by absorption, the representative body of the acquiring company is to file an application with the register kept at the registered seat of the company for the cross-border merger to be entered in same; in the case of a cross-border merger by new formation, the representative bodies of the companies being acquired are to file an application for entry of the newly formed company in the register kept at the registered seat of the company. The merger certificates of all companies being acquired, the common draft terms of merger and, as the case may be, the agreement regarding employee co-determination rights are to be attached to the application for entry in the register. The merger certificates may not be older than six (6) months; section 16 subsections (2) and (3) and section 17 shall not apply to the companies being acquired.

(2) The audit of whether or not the pre-requisites for entry in the register of the cross-border merger have been met shall extend in particular to the matter of whether or not the owners of shares in all of the companies involved in the cross-border merger have consented to identically worded common draft terms of merger and of whether or not an agreement regarding employee co-determination rights has been concluded, where applicable.

(3) The court having jurisdiction at the registered seat of the acquiring or newly formed company is to notify, *ex officio*, each register with which one of the companies being acquired had to lodge its records of the date on which the merger was entered with it.

**Book 3**  
**Division into several enterprises**

**Part 1**  
**General regulations**

**Chapter 1**  
**Eligibility for division into several enterprises**

**Section 123**  
**Types of divisions into several enterprises**

(1) A legal entity (legal entity transferring assets) may split up its assets, whereby it is dissolved without being wound up,

1. for purposes of absorption, by simultaneously transferring the parts of the assets, in each case as a whole, to other legal entities already in existence (acquiring legal entities) or

2. for purposes of new formation, by simultaneously transferring the parts of the assets, in each case as a whole, to other new legal entities that have been newly formed in this way by the legal entity splitting up its assets,

in return for shares in this legal entity being allotted, or memberships in same being granted, to the owners of shares in the legal entity transferring assets (split-up).

(2) A legal entity (legal entity transferring assets) may spin off a part, or several parts, from its assets

1. for purposes of absorption, by transferring this part or these parts, in each case as a whole, to one or several legal entities already in existence (acquiring legal entities) or

2. for purposes of new formation by transferring this part or these parts, in each case as a whole, to one or several new legal entities that have been newly formed in this way by the legal entity spinning off its assets

in return for shares in this legal entity or these legal entities being allotted, or memberships in same being granted, to the owners of shares in the legal entity transferring assets (spin-off).

(3) A legal entity (legal entity transferring assets) may hive down a part, or several parts, of its assets

1. for purposes of absorption, by transferring this part or these parts, in each case as a whole, to one or several legal entities already in existence (acquiring legal entities) or

2. for purposes of new formation by transferring this part or these parts, in each case as a whole, to one or several new legal entities that have been newly formed in this way by the legal entity transferring assets

in return for shares in this legal entity or these legal entities being allotted, or memberships in same being granted, to the legal entity transferring assets (hive-down).

(4) The division into several enterprises may also be effected by a simultaneous transfer to existing and newly formed legal entities.

**Section 124**  
**Legal entities eligible for division into several enterprises**

(1) The legal entities set out in section 3 (1) may be involved in a split-up or a spin-off as legal entities transferring assets, as acquiring legal entities, or as newly formed legal entities, while commercial associations may be involved in a split-up or a spin-off as legal entities transferring assets; the legal entities set out in section 3 (1) may be involved in a hive-down as legal entities transferring assets, as acquiring legal entities, or as newly formed legal

entities, while commercial associations, sole traders, foundations, as well as local authorities or networks of local authorities that are not local authorities may be involved as legal entities transferring assets.

(2) Section 3 subsections (3) and (4) shall apply *mutatis mutandis* to the division into several enterprises.

### **Section 125** **Applicable regulations**

Unless otherwise provided for in this Book, the regulations of Part 1 and of Chapters 1 through 9 of Part 2 of Book 2, to the exception of section 9 (2) and of section 62 (5), shall apply to the division into several enterprises; in the case of spin-offs and hive-downs, said regulations shall apply *mutatis mutandis* to the exception of section 18; in the case of hive-downs, said regulations shall apply *mutatis mutandis* to the exception of section 14 (2) and of section 15, sections 29 through 34, sections 54, 68, and 71. In the case of hive-downs, no audit in the sense of sections 9 through 12 shall be performed. The legal entity transferring assets shall take the stead of the legal entities transferring assets, while the acquiring or newly formed legal entities shall, if appropriate, take the stead of the acquiring or newly formed legal entity.

## **Chapter 2** **Division into several enterprises for purposes of absorption**

### **Section 126** **Substance of the division and takeover agreement**

(1) The division and takeover agreement or its draft at a minimum must set out the following information:

1. the names or the firm names and the registered seats of the legal entities involved in the division into several enterprises;
2. the agreement as to the transfer of the parts of the assets of the legal entity transferring said assets, in each case as a whole, in return for shares in the acquiring legal entities being allotted, or memberships in same being granted;
3. in the case of split-ups and spin-offs: the ratio applicable to the exchange of shares and, as the case may be, the amount of the additional cash payment, or information regarding the membership in the acquiring legal entities;
4. in the case of split-ups and spin-offs: the details regarding the allotment of the shares in the acquiring legal entities, or details concerning the acquisition of membership in the acquiring legal entities;
5. the date from which said shares or memberships will grant an entitlement to a portion of the net income for the year, as well as any special conditions affecting that entitlement;
6. the date from which the actions taken by the legal entity transferring assets will be deemed to have been taken for the account of each of the acquiring legal entities (cut-off date for the division into several enterprises);
7. the rights conferred by the acquiring legal entities upon individual owners of shares as well as upon the holders of special privileges, such as shares without voting rights, preferred stock, multiple voting stock, debt securities, and participatory rights, or the measures intended for these persons;
8. any special advantage granted to a member of a representative body or of a supervisory body of the legal entities involved in the division into several enterprises, to a

managing shareholder, a partner, an auditor, or an auditor responsible for auditing the division into several enterprises;

9. the exact designation and allocation of the items making up the assets and liabilities that are transferred to each of the acquiring legal entities, as well as the exact designation and allocation of the businesses or parts of businesses that will devolve upon the acquiring legal entities, assigning such items in each case to the respective acquiring legal entities;

10. in the case of split-ups and spin-offs: the allotment of the shares in each of the legal entities involved, or the granting of memberships in same, to the owners of shares in the legal entity transferring assets, as well as the measure applying to such allocation;

11. the repercussions of the division into several enterprises on the employees and the bodies representing them, as well as the measures intended to be taken in that regard.

(2) Inasmuch as, in the case of singular succession, the general regulations have determined a particular manner of designating the items to be transferred, these provisions shall also apply to the designation of the items making up the assets and liabilities (subsection (1) no. 9). Section 28 of the Land Register Ordinance (GBO) is to be complied with. In all other regards, reference may be made to deeds such as balance sheets and inventory lists, the content of which allows the individual item to be properly assigned; said deeds are to be attached as annexes to the division and takeover agreement.

(3) At the latest one (1) month prior to the date of the assembly of the owners of shares in each legal entity involved, such assembly to adopt a resolution consenting to the division and takeover agreement pursuant to section 125 in conjunction with section 13 (1), the agreement, or its draft, is to be forwarded to the works council respectively competent within this legal entity.

### **Section 127**

#### **Report on the division**

The representative bodies of each of the legal entities involved in the division into several enterprises are to submit a detailed written report explaining and justifying in legal and economic terms the division into several enterprises, the details of the agreement or of its draft and, in the case of split-ups and spin-offs, in particular the ratio applicable to the exchange of shares or the information regarding the memberships in the acquiring legal entities, the measure applying to their allocation as well as the amount of any cash compensation to be offered (report on the division); the representative bodies may also submit a common report. Section 8 subsection (1), second through fourth sentences, as well as subsections (2) and (3) of that section shall apply *mutatis mutandis*.

### **Section 128**

#### **Consent to the division into several enterprises in special circumstances**

Where, in the case of split-ups or spin-offs, the shares in the acquiring legal entities, or the memberships in same, are not allotted or granted to the owners of shares in the legal entity transferring assets in that ratio that corresponds to their ownership interest in the legal entity transferring assets, the division and takeover agreement shall enter into force only if all owners of shares in the legal entity transferring assets consent to said agreement. In the case of a division into several enterprises for purposes of absorption, the calculation of the proportionate ownership interest shall be based on the part of the assets that is to be transferred in each case.

### **Section 129**

#### **Application for entry in the register of the division into several enterprises**

The representative body of each of the acquiring legal entities shall also be authorised to file an application for entry in the register of the division into several enterprises.



### **Section 130**

#### **Entry in the register of the division into several enterprises**

(1) The division into several enterprises may be entered in the register kept at the registered seat of the legal entity transferring assets only after it has been entered in the register kept at the registered seat of each of the acquiring legal entities. The entry in the register kept at the registered seat of each of the acquiring legal entities is to include the note that the division into several enterprises shall enter into force only upon its being entered in the register kept at the registered seat of the legal entity transferring assets, unless the entries are made on the same day in the registers of all legal entities involved.

(2) The court having jurisdiction at the registered seat of the legal entity transferring assets is to inform, *ex officio*, the respective court having jurisdiction at the registered seat of each of the acquiring legal entities of the date on which the division into several enterprises was entered in the register, and is to transmit an excerpt from the register and the articles of association, the partnership agreement, or the by-laws of the legal entity transferring assets as a copy, as a hard copy, or as an electronic file. Following receipt of such notice, the respective court having jurisdiction at the registered seat of each of the acquiring legal entities is to record, *ex officio*, in its entries the date on which the division into several enterprises was entered in the register kept at the registered seat of the legal entity transferring assets.

### **Section 131**

#### **Effects of the entry in the register**

(1) The entry of the division into several enterprises in the register kept at the registered seat of the legal entity transferring assets will have the following effects:

1. The assets including the liabilities of the legal entity transferring assets will devolve to the acquiring legal entity in accordance with the allocation provided for in the division and takeover agreement, in each case as a whole; in the cases of spin-offs and hive-downs, the part or parts of the assets including the liabilities spun off or hived down will devolve to the acquiring legal entity in accordance with the allocation provided for in the division and takeover agreement, in each case as a whole.
2. In the case of a split-up, the legal entity transferring assets will cease to exist. No separate cancellation shall be required.
3. In the case of split-ups and spin-offs, the owners of shares in the legal entity transferring assets will become owners of shares in the legal entities involved in accordance with the allocation provided for in the division and takeover agreement; this shall not apply insofar as the acquiring legal entity or a third party acting in its own name, but for the account of this legal entity, owns shares in the legal entity transferring assets, or insofar as the legal entity transferring assets holds shares of its own, or insofar as a third party acting in its own name, but for the account of this legal entity, is an owner of shares in same. Rights of third parties to the shares in the legal entity transferring assets, or to the memberships in same, shall continue in existence, then having as their object the shares in the acquiring legal entity, or the memberships in same, instead of the shares in the legal entity transferring assets, or the memberships in same. In the case of hive-downs, the legal entity transferring assets will become owner of the shares in the acquiring legal entity according to the hive-down and takeover agreement.
4. It will remedy the circumstance that the division and takeover agreement has not been recorded by a notary and that individual owners of shares have failed to make declarations of consent or declarations of waiver that may be required.

(2) Defects of the division into several enterprises will not prejudice the effects of its entry in the register pursuant to subsection (1).

(3) If in the course of a split-up an item provided for in the agreement has not been allotted to any of the acquiring legal entities and such allotment cannot be established by construing

the agreement, the item shall devolve to all acquiring legal entities in the ratio resulting from the agreement as concerns the allocation of the surplus itemised under assets in the closing balance sheet over the liabilities itemised in same; should it be impossible to allot the item to several legal entities, its equivalent value is to be distributed in the ratio designated.

**Section 132  
(repealed)**

**Section 133**

**Protection of creditors and of holders of special rights**

(1) For those of the liabilities of the legal entity transferring assets that had been in existence since before its division into several enterprises entered into force, the legal entities involved in such division shall be liable as joint and several debtors. Sections 25, 26, and 28 of the Commercial Code (HGB) as well as section 125 in conjunction with section 22 shall remain unaffected; solely that legal entity involved in the division into several enterprises shall be under obligation to provide security that is being laid claim to.

(2) For the performance of the obligation pursuant to section 125 in conjunction with section 23, the legal entities involved in the division into several enterprises shall be liable as joint and several debtors. In the case of spin-offs and of hive-downs, the equivalent rights in the legal entity transferring assets may also be conferred in the sense of section 125 in conjunction with section 23.

(3) Those of the legal entities to whom the liabilities pursuant to subsection (1), first sentence, were not allotted in the division and takeover agreement shall be liable for these obligations if they are due before five (5) years have lapsed after the division into several enterprises and, on their basis, claims have been established against them in a manner as set out in section 197 (1) nos. 3 through 5 of the Civil Code (BGB), or if a court enforcement action or an enforcement action by the authorities has been taken or applied for; where public-law liabilities are concerned, it shall suffice for an administrative decision to be issued. As regards any benefit obligations that were created based on the Company Pension Act (BetrAVG) prior to the division into several enterprises having entered into force, the period set out in the first sentence shall amount to ten (10) years.

(4) The period shall commence running on the day on which the entry of the division into several enterprises in the register kept at the registered seat of the legal entity transferring assets has been published by notice pursuant to section 125 in conjunction with section 19 (3). Sections 204, 206, 210, 211, and section 212 subsections (2) and (3) of the Civil Code (BGB) applying to limitations shall apply *mutatis mutandis*.

(5) The establishment of claims in a manner as set out in section 197 (1) nos. 3 through 5 of the Civil Code (BGB) shall not be required should the legal entities designated in subsection (3) have acknowledged the claim in writing.

(6) The claims pursuant to subsection (2) shall become statute-barred after five (5) years. Subsection (4), first sentence, shall apply *mutatis mutandis* for the commencement of the limitation period.

**Section 134**

**Protection of creditors in special cases**

(1) Where a legal entity divides its assets such that those parts of the assets necessary for managing an business are essentially transferred to one or several acquiring legal entities, or to one or several newly formed legal entities, and the activities pursued by this legal entity or these legal entities essentially are limited to the management of these parts of the assets (investment vehicle), while the legal entity transferring assets is allowed to use said parts of the assets to manage its business (operating company), and where essentially the same persons hold ownership interests in the legal entities involved in the division into several enterprises, the investment vehicle shall also be liable, as a joint and several debtor, for the claims of the operating company's employees that come into existence, by reason of sections 111 through 113 of the Company Pension Act (BetrAVG), in the course of five (5)

years following the date on which the division into several enterprises has entered into force. This shall apply also in those cases in which the parts of the assets remain with the legal entity transferring assets and the acquiring or newly formed legal entity, or the acquiring or newly formed legal entities, are allowed to use them.

(2) The liability as a joint and several debtor pursuant to subsection (1) shall apply also to any benefit obligations that were created based on the Company Pension Act (BetrAVG) prior to the division into several enterprises having entered into force.

(3) Section 133 subsection (3), first sentence, and subsections (4) and (5) of said section shall apply *mutatis mutandis* to the claims against the investment vehicle pursuant to subsections (1) and (2), subject to the proviso that the period shall commence running five (5) years following the date designated in section 133 (4), first sentence.

### **Chapter 3**

#### **Division into several enterprises for purposes of new formation**

##### **Section 135**

###### **Applicable regulations**

(1) The regulations set out in Chapter 2 shall apply *mutatis mutandis* to the division of a legal entity into several enterprises for purposes of new formation, to the exception, however, of sections 129 and 130 (2) as well as to the exception of sections 4, 7 and 16 (1) and of section 27, which are to apply *mutatis mutandis* pursuant to section 125. The newly formed legal entities shall take the stead of the acquiring legal entities, the entry of each of the newly formed legal entities in the register shall take the stead of the entry of the division into several enterprises in the register kept at the registered seat of each of the acquiring legal entities.

(2) Unless otherwise provided for in the present Book, the company formation rules applying to the respective legal form of the newly formed legal entity shall be applied to the formation of the new legal entities. The legal entity transferring assets shall be equivalent to the founders. Regulations stipulating a minimum number of founders for the formation shall have no application.

##### **Section 136**

###### **Draft terms of the division into several enterprises**

The representative body of the legal entity transferring assets is to draw up draft terms of the division into several enterprises. The draft terms of the division into several enterprises shall take the stead of the division and takeover agreement.

##### **Section 137**

###### **Application for entry in the register and entry in same of the newly formed legal entities and of the division into several enterprises**

(1) The representative body of the legal entity transferring assets is to file an application for entry in the register for each newly formed legal entity and shall do so with the court in the judicial district of which said legal entity is to have its registered seat.

(2) The representative body of the legal entity transferring assets is to file an application for entry of the division into several enterprises in the register kept at the registered seat of the legal entity transferring assets.

(3) The court having jurisdiction at the registered seat of each of the newly formed legal entities is to inform, *ex officio*, the court having jurisdiction at the registered seat of the legal entity transferring assets of the date on which the newly formed legal entity was entered in the register. Following receipt of the notices for all newly formed legal entities, the court having jurisdiction at the registered seat of the legal entity transferring assets is to record in its respective entries the division into several enterprises and is to notify, *ex officio*, the courts having jurisdiction at the registered seat of each of the newly formed legal entities of the date on which said division was entered in the register, and is to transmit an excerpt from the register and the articles of association, the partnership agreement, or the by-laws of the

legal entity transferring assets as a copy, as a hard copy, or as an electronic file. The date of the entry in the register of the division into several enterprises is to be entered, *ex officio*, in the registers maintained at the registered seat of each of the newly formed legal entities; any publications by notice of the entry in the register of the newly formed legal entities that are stipulated by law shall be permissible only thereafter.

## **Part 2 Special regulations**

### **Chapter 1 Division into several enterprises involving limited liability companies**

#### **Section 138**

##### **Report on company formation on the basis of contributions in kind**

A report on company formation on the basis of contributions in kind (Section 5 (4) of the Limited Liability Companies Act (GmbHG)) is required in all cases.

#### **Section 139**

##### **Reduction of the share capital**

Where it is required, in order to implement the spin-off or the hive-down, to reduce the share capital of a limited liability company transferring assets, this may be done also in simplified form. Where the share capital is reduced, the spin-off or the hive-down may be entered in the register only after the reduction of the share capital has been entered in the register.

#### **Section 140**

##### **Application for entry in the register of the spin-off or the hive-down**

In filing an application for entry in the register of the spin-off or the hive-down with the register kept at the registered seat of a limited liability company transferring assets, its managing directors are to also file the declaration that, as per the time of the application for entry in the register, the pre-requisites for the formation of this company stipulated by the law and by the articles of association have been met, taking account of the spin-off or the hive-down.

## **Chapter 2**

### **Division into several enterprises involving stock corporations and partnerships limited by shares**

#### **Section 141**

##### **Ineligibility for a division into several enterprises**

A stock corporation or a partnership limited by shares that has not yet been entered in the register for two (2) years cannot be divided into several enterprises in any other way than by way of a hive-down for purposes of new formation.

#### **Section 142**

##### **Division into several enterprises with capital increase; report on the division**

(1) Section 69 is to be applied subject to the proviso that in all cases, an audit is to be performed of the contribution in kind pursuant to section 183 (3) of the Stock Corporation Act (AktG).

(2) If appropriate, the report on the division is to refer to the audit report of the contributions in kind made to an acquiring stock corporation pursuant to section 183 (3) of the Stock Corporation Act (AktG) while also naming the register with which this report is to be lodged.

#### **Section 143**

##### **Division into several enterprises for purposes of new formation while maintaining the ratio of ownership interests**

Where the shares of stock in the newly formed stock corporation or in the newly formed stock corporations (Section 123 (1) no. 2, subsection (2) no. 2) are allotted in the same ratio

as the ownership interest held by the stockholders in the transferring stock corporation, sections 8 through 12 as well as 63 (1) nos. 3 through 5 shall have no application.

#### **Section 144**

##### **Formation report and audit of the formation**

In all cases, a formation report (Section 32 of the Stock Corporation Act (AktG)) and an audit of the formation (Section 33 (2) of the Stock Corporation Act) shall be required.

#### **Section 145**

##### **Reduction of the nominal capital**

Where it is required, in order to implement the spin-off or the hive-down, to reduce the nominal capital of a transferring stock corporation or a transferring partnership limited by shares, this may be done also in simplified form. Where the nominal capital is reduced, the spin-off or the hive-down may be entered in the register only after the implementation of the reduction of the nominal capital has been entered in the register.

#### **Section 146**

##### **Application for entry in the register of the spin-off or the hive-down**

(1) In filing an application for entry in the register of the spin-off or of the hive-down with the register kept at the registered seat of a transferring stock corporation, its management board – or, in the case of a partnership limited by shares, the personally liable shareholders authorised to represent it – are to also file the declaration that, as per the time of the application for entry in the register, the pre-requisites for the formation of this company stipulated by the law and by the by-laws have been met, taking account of the spin-off or the hive-down.

(2) Besides the documents otherwise required, the following are to be attached to the application for entry in the register of the spin-off or of the hive-down:

1. the report on the division pursuant to section 127;
2. in the case of a spin-off, the audit report pursuant to section 125 in conjunction with section 12.

### **Chapter 3**

#### **Division into several enterprises involving registered cooperative societies**

#### **Section 147**

##### **Eligibility for a division into several enterprises**

The division into several enterprises of a legal entity having a different legal form for purposes of the absorption of parts of its assets by a registered cooperative society may be implemented only if, concurrently with the division into several enterprises, a necessary amendment of the by-laws of the acquiring cooperative society is resolved upon.

#### **Section 148**

##### **Application for entry in the register of the spin-off or the hive-down**

(1) In filing an application for entry in the register of the spin-off or of the hive-down with the register kept at the registered seat of a transferring cooperative society, the management board of same is to also file the declaration that as per the time of the application for entry in the register, the pre-requisites for the formation of this cooperative society stipulated by the law and by the by-laws have been met, taking account of the spin-off or the hive-down.

(2) Besides the documents otherwise required, the following are to be attached to the application for entry in the register of the spin-off or of the hive-down:

1. the report on the division pursuant to section 127;
2. the audit opinion pursuant to section 125 in conjunction with section 81.

#### **Chapter 4**

#### **Division into several enterprises involving associations having legal personality**

##### **Section 149**

##### **Eligibility for a division into several enterprises**

(1) An association having legal personality may be involved in a division into several enterprises only if this is not contravened by the by-laws of the association or the regulations of *Land* law.

(2) A registered association may only be involved in a division into several enterprises as an acquiring legal entity in order to absorb other registered associations or in order to form a registered association together with them.

#### **Chapter 5**

#### **Division into several enterprises with the involvement of confederations responsible for auditing cooperative societies**

##### **Section 150**

##### **Eligibility for a division into several enterprises**

The split-up of confederations responsible for auditing cooperative societies or the spin-off or hive-down of parts of such a confederation may only be implemented for purposes of one confederation (acquiring confederation) absorbing the parts of another confederation (transferring confederation), while a hive-down may be implemented also for the purpose of a company limited by shares absorbing parts of the confederation, or for the purpose of newly forming such a company limited by shares.

#### **Chapter 6**

#### **Division into several enterprises involving mutual insurance companies**

##### **Section 151**

##### **Eligibility for a division into several enterprises**

The division into several enterprises involving mutual insurance companies may be implemented only by split-up or spin-off and only in such manner that the parts of an association being acquired devolve to other mutual insurance companies already in existence or to newly formed mutual insurance companies or to insurance stock corporations. Furthermore, a mutual insurance company may transfer a part of its assets, by way of a hive-down, to a limited liability company already in existence or to a newly formed limited liability company, or to an existing or newly formed stock corporation, provided that this does not entail any transfer of insurance contracts.

#### **Chapter 7**

#### **Hive-down out of the assets of a sole trader**

##### **Subchapter 1**

##### **Eligibility for a hive-down**

##### **Section 152**

##### **Acquiring legal entities or newly formed legal entities**

A hive-down of an enterprise operated by a sole trader, the firm name of which has been entered in the commercial register, or of parts of said enterprise out of the assets of this trader may be implemented only for the purpose of this enterprise, or parts of this enterprise, being absorbed by commercial partnerships, companies limited by shares, or registered cooperative societies, or for purposes of the new formation of companies limited by shares. No hive-down may be implemented if the liabilities of the sole trader exceed his assets.

##### **Subchapter 2**

##### **Hive-down for purposes of absorption**

### **Section 153**

#### **Report on the hive-down**

Where sole traders are involved, a report on the hive-down shall not be required.

### **Section 154**

#### **Entry in the register of the hive-down**

The court having jurisdiction at the registered seat of the sole trader is to refuse to enter the hive-down in the register also in those cases in which it is manifest that the liabilities of the sole trader exceed his assets.

### **Section 155**

#### **Effects of the hive-down**

Where the hive-down concerns the entire enterprise of the sole trader, the entry in the register of the hive-down pursuant to section 131 will have the effect of extinguishing the firm name that the sole trader has been using. Such extinction of the firm name is to be entered in the register *ex officio*.

### **Section 156**

#### **Liability of the sole trader**

The devolution of liabilities to the acquiring or newly formed companies will not release the sole trader from his liability concerning same. Section 418 of the Civil Code (BGB) shall have no application.

### **Section 157**

#### **Limitation in time of the liability for transferred liabilities**

(1) The sole trader shall be liable for the liabilities set out in the hive-down and takeover agreement if they are due before five (5) years have lapsed after the hive-down and, on their basis, claims have been established against him in a manner as set out in section 197 (1) nos. 3 through 5 of the Civil Code (BGB), or if a court enforcement action or an enforcement action by the authorities has been taken or applied for; where public-law liabilities are concerned, it shall suffice for an administrative decision to be issued. The liability of the sole trader as shareholder of the acquiring legal entity pursuant to section 128 of the Commercial Code (HGB) shall remain unaffected hereby.

(2) The period shall commence running on the day on which the entry of the hive-down in the register kept at the registered seat of the sole trader has been published by notice pursuant to section 125 in conjunction with section 19 (3). Sections 204, 206, 210, 211 and 212 subsections (2) and (3) of the Civil Code (BGB) applying to limitations shall apply *mutatis mutandis*.

(3) The establishment of claims in a manner as set out in section 197 (1) nos. 3 through 5 of the Civil Code (BGB) shall not be required should the sole trader have acknowledged the claim in writing.

(4) Subsections (1) through (3) are to be applied also if the sole trader takes up management activities in the legal entity having a different legal form.

### **Subchapter 3**

#### **Hive-down for purposes of new formation**

### **Section 158**

#### **Applicable regulations**

Unless otherwise provided for in the present Subchapter, the regulations set out in Subchapter 2 shall apply *mutatis mutandis* to the hive-down for purposes of new formation.

### **Section 159**

#### **Report on company formation on the basis of contributions in kind, formation report, and audit of the formation**

(1) Section 58 (1) shall apply *mutatis mutandis* to the report on company formation on the basis of contributions in kind (Section 5 (4) of the Limited Liability Companies Act (GmbHG)),

while Section 75 (1) shall apply *mutatis mutandis* to the formation report (Section 32 of the Stock Corporation Act (AktG)).

(2) In the case of a stock corporation or a partnership limited by shares having been newly formed, the audit by the members of the management board and of the supervisory board (Section 33 (1) of the Stock Corporation Act (AktG)) as well as the audit by one or several auditors (Section 33 (2) of the Stock Corporation Act) is to also extend to the matter of whether or not the liabilities of the sole trader exceed his assets.

(3) In order to allow the auditors to establish whether or not the liabilities of the sole trader exceed his assets, the sole trader is to provide the auditors with an inventory balancing his assets against his liabilities. Insofar as this is required for the audit, the inventory is to be broken down into parts. Section 320 (1), second sentence, and subsection (2), first sentence, of the Commercial Code (HGB) shall apply *mutatis mutandis* if there is cause to assume that assets listed in the inventory have been overstated, or that liabilities have not been included therein, or not fully and completely.

#### **Section 160**

##### **Application for entry in the register and entry in the register**

(1) The application for entry in the register pursuant to section 137 (1) is to be filed by the sole trader and the managing directors of a newly formed company, or the members of the management board and of the supervisory board of same.

(2) The entry in the register of the company is to be refused if the liabilities of the sole trader exceed his assets.

#### **Chapter 8**

##### **Hive-down out of the assets of foundations having legal personality**

#### **Section 161**

##### **Eligibility for a hive-down**

The hive-down of an enterprise operated by a foundation having legal personality (Section 80 of the Civil Code (BGB)), or of parts of such enterprise, out of the assets of said foundation may only be implemented for purposes of the absorption of this enterprise, or parts of this enterprise, by commercial partnerships or companies limited by shares or for purposes of the new formation of companies limited by shares.

#### **Section 162**

##### **Report on the hive-down**

(1) A report on the hive-down shall be required only if, pursuant to section 164 (1), the hive-down requires government approval or if it is contingent, within the lifetime of the founder, on his consent.

(2) Inasmuch as the hive-down requires government approval or is contingent on the consent of the founder pursuant to section 164 (1), the report on the hive-down is to be transmitted to the government authority having jurisdiction and to the founder.

#### **Section 163**

##### **Resolution on the agreement**

(1) The regulations of the laws governing foundations as regards the adoption of resolutions on the amendment of the by-laws shall apply *mutatis mutandis* to the resolution as to a hive-down.

(2) Unless otherwise determined by the laws governing foundations that are applicable pursuant to subsection (1), the resolution as to a hive-down must be adopted unanimously by the body designated by the by-laws as the body competent for adopting resolutions on amendments of the by-laws or, if such a body has not been determined, by the management board of the foundation.

(3) The resolution and the consent pursuant to subsections (1) and (2) must be recorded by a notary.



#### **Section 164**

##### **Approval of the hive-down**

(1) The hive-down shall require government approval if this is stipulated by the laws governing foundations.

(2) Inasmuch as the hive-down pursuant to subsection (1) does not require government approval, the court having jurisdiction at the registered seat of the foundation is to refuse to enter the hive-down in the register also in those cases in which it is manifest that the liabilities of the foundation exceed its assets.

#### **Section 165**

##### **Report on company formation on the basis of contributions in kind and formation report**

Section 58 (1) shall apply *mutatis mutandis* to the report on company formation on the basis of contributions in kind (Section 5 (4) of the Limited Liability Companies Act (GmbHG)), while Section 75 (1) shall apply *mutatis mutandis* to the formation report (Section 32 of the Stock Corporation Act (AktG)).

#### **Section 166**

##### **Liability of the foundation**

The devolution of liabilities to the acquiring or newly formed companies will not release the foundation from its liability concerning same. Section 418 of the Civil Code (BGB) shall have no application.

#### **Section 167**

##### **Limitation in time of the liability for transferred liabilities**

Section 157 shall apply *mutatis mutandis* to the limitation in time of the liability of the foundation for the liabilities set out in the hive-down and takeover agreement.

### **Chapter 9**

#### **Hive-down out of the assets of local authorities or networks of local authorities**

#### **Section 168**

##### **Eligibility for a hive-down**

An enterprise operated by a local authority, or by a network of local authorities that is not a local authority, may be hived down out of the assets of this authority or this network only for purposes of the absorption of this enterprise by a commercial partnership, a company limited by shares or a registered cooperative society, or for purposes of new formation of a company limited by shares or a registered cooperative society; furthermore, it shall be eligible for a hive-down only in those cases in which this is not contravened by the laws of the Federation or the laws of a federal *Land* that govern for the authority or the network.

#### **Section 169**

##### **Report on the hive-down; resolution as to a hive-down**

A report on the hive-down shall not be required for the authority or the network. The laws concerning organisations that are relevant for the authority or the network shall determine whether and subject to which pre-requisites a resolution as to a hive-down shall be required.

#### **Section 170**

##### **Report on company formation on the basis of contributions in kind; formation report**

Section 58 (1) shall apply *mutatis mutandis* to the report on company formation on the basis of contributions in kind (Section 5 (4) of the Limited Liability Companies Act (GmbHG)), while Section 75 (1) shall apply *mutatis mutandis* to the formation report (Section 32 of the Stock Corporation Act (AktG)).

#### **Section 171**

##### **Entry into force of the hive-down**

The effects of the hive-down pursuant to section 131 shall enter into force upon its being entered in the register kept at the registered seat of the acquiring legal entity or upon the entry in the register of the newly formed legal entity.

#### **Section 172**

##### **Liability of the authority or the network**

The devolution of liabilities to the acquiring or newly formed company will not release the authority or network from its liability concerning same. Section 418 of the Civil Code (BGB) shall have no application.

#### **Section 173**

##### **Limitation in time of the liability for transferred liabilities**

Section 157 shall apply *mutatis mutandis* to the limitation in time of the liability for the liabilities set out in the hive-down and takeover agreement.

#### **Book 4**

##### **Asset transfer**

##### **Part 1**

##### **Eligibility for an asset transfer**

#### **Section 174**

##### **Types of asset transfer**

(1) A legal entity (legal entity transferring assets) may transfer its assets, as a whole, whereby it is dissolved without being wound up, to some other legal entity that is already in existence (acquiring legal entity) in return for granting compensation to the owners of shares in the legal entity transferring assets, such compensation not consisting of shares or memberships (full transfer).

(2) A legal entity (legal entity transferring assets) may

1. split up its assets, whereby it is dissolved without being wound up, by way of the simultaneous transfer of the parts of the assets, in each case as a whole, to other legal entities already in existence,
2. spin off one or several parts from its assets by transferring this part or these parts, in each case as a whole, to one or several legal entities already in existence, or
3. hive-down one or several parts of its assets by transferring this part or these parts, in each case as a whole, to one or several legal entities already in existence,

in return for the compensation designated in subsection (1), in the cases set out under nos. 1 or 2, to the owners of shares in the legal entity transferring assets, and in the case set out under no. 3, to the legal entity transferring assets (partial transfer).

#### **Section 175**

##### **Legal entities involved**

A full transfer or a partial transfer shall be possible in each case only if they are implemented

1. by a company limited by shares, to the federal government, a Land, a local authority, or a network of local authorities;
2.
  - a) by an insurance stock corporation, to mutual insurance companies or to public-law insurers;
  - b) by a mutual insurance company, to insurance stock corporations or to public-law insurers;

c) by a public-law insurer, to insurance stock corporations or to mutual insurance companies.

## **Part 2**

### **Transfer of the assets, or parts of the assets, of a company limited by shares to the public sector**

#### **Chapter 1 Full transfer**

##### **Section 176**

###### **Application of the rules governing mergers**

(1) In the case of a full transfer pursuant to section 175 no. 1, and unless otherwise provided for in the regulations below, the regulations of Book 2 respectively applicable to mergers by way of absorption of such a transferring company shall apply *mutatis mutandis* to the company limited by shares that is transferring assets.

(2) The information to be provided in the transfer agreement pursuant to section 5 (1) nos. 4, 5 and 7 is not applicable. The register kept at the registered seat of the company transferring assets shall take the stead of the register kept at the registered seat of the acquiring legal entity. The nature and amount of the compensation shall take the stead of the ratio applicable to the exchange of the shares. A claim to cash compensation shall take the stead of the claim pursuant to section 23; section 29 (1), section 30 and section 34 shall apply *mutatis mutandis* to said claim.

(3) Upon the asset transfer having been entered in the commercial register kept at the registered seat of the company transferring assets, that company's assets including its liabilities shall devolve to the acquiring legal entity. The company transferring assets shall cease to exist; this shall not require any separate cancellation to be made.

(4) The involvement of the acquiring legal entity in the asset transfer shall be governed by the regulations applicable to it.

#### **Chapter 2 Partial transfer**

##### **Section 177**

###### **Application of the rules governing divisions into several enterprises**

(1) In the case of a partial transfer pursuant to section 175 no. 1, and unless otherwise provided for in the regulations below, the regulations of Book 3 applying to split-ups, spin-offs, or hive-downs for purposes of absorption of parts of a company limited by shares that is transferring assets are to be applied *mutatis mutandis* to such a company limited by shares transferring its assets, as are the regulations of Book 2 declared in Book 3 to be applicable *mutatis mutandis* to comparable procedures.

(2) Section 176 subsections (2) through (4) shall apply *mutatis mutandis*. Section 126 (1) nos. 4, 5, 7, and 10 shall take the stead of section 5 (1) nos. 4, 5, and 7.

## **Part 3**

### **Asset transfers among insurers**

#### **Chapter 1**

##### **Transfer of the assets of a stock corporation to mutual insurance companies or to public-law insurers**

#### **Subchapter 1 Full transfer**

##### **Section 178**

###### **Application of the rules governing mergers**

(1) In the case of a full transfer pursuant to section 175 no. 2 letter a, and unless otherwise provided for in the regulations below, the regulations of Book 2 respectively applying to the merger by absorption of a stock corporation and the regulations of Book 2 respectively applying to an acquiring mutual insurance company in the case of a merger shall apply *mutatis mutandis* to the legal entities involved.

(2) Section 176 subsections (2) through (4) shall apply *mutatis mutandis*.

(3) The laws of the Federation or the laws of a federal *Land* governing an acquiring public-law insurer determine whether or not the asset transfer agreement, in order to enter into force, must also be consented to by some other body of the public-law insurer than that authorised to represent same, or by any other authority, and what requirements must be met in order for such consent to be granted.

## **Subchapter 2 Partial transfer**

### **Section 179**

#### **Application of the rules governing divisions into several enterprises**

(1) In the case of a partial transfer pursuant to section 175 no. 2 letter a, and unless otherwise provided for in the regulations below, the regulations of Book 3 applying to split-ups, spin-offs, or hive-downs for purposes of absorption of parts of a stock corporation, and the regulations of Book 3 applying to acquiring mutual insurance companies in the event of the split-up, spin-off, or hive-down of parts of their assets are to be applied *mutatis mutandis* to the legal entities involved, as are the regulations of Book 2 declared in Book 3 to be applicable *mutatis mutandis* to comparable procedures.

(2) Section 176 subsections (2) through (4) as well as section 178 (3) shall apply *mutatis mutandis*.

## **Chapter 2**

### **Transfer of the assets of a mutual insurance company to stock corporations or public-law insurers**

#### **Subchapter 1 Full transfer**

### **Section 180**

#### **Application of the rules governing mergers**

(1) In the case of a full transfer pursuant to section 175 no. 2 letter b, and unless otherwise provided for in the regulations below, the regulations of Book 2 applying to the merger by absorption of a mutual insurance company and the regulations of Book 2 applying to an acquiring stock corporation in the case of a merger shall apply *mutatis mutandis* to the legal entities involved.

(2) Section 176 subsections (2) through (4) as well as section 178 (3) shall apply *mutatis mutandis*.

(3) Where, pursuant to the by-laws of the mutual insurance company, a member or a third party is entitled to an irrevocable right to the surplus on winding-up, or a part thereof, the resolution adopted on the asset transfer shall require the consent of the member or the third party; such consent must be recorded by a notary.

### **Section 181**

#### **Provision of compensation**

(1) The acquiring legal entity is under obligation to provide appropriate compensation if this is justified in light of the financial position and revenue situation of the mutual insurance company transferring assets as given at the time the most senior representative committee adopts the resolution.

(2) It is to be stipulated in the resolution by which the transfer agreement is approved that, in distributing the compensation, each member is to be considered that has been a member of

the mutual insurance company for a minimum of three (3) months prior to the resolution being adopted. Furthermore, the resolution is to specify the measures according to which the compensation is to be distributed to the members.

(3) Each member entitled shall obtain compensation in an amount equal to that provided to the other members. Any other distribution may be stipulated only based on one or several of the following measures:

1. the amount insured,
2. the amount of the contributions,
3. the amount of the premium reserve made in the life insurance policy,
4. the measure determined in the by-laws of the mutual insurance company for the distribution of the surplus,
5. the measure determined in the by-laws of the mutual insurance company for the distribution of the assets,
6. the duration of the membership.

(4) Where, contrary to subsection (1), no compensation has been agreed, it is to be determined by the court upon a corresponding petition having been made; section 30 (1) and section 34 shall apply *mutatis mutandis*.

## **Section 182**

### **Notification of the members**

As soon as the asset transfer has entered into force, the representative body of the acquiring legal entity is to apprise all members, who have been members of the mutual insurance company for a minimum of three (3) months prior to the resolution as to the asset transfer having been adopted by the most senior representative committee, of the wording of the agreement, and shall do so in text form. The corresponding notice shall indicate the option to demand that a court determine the appropriate compensation.

## **Section 183**

### **Appointment of a trustee**

(1) Where compensation has been agreed for the asset transfer, the mutual insurance company being acquired is to appoint a trustee responsible for taking receipt of same. The asset transfer may be entered in the register only once the trustee has apprised the court of the fact that he is in possession of the compensation.

(2) Where the court determines the compensation pursuant to section 181 (4), it is to appoint, *ex officio*, a trustee responsible for taking receipt of same. Those members shall be entitled to the compensation, in equal shares, who have been members of the mutual insurance company for a minimum of three (3) months prior to the resolution as to the asset transfer having been adopted by the most senior representative committee. Section 26 (4) shall apply *mutatis mutandis*.

## **Subchapter 2**

### **Partial transfer**

## **Section 184**

### **Application of the rules governing divisions into several enterprises**

(1) In the case of a partial transfer pursuant to section 175 no. 2 letter b, and unless otherwise provided for in the regulations below, the regulations of Book 3 applying to split-ups, spin-offs, or hive-downs for purposes of absorption of parts of a mutual insurance company and the regulations of Book 3 applying to acquiring stock corporations in the case of a split-up, spin-off, or hive-down are to be applied *mutatis mutandis* to the legal entities

involved, as are the regulations of Book 2 declared in Book 3 to be applicable *mutatis mutandis* to comparable procedures.

(2) Section 176 subsections (2) through (4) as well as section 178 (3) shall apply *mutatis mutandis*.

### **Chapter 3**

#### **Transfer of the assets of a smaller mutual insurance company to a stock corporation or to a public-law insurer**

##### **Section 185**

##### **Eligibility for an asset transfer**

A smaller mutual insurance company may transfer its assets only by way of a full transfer to an insurance stock corporation or to a public-law insurer.

##### **Section 186**

##### **Applicable regulations**

The regulations set out in Chapter 2 shall apply *mutatis mutandis* to the asset transfer. In this context, the application filed with the supervisory authority for approval shall take the stead of the application for entry in the register where smaller mutual insurance companies are concerned, while the publication by notice in the Official Gazette (*Bundesanzeiger*) pursuant to section 187 shall take the stead of the entry in the register and its publication by notice.

##### **Section 187**

##### **Publication by notice of the asset transfer**

As soon as the asset transfer has been approved by all supervisory authorities involved, the supervisory authority responsible for the smaller mutual insurance company transferring assets shall publish the asset transfer and its approval by notice in the Official Gazette (*Bundesanzeiger*) in cases in which assets have been transferred to a public-law insurer.

### **Chapter 4**

#### **Transfer of the assets of a public-law insurer to stock corporations or mutual insurance companies**

##### **Subchapter 1**

##### **Full transfer**

##### **Section 188**

##### **Application of the rules governing mergers**

(1) In the case of a full transfer pursuant to section 175 no. 2 letter c, and unless otherwise provided for in the regulations below, the regulations of Book 2 applying to mergers by absorption shall apply *mutatis mutandis* to the acquiring legal entities, while section 176 (3) shall apply *mutatis mutandis* to the insurance company transferring assets.

(2) Section 176 subsections (2) and (4) as well as section 178 (3) shall apply *mutatis mutandis*.

(3) Where public-law insurers are concerned, the application for approval filed with the supervisory authority shall take the stead of the application for entry in the register, while the publication by notice pursuant to the second sentence shall take the stead of the entry in the register and its publication by notice. As soon as the asset transfer has been approved by all supervisory authorities involved, the supervisory body responsible for the public-law insurer shall publish the asset transfer and its approval by notice in the Official Gazette (*Bundesanzeiger*).

##### **Subchapter 2**

##### **Partial transfer**

##### **Section 189**

##### **Application of the rules governing divisions into several enterprises**

(1) In the case of a partial transfer pursuant to section 175 no. 2 letter c, and unless otherwise provided for in the regulations below, the regulations of Book 3 applying to split-ups, spin-offs, or hive-downs for purposes of absorption shall apply *mutatis mutandis* to the acquiring legal entities, as shall the regulations of Book 2 declared in Book 3 to be applicable *mutatis mutandis* to the comparable procedure, while section 176 (3) shall apply *mutatis mutandis* to the insurance company transferring assets.

(2) Section 176 subsections (2) and (4), section 178 (3) as well as section 188 (3) shall apply *mutatis mutandis*.

## **Book 5 Change of the legal form**

### **Part 1 General regulations**

#### **Section 190 General scope of application**

(1) The legal structure of a legal entity may be modified by way of a change of legal form.

(2) Unless otherwise provided for in the present Book, the regulations concerning the change of legal form shall not apply to modifications of the legal structure that have been provided for in other Acts or have been declared permissible in same.

#### **Section 191 Eligible legal entities**

(1) The following legal entities may change their legal form:

1. commercial partnerships (Section 3 (1) no. 1) and professional partnerships;
2. companies limited by shares (Section 3 (1) no. 2);
3. registered cooperative societies;
4. associations having legal personality;
5. mutual insurance companies;
6. corporations under public law and public-law institutions.

(2) Legal entities having a new legal form may be the following:

1. partnerships under the Civil Code (GbR);
2. commercial partnerships and professional partnerships;
3. companies limited by shares;
4. registered cooperative societies.

(3) It is also possible for dissolved legal entities to change their legal form if it were possible to adopt a resolution to continue these legal entities in the legal form they had thus far.

#### **Section 192 Report on the change of legal form**

(1) The representative body of the legal entity changing its legal form is to submit a detailed written report explaining and justifying in legal and economic terms the change of legal form and in particular the ownership interest to be held by the owners of shares in the legal entity (report on the change of legal form). Section 8 (1), second through fourth sentence, and subsection (2) shall apply *mutatis mutandis*. The report on the change of legal form must include a draft of the resolution on change of legal form.

(2) A report on the change of legal form shall not be required if only one owner of shares holds an ownership interest in the legal entity changing its legal form or if all owners of

shares waive having this report submitted. The declarations of waiver are to be recorded by a notary.

### **Section 193**

#### **Resolution to change the legal form**

(1) The change of legal form requires a resolution to be adopted by the owners of shares in the legal entity changing its legal form (resolution on change of legal form). The resolution may only be adopted at an assembly of the owners of shares.

(2) Where the assignment of the shares in the legal entity changing its legal form is contingent on the approval of individual owners of shares, the resolution on change of legal form shall require their consent in order to enter into force.

(3) The resolution on change of legal form and the declarations of consent by individual owners of shares required by the present Act, including the required declarations of consent to be made by owners of shares who have not attended the assembly, must be recorded by a notary. Upon a corresponding demand being made, each of the owners of shares is to be issued, at his costs, a copy of the record of the resolution, such issuance being effected without undue delay.

### **Section 194**

#### **Substance of the resolution on change of legal form**

(1) The resolution on change of legal form at a minimum must determine the following:

1. the legal structure that the legal entity is to obtain by the change of its legal form;
2. the name or the firm name of the legal entity in its new legal form;
3. any ownership interest the owners thus far holding shares in the legal entity will have in accordance with the regulations applying to the new legal form, unless their ownership interest ceases to exist pursuant to the stipulations of the present Book;
4. the number, type, and scope of the shares or the memberships that the owners of shares are to obtain by the change of legal form or that are to be conferred upon an acceding personally liable shareholder;
5. the rights in the legal entity that are intended to be conferred upon individual owners of shares and upon the holders of special rights such as shares without voting rights, preferred stock, multiple voting stock, debt securities, and participatory rights, or the measures intended for these persons;
6. an offer of compensation pursuant to section 207; this shall not apply if the resolution on change of legal form requires the consent of all owners of shares in order to enter into force, or if only one owner of shares holds an ownership interest in the legal entity changing its legal form;
7. the repercussions the change of legal form will have on the employees and the bodies representing them as well as the measures intended to be taken in that regard.

(2) The draft of the resolution on change of legal form is to be forwarded to the works council respectively responsible at the legal entity changing its legal form not less than one (1) month prior to the date of the assembly of the owners of shares that is to adopt a resolution on change of legal form.

### **Section 195**

#### **Period for filing actions against the resolution on change of legal form; court actions that are not an available remedy against the resolution on change of legal form**

(1) An action brought against the entry into force of the resolution on change of legal form must be filed within one (1) month following the adoption of the resolution.



(2) An action brought against the entry into force of the resolution on change of legal form cannot be based on the shares in the legal entity in its new legal form having been specified at too low a value in the resolution, or on the membership not sufficing as consideration for the shares or for the membership in the legal entity changing its legal form.

#### **Section 196**

##### **Improvement of the ownership interest held**

Where the shares in the legal entity in its new legal form have been specified at too low a value in the resolution on change of legal form or where the membership in same does not suffice as consideration for the shares or the membership in the legal entity changing its legal form, each of the owners of shares who is prohibited by section 195 (2) from exercising his right to file an action against the entry into force of the resolution on change of legal form may demand that the legal entity provide compensation by an additional cash payment. Upon a corresponding petition having been made, the court shall determine which additional payment is appropriate pursuant to the regulations of the Act on Valuation Proceedings under Corporate Law (SpruchG). Section 15 (2) shall apply *mutatis mutandis*.

#### **Section 197**

##### **Applicable company formation rules**

Unless otherwise provided for in the present Book, the company formation rules applicable to the new legal form shall be applied to the change of legal form. Regulations requiring a minimum number of founders for the formation, as well as the regulations as to the appointments to the first supervisory board and the composition of same, shall have no application. In the event the legal structure of a legal entity is changed to become a stock corporation, section 31 of the Stock Corporation Act (AktG) shall apply.

#### **Section 198**

##### **Application for entry in the register of the change of legal form**

(1) An application for entry in the register of the new legal form of the legal entity is to be filed with the register in which the legal entity changing its legal form is entered.

(2) Where the legal entity changing its legal form has not been entered in a register, the legal entity in its new legal form is to file an application, with the court having jurisdiction, for entry in the register responsible for the new legal form. The same shall apply if, as a result of the change of legal form, a different type of register is responsible for the legal entity or if a relocation of the legal entity's registered seat connected to the change of legal form means that some other court maintaining the register has jurisdiction. In the case set out in the second sentence, an application for entry in the register of the transformation is to be filed also with the register in which the legal entity changing its legal form is entered. This entry is to include the note that the transformation shall enter into force only upon the legal entity in its new legal form having been entered in the register responsible for the new legal form, unless the entries are made on the same day in the registers of all legal entities involved. The legal entity having a new legal form may be entered in the register only after the transformation has been entered pursuant to the third and fourth sentences.

(3) Section 16 subsections (2) and (3) shall apply *mutatis mutandis*.

#### **Section 199**

##### **Annexes to the application for entry in the register**

Besides the documents usually required for this purpose, the following likewise are to be attached to the application for entry in the register of the new legal form, or of the legal entity in its new legal form, as an execution or a publicly certified copy or, insofar as they need not be recorded by a notary, the original or a copy thereof: the record of the resolution on change of legal form, the declarations of consent by individual owners of shares required by the present Act including the declarations of consent by owners of shares who have not attended the assembly, the report on the change of legal form or the declarations waiving the

preparation of same, proof of the draft of the resolution on change of legal form having been forwarded pursuant to section 194 (2).

### **Section 200**

#### **Firm name or name of the legal entity**

- (1) Unless otherwise provided for in the present Book, the legal entity having a new legal form may continue to use the firm name it has used thus far. Additional designations indicating the legal form of the company changing its legal form may not be used, also not if the legal entity continues to use the firm name it has used thus far.
- (2) Section 19 of the Commercial Code (HGB), section 4 of the Limited Liability Companies Act (GmbHG), sections 4, 279 of the Stock Corporation Act (AktG), or section 3 of the Act on Cooperative Societies (GenG) shall apply *mutatis mutandis* to any firm name that continues in use following the change of legal form.
- (3) Where a natural person held an ownership interest in the legal entity changing its legal form, whose ownership interest shall cease to exist in the legal entity in its new legal form, the name of this owner of shares may be used in the firm name that is continued to be used or has been newly formed solely if the affected owner of shares or his heirs have expressly agreed to such use.
- (4) Where the legal entity changing its form or the legal entity having a new legal form is a professional partnership, subsections (1) and (3) shall apply *mutatis mutandis* to the continued use of the firm name or name, or the formation of same. A firm name may continue to be used as the name of a professional partnership solely subject to the pre-requisites set out in section 2 (1) of the Professional Partnership Act (PartGG). Section 1 (3) and section 11 of the Professional Partnership Act shall apply *mutatis mutandis*.
- (5) As a result of the change of legal form into a partnership under the Civil Code (GmbH), the firm name of the company changing its legal form shall be extinguished.

### **Section 201**

#### **Publication by notice of the change of legal form**

The court having jurisdiction for the application for entry in the register of the new legal form, or of the legal entity in its new legal form, is to publish by notice the entry in the register of the new legal form, or of the legal entity having a new legal form, pursuant to section 10 of the Commercial Code (HGB) and shall fully and completely publish by notice the contents thereof.

### **Section 202**

#### **Effects of the entry in the register**

- (1) The entry in the register of the new legal form will have the following effects:
  1. the legal entity changing its legal form will continue in existence in the legal form determined in the resolution on change of legal form.
  2. the owners of shares in the legal entity changing its legal form will hold an ownership interest in the legal entity in accordance with the regulations applicable to the new legal form, unless their ownership interest ceases to exist in accordance with the stipulations of the present Book. Any rights of third parties to the shares in the legal entity changing its legal form, or to the memberships in same, shall continue in existence, then having as their object the shares in the legal entity having a new legal form, or memberships in same.
  3. it will remedy the facts that the resolution on change of legal form has not been recorded by a notary and, as the case may be, that the declarations of consent or declarations of waiver that may be required under certain circumstances have not been made by individual owners of shares.
- (2) The effects determined in subsection (1) shall come about in the cases governed by section 198 (2) upon entry in the register of the legal entity in its new legal form.

(3) Defects of the change of legal form will not prejudice the effects of the entry in the register of the new legal form, or of the legal entity in its new legal form.

### **Section 203**

#### **Term of office the members of the supervisory board**

Where, in the case of a change of legal form, the manner of appointing the supervisory board and its composition correspond, for the legal entity in its new legal form, to the manner of its appointment and its composition at the legal entity changing its legal form, the members of the supervisory board shall remain in office for the remainder of their terms as members of the supervisory board of the legal entity in its new legal form. The owners of shares in the legal entity changing its legal form may determine, in the resolution on change of legal form, that the appointment of the members of the supervisory board they have delegated shall come to an end.

### **Section 204**

#### **Protection of the creditors and of the holders of special rights**

Section 22 shall apply *mutatis mutandis* to the protection of the creditors, while section 23 shall apply *mutatis mutandis* to the protection of the holders of special rights.

### **Section 205**

#### **Obligation to provide compensation for damages of the administrative bodies of the legal entity changing its legal form**

(1) The members of the representative body and, where a supervisory body exists, the members of such supervisory body of the legal entity changing its legal form, are under obligation, as joint and several debtors, to provide compensation for those damages suffered by this legal entity, by the owners of its shares, or by its creditors as a result of the legal form having been changed. Section 25 (1), second sentence, shall apply *mutatis mutandis*.

(2) The claims set out in subsection (1) shall become statute-barred five (5) years following the day on which the entry in the register of the new legal form, or of the legal entity in its new legal form, that is to be applied for has been published by notice.

### **Section 206**

#### **Assertion of the claim to compensation of damages**

The claims pursuant to section 205 (1) may only be asserted by a special representative. The court having jurisdiction at the registered seat of the legal entity in its new legal form is to appoint such a representative upon a corresponding petition having been filed by an owner of shares or by a creditor of the legal entity changing its legal form. Section 26 subsection (1), third and fourth sentences, subsection (2), subsection (3), second and third sentences, and subsection (4) shall apply *mutatis mutandis*; the corresponding publications of record of the legal entity in its new legal form shall take the stead of the publications of record that served the legal entity transferring assets for its public notices.

### **Section 207**

#### **Offer of cash compensation**

(1) The legal entity changing its legal form is to offer to each of the owners of shares recording an objection against the resolution on change of legal form to acquire that owner's shares or memberships that have been transformed in return for appropriate cash compensation; section 71 (4), second sentence, of the Stock Corporation Act (AktG) shall have no application in this regard. Where the legal entity is unable, due to its new legal form, to acquire its own shares, or memberships in itself, the cash compensation is to be offered for the case that the owner of shares declares his withdrawal from the legal entity. The legal entity is to bear the costs of a transfer.

(2) Section 29 (2) shall apply *mutatis mutandis*.

### **Section 208**

#### **Content of the claim to cash compensation and review of the cash compensation**

Section 30 shall apply *mutatis mutandis* to the claim to cash compensation.

#### **Section 209**

##### **Acceptance of the offer**

The offer pursuant to section 207 may be accepted only within two (2) months following the day on which the entry in the register of the new legal form, or of the legal entity in its new legal form, has been published by notice. Where a petition has been filed pursuant to section 212 to have the court determine the cash compensation, the offer may be accepted within two (2) months following the day on which the decision has been published by notice in the Official Gazette (*Bundesanzeiger*).

#### **Section 210**

##### **Actions that are not an available remedy against the resolution on change of legal form**

An action brought against the entry into force of the resolution on change of legal form cannot be based on the offer pursuant to section 207 having been specified at too low a value or the cash compensation not having been offered in the resolution on change of legal form, or not in a proper manner.

#### **Section 211**

##### **Disposition in other ways**

Restrictions governing dispositions do not prevent the owner of shares from disposing in any other way over the shares following the adoption of the resolution on change of legal form until the period determined in section 209 has lapsed.

#### **Section 212**

##### **Court review of the compensation**

Where an owner of shares asserts that the cash compensation that was to be offered to him pursuant to section 207 (1) has been specified in the resolution on change of legal form at too low a value, the court is to determine the appropriate cash compensation, upon that owner's petition, in accordance with the regulations set out in the Act on Valuation Proceedings under Corporate Law (*SpruchG*). The same shall apply if the cash compensation was not offered, or not in a proper manner.

#### **Section 213**

##### **Unknown stockholders**

Section 35 shall apply *mutatis mutandis* to unknown stockholders.

### **Part 2**

#### **Special regulations**

##### **Chapter 1**

#### **Change of the legal form of partnerships**

##### **Subchapter 1**

#### **Change of the legal form of commercial partnerships**

#### **Section 214**

##### **Eligibility for a change of legal form**

(1) A commercial partnership may obtain, based on a resolution on change of legal form pursuant to this Act, solely the legal form of a company limited by shares or that of a registered cooperative society.

(2) A commercial partnership that has been dissolved may not change its legal form if the shareholders have agreed pursuant to section 145 of the Commercial Code (*HGB*) that a different manner of distributing the assets is to be pursued than winding up the partnership or changing its legal form.

### **Section 215**

#### **Report on the change of legal form**

A report on the change of legal form shall not be required if all shareholders of the company changing its legal form are entitled to manage its affairs.

### **Section 216**

#### **Notification of the shareholders**

The representative body of the company changing its legal form is to give advance notice in text form to all of the shareholders not entitled to manage the affairs of the company, doing so at the latest together with the invitation convening the meeting of shareholders that is to adopt a resolution on change of legal form, apprising them that a change of legal form will be the subject matter of a resolution to be adopted; the representative body is to transmit a report on the change of legal form required by the stipulations of the present Book as well as an offer of compensation pursuant to section 207.

### **Section 217**

#### **Resolution adopted by the meeting of shareholders**

- (1) The resolution on change of legal form adopted by the meeting of shareholders shall require the consent of all shareholders present; those shareholders not in attendance must also consent to this resolution. The articles of association of the company changing its legal form may stipulate that the decision be taken by the majority of the shareholders. The majority must consist of three quarters of the votes cast.
- (2) Those of the shareholders who, in the case of a decision being taken by the majority of the votes cast, have voted for the change of legal form are to be listed by name in the record of the resolution on change of legal form.
- (3) All those shareholders must consent to a change of legal form to a partnership limited by shares who are to have the position of a personally liable shareholder of this company.

### **Section 218**

#### **Substance of the resolution on change of legal form**

- (1) The resolution on change of legal form must also include the articles of association of the limited liability company or the by-laws of the cooperative society, or it must establish the by-laws of the stock corporation or of the partnership limited by shares. It shall not be required for the by-laws to be signed by the members.
- (2) The resolution on change of legal form to a partnership limited by shares must stipulate that, at a minimum, one shareholder of the company changing its legal form is to have an ownership interest in this company as a personally liable shareholder or that, at a minimum, one personally liable shareholder is to accede to the company.
- (3) The resolution on change of legal form to that of a cooperative society must stipulate that each member is to hold a minimum of one (1) business share. The resolution may also determine that each member of the cooperative society is to be allotted an ownership interest consisting of a minimum of one (1) business share, and in all other regards an ownership interest consisting of as many business shares as are to be regarded as having been fully paid in when the amount of that member's capital contribution to this cooperative society is credited.

### **Section 219**

#### **Legal status as a founder**

In applying the company formation rules, the shareholders of the company changing its legal form shall be equivalent to the founders. In the event of the decision being taken by the majority of the votes cast, the shareholders who have voted for the change of legal form shall take the stead of the founders, and where the legal entity changes its legal form to that of a partnership limited by shares, any acceding personally liable shareholders shall likewise take the stead of the founders.

## **Section 220**

### **Capital protection**

- (1) The aggregate nominal value of a limited liability company's share capital, or of the nominal capital of a stock corporation or that of a partnership limited by shares, may not exceed the assets of the company changing its legal form that remain after deduction of its debts.
- (2) The report on company formation on the basis of contributions in kind, in the event of the legal form being changed to that of a limited liability company, or the formation report, in the event of the legal form being changed to that of a stock corporation or of a partnership limited by shares, is to also present the development taken by the business of the company undergoing the change of legal form and the company's economic status.
- (3) In the event of the legal form being changed to that of a stock corporation or of a partnership limited by shares, the formation is to be audited in any case, with the audit being performed by one or several auditors (Section 33 (2) of the Stock Corporation Act (AktG)). The period of two (2) years determined for post-formation agreements in section 52 (1) of the Stock Corporation Act shall commence running on the date on which the change of legal form enters into force.

## **Section 221**

### **Accession of personally liable shareholders**

Where a resolution for a change of the legal form to that of a partnership limited by shares stipulates the accession by a shareholder, who had previously not been a member of the company changing its legal form, this must be recorded by a notary. The by-laws of the partnership limited by shares are to be approved by each personally liable shareholder so acceding.

## **Section 222**

### **Application for entry in the register of the change of legal form**

- (1) The application for entry in the register pursuant to section 198, including the application for entry in the register of the by-laws of the cooperative society, is to be filed by all members of the future representative body as well as, in cases in which the legal entity must have a supervisory board in accordance with the regulations applicable to the new legal form, also by all members of this supervisory board. Concurrently with the application for entry in the register of the cooperative society, an application is to be filed for entry in the register of the members of its management board.
- (2) Where the legal entity in its new legal form is a stock corporation or a partnership limited by shares, all those shareholders shall also file the application for entry in the register pursuant to subsection (1) who, pursuant to section 219, are equivalent to the founders of this company.
- (3) The application for entry in the register of the change of legal form pursuant to section 198 (2), third sentence, may also be filed by the shareholders authorised to represent the company changing its legal form.

## **Section 223**

### **Annexes to the application for entry in the register**

Besides the documents usually required for this purpose, an execution copy or a publicly certified copy of the deeds recording the accession of all acceding personally liable shareholders are likewise to be attached to the application for entry in the register of the new legal form, or of the legal entity in its new legal form.

## **Section 224**

### **Continuance and limitation in time of personal liability**

- (1) The change of legal form shall not affect the claims resulting from liabilities of the company changing its legal form that the creditors of the company may have against one of

the company's shareholders, who is personally liable for such obligations pursuant to section 128 of the Commercial Code (HGB) at the time the legal form is changed.

(2) The shareholder shall be liable for these obligations if they are due before five (5) years have lapsed after the change of legal form and, on their basis, claims have been established against him in a manner as set out in section 197 (1) nos. 3 through 5 of the Civil Code (BGB), or if a court enforcement action or an enforcement action by the authorities has been taken or applied for; where public-law liabilities are concerned, it shall suffice for an administrative decision to be issued.

(3) The period shall commence running on the day on which the entry in the register of the new legal form, or of the legal entity in its new legal form, has been published by notice. Sections 204, 206, 210, 211, and 212 subsections (2) and (3) of the Civil Code (BGB) applying to limitations shall apply *mutatis mutandis*.

(4) The establishment of claims in a manner as set out in section 197 (1) nos. 3 through 5 of the Civil Code (BGB) shall not be required should the shareholder have acknowledged the claim in writing.

(5) Subsections (1) through (4) are to be applied also if the shareholder takes up management activities in the legal entity having a different legal form.

#### **Section 225**

##### **Review of the offer of compensation**

In the case of section 217 (1), second sentence, the question of whether or not the cash compensation offered is a fair equivalent pursuant to section 208 in conjunction with section 30 (2) shall be reviewed only upon a shareholder making a corresponding demand. The company shall bear the costs.

#### **Subchapter 2**

##### **Change of the legal form of professional partnerships**

#### **Section 225a**

##### **Eligibility for a change of legal form**

A professional partnership may obtain, based on a resolution on change of legal form pursuant to this Act, solely the legal form of a company limited by shares or that of a registered cooperative society.

#### **Section 225b**

##### **Report on the change of legal form and notification of the partners**

A report on the change of legal form shall be required only if a partner of the partnership changing its legal form is prohibited by section 6 (2) of the Professional Partnership Act (PartGG) from managing the affairs of the partnership. Partners prohibited from managing the affairs of the partnership are to be notified pursuant to section 216.

#### **Section 225c**

##### **Applicable regulations**

Section 214 (2) and sections 217 through 225 shall apply *mutatis mutandis* to the change of legal form by a professional partnership.

#### **Chapter 2**

##### **Change of the legal form by companies limited by shares**

#### **Subchapter 1**

##### **General regulations**

#### **Section 226**

##### **Eligibility for a change of legal form**

A company limited by shares may obtain, based on a resolution on change of legal form pursuant to the present Act, solely the legal form of a partnership under the Civil Code

(GbR), or that of a commercial partnership, a professional partnership, that of some other company limited by shares, or that of a registered cooperative society.

#### **Section 227**

##### **Regulations having no application**

In cases in which a partnership limited by shares changes its legal form, sections 207 through 212 are not to be applied to its personally liable shareholders.

#### **Subchapter 2**

##### **Change of the legal form by partnerships**

#### **Section 228**

##### **Eligibility for a change of legal form**

(1) A company limited by shares may obtain the legal form of a commercial partnership by way of changing its legal form only if the purpose of the company is compliant, as per the time the change of legal form enters into force, with the regulations governing the formation of an unlimited partnership (section 105 subsections (1) and (2) of the Commercial Code (HGB)).

(2) A change of the legal form to that of a professional partnership is possible only if, as per the point in time at which the change of legal form enters into force, all owners of shares in the legal entity changing its legal form are natural persons pursuing a liberal profession (section 1 subsections (1) and (2) of the Professional Partnership Act (PartGG)). Section 1 (3) of the Professional Partnership Act shall remain unaffected.

#### **Section 229**

**(repealed)**

#### **Section 230**

##### **Preparations for the assembly of the owners of shares**

(1) The managing directors of a limited liability company changing its legal form are to give advance notice in text form to all of the shareholders, at the latest together with the invitation convening the meeting of shareholders that is to adopt a resolution on change of legal form, apprising them that a change of legal form will be the subject matter of a resolution to be adopted and are to transmit the report on the change of legal form.

(2) From the time onwards at which the general meeting of a stock corporation or of a partnership limited by shares is convened that is to adopt a resolution on change of legal form, the report on the change of legal form is to be kept available for inspection by the stockholders at the business premises of the company. Upon a corresponding demand being made, each stockholder and each personally liable shareholder prohibited from managing the affairs of company is to be provided with a copy of the report on the change of legal form without undue delay and at no charge. Subject to their consent, the report on the change of legal form may be transmitted to the stockholder and to the personally liable shareholder prohibited from managing the affairs of the company by means of electronic communication. The obligations pursuant to the first and second sentences shall not be applicable if the report on the change of legal form is kept accessible, for the same period of time, on the company website.

#### **Section 231**

##### **Notice of the offer of compensation**

The representative body of the company changing its legal form is to transmit to the shareholders or stockholders the offer of compensation pursuant to section 207, at the latest together with the invitation convening the meeting of shareholders, or the general meeting, that is to adopt a resolution on change of legal form. The publication of the offer of compensation by notice in the Official Gazette (*Bundesanzeiger*) and the publications of record otherwise determined shall be equivalent to this transmission.



### **Section 232**

#### **Conduct of the assembly of the owners of shares**

(1) At the meeting of shareholders, or at the general meeting, that is to adopt a resolution on change of legal form, the report on the change of legal form is to be kept on display. At general meetings, the report on the change of legal form may also be made accessible by other means.

(2) At the outset of the meeting of a stock corporation or of a partnership limited by shares, its representative body is to give an oral presentation of the draft resolution on change of legal form, or of its draft.

### **Section 233**

#### **Resolution adopted by the assembly of the owners of shares**

(1) The resolution on change of legal form adopted by the meeting of shareholders, or the general meeting, shall require the consent of all shareholders or stockholders in attendance if the company changing its legal form is to obtain the legal form of a partnership under the Civil Code (GbR), or that of an unlimited partnership or of a professional partnership; the consent by the owners of shares who have not attended the meeting shall likewise be required.

(2) Where it is intended to change the legal form of the company to that of a limited partnership, the resolution on change of legal form shall require a majority of at least three quarters of the votes cast at the meeting of shareholders of a limited liability company, or of the nominal capital represented at the time the resolution is adopted by a stock corporation or a partnership limited by shares; section 50 (2) and section 65 (2) shall apply *mutatis mutandis*. The articles of association or the by-laws of the company changing its legal form may stipulate a greater majority ratio and may impose further requirements. All those shareholders or stockholders must consent to a change of the legal form who are to have the position of a personally liable shareholder in the limited partnership.

(3) Furthermore, the personally liable shareholders of a partnership limited by shares must consent to its changing its legal form. The by-laws of the company changing its legal form may stipulate, for the case that the legal form is to be changed to that of a limited partnership, that this resolution shall require a decision to be taken by a majority of these shareholders. Each of these shareholders may declare his withdrawal from the legal entity as per the point in time at which the change of legal form enters into force.

### **Section 234**

#### **Substance of the resolution on change of legal form**

The resolution on change of legal form must also include:

1. the determination of the partnership's registered seat;
2. in cases in which the legal form is changed to that of a limited partnership: the limited partners as well as the amount that each of them has paid in as a capital contribution;
3. the partnership's articles of association. In cases in which the legal form is changed to that of a professional partnership, section 213 shall not apply to the partnership agreement.

### **Section 235**

#### **Application for entry in the register of the change of legal form**

(1) In cases in which the legal form is changed to that of a partnership under the Civil Code (GbR), an application is to be filed with the register in which the company changing its legal form is entered for entry of the change of the company's legal form, instead of the new legal form. Section 198 (2) shall have no application.

(2) The application for entry in the register pursuant to subsection (1) or pursuant to section 198 is to be filed by the representative body of the company changing its legal form.

### **Section 236**

#### **Effects of the change of legal form**

Upon the change of legal form by a partnership limited by shares entering into force, those personally liable shareholders who have declared their withdrawal from the legal entity pursuant to section 233 (3), third sentence, shall leave the company.

### **Section 237**

#### **Continuance and limitation in time of personal liability**

Where a personally liable shareholder of a partnership limited by shares changing its legal form obtains, by the change of the legal form to that of a limited partnership, the legal status of a limited partner, section 224 shall apply *mutatis mutandis* to his liability for the obligations that were in existence as per the point in time at which the company changing its legal form so changed its legal form.

### **Subchapter 3**

#### **Change of the legal form to that of a company limited by shares having a different legal form**

### **Section 238**

#### **Preparations for the assembly of the owners of shares**

Sections 230 and 231 shall apply *mutatis mutandis* to the preparations for the meeting of shareholders or for the general meeting that is to adopt a resolution on change of legal form. Section 192 (2) shall remain unaffected.

### **Section 239**

#### **Conduct of the assembly of the owners of shares**

- (1) The report on the change of legal form is to be kept on display at the meeting of shareholders or at the general meeting that is to adopt a resolution on change of legal form. At a general meeting, the report on the change of legal form may also be made accessible by other means.
- (2) At the outset of the meeting of a stock corporation or of a partnership limited by shares, its respective representative body is to give an oral presentation of the draft resolution on change of legal form, or of its draft.

### **Section 240**

#### **Resolution adopted by the assembly of the owners of shares**

- (1) The resolution on change of legal form shall require a majority of at least three quarters of the votes cast at the meeting of shareholders of a limited liability company, or at least three quarters of the nominal capital of a stock corporation or of a partnership limited by shares that is represented at the time the resolution is adopted; section 65 (2) shall apply *mutatis mutandis*. The articles of association or the by-laws of the company changing its legal form may stipulate a greater majority ratio and may impose further requirements; in the case of a partnership limited by shares changing its legal form to that of a stock corporation, they may also stipulate a majority with a lower ratio.
- (2) All those shareholders or stockholders must consent to a change of legal form by a limited liability company, or a stock corporation, to that of a partnership limited by shares who are to have the position of a personally liable shareholder in the company having a new legal form. Section 221 shall apply *mutatis mutandis* to the accession of personally liable shareholders.
- (3) Furthermore, the personally liable shareholders of a partnership limited by shares must consent to its changing its legal form. The by-laws of the company changing its legal form may stipulate that this resolution shall require a decision to be taken by the majority of these shareholders.

### **Section 241**

#### **Consents required for the change of legal form by a limited liability company**

(1) Where, by the resolution on change of legal form adopted by a limited liability company changing its legal form, the shares of stock are quoted, by the by-laws of the stock corporation or of the partnership limited by shares, at an amount that is higher than the minimum amount pursuant to section 8 (2) or (3) of the Stock Corporation Act (AktG) and at an amount deviating from the nominal value of the business shares in the company changing its legal form, each shareholder must grant his consent who cannot participate with an ownership interest corresponding to the aggregate nominal value of his business shares.

(2) Furthermore, section 50 (2) shall apply *mutatis mutandis* to the requirement of consent being granted by individual shareholders.

(3) Where individual shareholders are subject to other obligations they must additionally fulfil vis-à-vis the company, besides paying in their capital contributions, and where these obligations cannot be upheld, due to the restrictive determination made by section 55 of the Stock Corporation Act (AktG), in the context of the change of legal form, the change of legal form shall also require these shareholders to grant their consent.

#### **Section 242**

##### **Consent required for the change of legal form by a stock corporation or by a partnership limited by shares**

Where, by the resolution on change of legal form adopted by a stock corporation changing its legal form or by a partnership limited by shares changing its legal form, the nominal value of the business shares is specified in the articles of association of the limited liability company in deviation from the amount of the shares of stock, each stockholder must consent to this specification who cannot participate with his entire ownership interest.

#### **Section 243**

##### **Substance of the resolution on change of legal form**

(1) Section 218 shall apply *mutatis mutandis* to the resolution on change of legal form. Stipulations regarding special benefits, formation expenses, contributions in kind, and acquisitions of assets that are set out in the articles of association or in the by-laws of the company changing its legal form are to be included in the articles of association or in the by-laws of the company having a new legal form. Section 26 subsections (4) and (5) of the Stock Corporation Act (AktG) shall remain unaffected.

(2) Regulations of other acts concerning the modification of the share capital or of the nominal capital shall remain unaffected.

(3) The articles of association or the by-laws of the company having a new legal form may specify the amount of the share capital or nominal capital allocable to the shares in a different amount than that of the shares in the company changing its legal form. In the case of a limited liability company, it must be denominated in full euros.

#### **Section 244**

##### **Record of the resolution on change of legal form; articles of association**

(1) The record of the resolution on change of legal form is to list the persons by name who, pursuant to section 245 subsections (1) through (3), are equivalent to the founders of the company.

(2) Where a stock corporation or a partnership limited by shares changes its legal form to that of a limited liability company, the articles of association need not be signed by the shareholders.

#### **Section 245**

##### **Legal status as a founder; capital protection**

(1) Where a limited liability company changes its legal form to that of a stock corporation or of a partnership limited by shares, those shareholders who have voted for the change of legal form shall take the stead of the founders wherever the company formation rules of the Stock Corporation Act (AktG) are applied; where a limited liability company changes its legal form to that of a partnership limited by shares, this shall also apply to any personally liable

shareholders acceding to same. Section 220 shall apply *mutatis mutandis*. Section 52 of the Stock Corporation Act shall have no application if the limited liability company already has been entered in the register for more than two (2) years prior to the change of legal form entering into force.

(2) Where a stock corporation changes its legal form to that of a partnership limited by shares, the personally liable shareholders of the company having a new legal form shall take the stead of the founders wherever the company formation rules of the Stock Corporation Act (AktG) are applied. Section 220 shall apply *mutatis mutandis*. Section 52 of the Stock Corporation Act shall have no application.

(3) Where a partnership limited by shares changes its legal form to that of a stock corporation, the personally liable shareholders of the company changing its legal form shall take the stead of the founders wherever the company formation rules of the Stock Corporation Act (AktG) are applied. Section 220 shall apply *mutatis mutandis*. Section 52 of the Stock Corporation Act shall have no application.

(4) Where a stock corporation or a partnership limited by shares changes its legal form to that of a limited liability company, a report on company formation on the basis of contributions in kind shall not be required.

#### **Section 246**

##### **Application for entry in the register of the change of legal form**

(1) The application for entry in the register pursuant to section 198 is to be filed by the representative body of the company changing its legal form.

(2) Concurrently with the application for entry in the register of the new legal form, or of the legal entity in its new legal form, an application is to be filed for entry in the register of the managing directors of the limited liability company, the members of the management board of the stock corporation, or the personally liable shareholders of the partnership limited by shares.

(3) Section 8 (2) of the Limited Liability Companies Act (GmbHG) and section 37 (1) of the Stock Corporation Act (AktG) shall not apply to the application for entry in the register pursuant to section 198.

#### **Section 247**

##### **Effects of the change of legal form**

(1) By the change of legal form, the share capital that a limited liability company changing its legal form had until the change of legal form will become the nominal capital of the company having a new legal form, or the nominal capital that a stock corporation changing its legal form or partnership limited by shares changing its legal form had until the change of legal form will become the share capital of the company having a new legal form.

(2) By the change of legal form by a partnership limited by shares, its personally liable shareholders shall leave the company in that capacity.

#### **Section 248**

##### **Exchange of the shares**

(1) Section 73 of the Stock Corporation Act (AktG) shall apply *mutatis mutandis* to the exchange of the business shares in a limited liability company changing its legal form in return for shares of stock, while section 226 of the Stock Corporation Act shall apply *mutatis mutandis*, where business shares are merged, to the cancellation of stock.

(2) Section 73 subsections (1) and (2) of the Stock Corporation Act (AktG) shall apply *mutatis mutandis* to the exchange of the shares of stock in a stock corporation changing its legal form, or in a partnership limited by shares changing its legal form, in return for business shares in a limited liability company, while section 226 subsections (1) and (2) of the Stock Corporation Act shall apply *mutatis mutandis*, where shares of stock are merged, to the cancellation of stock.

(3) No approval by the court shall be required.

#### **Section 249**

##### **Protection of creditors**

Section 224 also shall apply *mutatis mutandis* to the change of legal form by a partnership limited by shares to that of a limited liability company or to that of a stock corporation.

#### **Section 250**

##### **Regulations having no application**

Sections 207 through 212 shall not apply to the change of legal form by a stock corporation to that of a partnership limited by shares or to the change of legal form by a partnership limited by shares to that of a stock corporation.

#### **Subchapter 4**

##### **Change of the legal form to that of a registered cooperative society**

#### **Section 251**

##### **Preparations for and conduct of the assembly of the owners of shares**

(1) Sections 229 through 231 shall apply *mutatis mutandis* to the preparations for the meeting of shareholders, or for the general meeting, that is to adopt a resolution on change of legal form. Section 192 (2) shall remain unaffected.

(2) Section 239 (1), first sentence, shall apply *mutatis mutandis* to the meeting of shareholders, or the general meeting, that is to adopt a resolution on change of legal form, with section 239 (1), second sentence, and subsection (2) also applying *mutatis mutandis* to the general meeting.

#### **Section 252**

##### **Resolution adopted by the assembly of the owners of shares**

(1) The resolution on change of legal form adopted by the meeting of shareholders or the general meeting shall require the consent of all shareholders or stockholders in attendance if the by-laws of the cooperative society stipulate an obligation of the members to provide additional funding; the owners of shares who are not in attendance must also consent to said resolution.

(2) Where the members are not to be obligated to provide additional funding, the resolution on change of legal form shall require a majority of at least three quarters of the votes cast at the meeting of shareholders of a limited liability company, or at least three quarters of the nominal capital of a stock corporation or of a partnership limited by shares represented at the time the resolution is adopted; section 50 (2) and section 65 (2) shall apply *mutatis mutandis*. The articles of association or the by-laws of the company changing its legal form may stipulate a greater majority ratio and may impose further requirements.

(3) Section 240 (3) shall apply *mutatis mutandis* to the change of legal form by a partnership limited by shares.

#### **Section 253**

##### **Substance of the resolution on change of legal form**

(1) The resolution on change of legal form must also include the by-laws of the cooperative society. It shall not be required for the by-laws to be signed by the members.

(2) The resolution on change of legal form must provide for each member to have an ownership interest of at least one business share. The resolution may also determine that each member will obtain an ownership interest of at least one (1) business share in the acquiring cooperative society and in all other cases will obtain an ownership interest comprising as many business shares as are to be regarded, in crediting the amount of his capital contribution, as a member, to the cooperative society, as having been fully paid in.

#### **Section 254**

##### **Application for entry in the register of the change of legal form**

- (1) The representative body of the company changing its legal form is to file the application for entry in the register pursuant to section 198, including the application for entry in the register of the by-laws of the cooperative society.
- (2) Concurrently with the application for entry in the register of the cooperative society, an application is to be filed for entry in the register of the members of its management board.

#### **Section 255**

##### **Effects of the change of legal form**

- (1) Each owner of shares obtaining the legal status of a member will hold an ownership interest in the cooperative society in accordance with the stipulations of the resolution on change of legal form. An obligation to assume further business shares shall remain unaffected. Section 202 (1) no. 2, second sentence, is to be applied subject to the proviso that the rights of third parties to the shares thus far comprising the ownership interest shall continue in existence, then having as their object the amount of the member's capital contribution obtained by the change of legal form.
- (2) The court may not mandate the cooperative society to be wound up, *ex officio*, pursuant to section 80 of the Act on Cooperative Societies (GenG) before one (1) year has lapsed after the change of legal form has entered into force.
- (3) By the change of legal form by a partnership limited by shares, its personally liable shareholders shall leave the legal entity in that capacity.

#### **Section 256**

##### **Amounts of the members' capital contributions; notification of members**

- (1) Each member is to be credited with the value of the business shares, or shares of stock, forming his ownership in the company changing its legal form as the amount of that member's capital contribution to the cooperative society.
- (2) Where the amount of the capital contribution that a member obtains by the change of legal form exceeds the aggregate amount of business shares comprising that member's ownership interest in the cooperative society, the surplus is to be disbursed to the member after six (6) months have lapsed since the day on which the entry in the register of the cooperative society was published by notice. However, no such disbursement may be effected before the creditors who have filed their claims pursuant to section 204 in conjunction with section 22 have been satisfied or have had security provided to them.
- (3) The cooperative society is to inform each member of the following, in text form and without undue delay, after the entry in the register of the cooperative society has been published by notice:
1. the amount of his capital contribution as a member;
  2. the amount and the number of business shares comprising his ownership interest in the cooperative society;
  3. the amount that, after the amount of the member's capital contribution has been credited, the member is to pay in, or the amount that is to be disbursed to the member pursuant to subsection (2);
  4. the liability amount of the cooperative society, should its members have to provide additional funding up to a liability amount.

#### **Section 257**

##### **Protection of creditors**

Section 224 also shall apply *mutatis mutandis* to the change of legal form by a partnership limited by shares.

### **Chapter 3**

#### **Change of the legal form of registered cooperative societies**

### **Section 258**

#### **Eligibility for a change of legal form**

(1) A registered cooperative society may obtain, based on a resolution on change of legal form pursuant to this Act, solely the legal form of a company limited by shares.

(2) The change of legal form is possible only if each member that obtains an ownership interest in the company having a new legal form is allotted, where the member is a shareholder with limited liability, a business share, the nominal value of which is denominated in full euros, or, where the member is a stockholder, at a minimum one full share of stock.

### **Section 259**

#### **Expert report of the confederation responsible for auditing cooperative societies**

Prior to the general assembly being convened that is to adopt a resolution on change of legal form, an expert opinion is to be obtained from the confederation responsible for auditing cooperative societies as to whether or not the change of legal form is reconcilable with the interests of the respective cooperative society's members and creditors, and in particular, whether or not section 263 (2), second sentence, and section 264 (1) are being observed in establishing the share capital or the nominal capital (audit opinion).

### **Section 260**

#### **Preparations for the general assembly**

(1) The management board of the cooperative society changing its legal form is to give advance notice in text form to all of the members, at the latest together with the invitation convening the general assembly that is to adopt a resolution on change of legal form, apprising them that a change of legal form will be the subject matter of a resolution to be adopted. The advance notice is to set out the majority ratios required by section 262 (1) for the resolution to be adopted, while also indicating the option to raise an objection and the rights resulting therefrom.

(2) Section 230 (2) and section 231, first sentence, shall apply *mutatis mutandis* to the preparations for the general assembly. Section 192 (2) shall remain unaffected.

(3) Besides the documents usually required for this purpose, the audit opinion submitted pursuant to section 259 is to be kept available for inspection by the members at the business premises of the cooperative society changing its legal form from the date onwards on which the general assembly has been convened that is to adopt a resolution on change of legal form. Upon a corresponding demand being made, each member is to be provided with a copy of said audit opinion without undue delay and at no charge. The obligations pursuant to the first and second sentences shall not be applicable if the audit opinion is kept accessible, for the same period of time, on the website of the cooperative society.

### **Section 261**

#### **Conduct of the general assembly**

(1) At the general assembly that is to adopt a resolution on change of legal form, the report on the change of legal form, where it is required by the stipulations of the present Book, and the audit opinion submitted pursuant to section 259 are to be kept on display. At the outset of the meeting, the management body is to give an oral presentation of the resolution on change of legal form.

(2) The audit opinion is to be read out to the general assembly. The confederation responsible for auditing cooperative societies is entitled to participate in the general assembly in an advisory capacity.

### **Section 262**

#### **Resolution adopted by the general assembly**

(1) The resolution on change of legal form adopted by the general assembly shall require a majority of at least three quarters of the votes cast. It shall require a majority of nine tenths of the votes cast if, at the latest by midnight of the third day prior to the general assembly, a

minimum of 100 members, and in the case of cooperative societies having fewer than 1,000 members, one tenth of the members, have raised an objection to the change of legal form, submitting it by registered letter. The by-laws may stipulate greater majority ratios and may impose further requirements.

(2) Section 240 (2) shall apply *mutatis mutandis* to the change of the legal form to that of a partnership limited by shares.

### **Section 263**

#### **Substance of the resolution on change of legal form**

(1) Sections 218, 243 (3) and section 244 (2) also shall apply *mutatis mutandis* to the resolution on change of legal form.

(2) In establishing the number, type, and scope of the shares (Section 194 (1) no. 4), the resolution is to stipulate that each member obtaining the legal status of a shareholder having limited liability, or that of a stockholder, shall obtain an ownership interest in the share capital, or in the nominal capital, of the company having a new legal form in that ratio that existed, at the end of the fiscal year last ended prior to the resolution on change of legal form being adopted, between the amount of his capital contribution as a member and the aggregate of the amounts of the capital contributions of all members who, by the change of legal form, have become shareholders or stockholders. The aggregate nominal value of the nominal capital is to be specified such that, wherever possible, full shares of stock are allotted to each member.

(3) The business shares in a limited liability company are to be quoted at a nominal value higher than one hundred (100) euros only inasmuch as full business shares with the higher nominal value are allotted to the members of the cooperative society changing its legal form. Shares of stock may be quoted at an amount that is higher than the minimum amount pursuant to section 8 subsections (2) and (3) of the Stock Corporation Act (AktG) only inasmuch as full shares of stock are allotted to the members at the higher amount. Where the representative body of the stock corporation or of the partnership limited by shares is authorised by the by-laws to increase the nominal capital up to a determined aggregate nominal value by issuing new stock in return for capital contributions, such authorisation may not provide for the representative body to decide on the preclusion of the pre-emptive right for newly issued shares.

### **Section 264**

#### **Capital protection**

(1) The aggregate nominal value of a limited liability company's share capital, or of the nominal capital of a stock corporation or that of a partnership limited by shares, may not exceed the assets of the cooperative society changing its legal form that remain after the deduction of its debts.

(2) Where the legal form is changed to that of a limited liability company, the members of the cooperative society changing its legal form shall not be obligated to submit a report on company formation on the basis of contributions in kind.

(3) In the event of the legal form being changed to that of a stock corporation, or that of a partnership limited by shares, the formation is to be audited in any case, with the audit being performed by one or several auditors (Section 33 (2) of the Stock Corporation Act (AktG)). However, the members of the cooperative society changing its legal form shall not be under obligation to submit a formation report; section 32, section 35 subsections (1) and (2) and section 46 of the Stock Corporation Act shall have no application. The period of two (2) years determined for post-formation agreements in section 52 (1) of the Stock Corporation Act shall commence running on the date on which the change of legal form enters into force.

### **Section 265**

#### **Application for entry in the register of the change of legal form**

Section 222 (1), first sentence, and subsection (3) shall apply *mutatis mutandis* to the application for entry in the register pursuant to section 198. The audit opinion submitted



pursuant to section 259 shall be attached, as the original or as a publicly certified copy, to the application for entry in the register.

#### **Section 266**

##### **Effects of the change of legal form**

(1) By the change of legal form, the shares thus far comprising the ownership interest shall become shares in the company having a new legal form and fractional shares. Section 202

(1) no. 2, second sentence, is to be applied subject to the proviso that the rights of third parties existing in the members' capital contributions thus far comprising the members' ownership interest shall continue to exist, then having as their object the shares and fractional shares obtained by the change of legal form.

(2) Fractional shares occasioned by the change of legal form may be sold independently and are transferable by inheritance.

(3) The rights arising from a share of stock, including the claim to having a stock certificate issued, may be exercised only if fractional shares of stock that together make up a full share of stock are held by a single holder, or if several parties entitled to certain rights, whose fractional shares of stock together make up a full share of stock, join together for purposes of exercising the rights. The legal entity shall make arrangement enabling the fractional shares to be consolidated to form a full share of stock.

#### **Section 267**

##### **Notification of the owners of shares**

(1) The representative body of the company having a new legal form is to inform each owner of shares, in text form and without undue delay after the entry of the company in the register has been published by notice, of the content of same and of the number and, unless the shares are no par value shares, of the nominal value of the shares and the fractional share that have been allotted to him. In this context, the regulations applying to fractional shares set out in section 266 are to be indicated.

(2) Concurrently with the notification, an outline of its substance is to be published by notice in the publications of record. The indication pursuant to subsection (1), second sentence, need not be included in the publication by notice.

#### **Section 268**

##### **Instructions to stockholders; sale of stock**

(1) The notice pursuant to section 267 is to instruct stockholders to collect the shares of stock to which they are entitled. In this context, it is to be indicated that the company is entitled to sell, for the account of the parties involved, any shares of stock that have not been collected, in spite of three (3) reminders warning of the consequences having been sent, within six (6) months of the instructions having been published by notice in the publications of record. This indication need not be included in the notice of the instructions published in the publications of record.

(2) After six (6) months have lapsed since the publication of the instructions by notice in the publications of record, the company having a new legal form is to issue a reminder warning that it will sell any shares of stock that have not been collected. This reminder warning of the consequences is to be published by notice in the publications of record three (3) times at intervals of at least one (1) month. The last such publication must be made before one (1) year has lapsed since the instructions were published by notice.

(3) After six (6) months have lapsed since the last publication by notice of the reminder warning of the consequences, the company is to sell the shares of stock that have not been collected, doing so for the account of the parties involved, at the stock exchange price officially quoted and by arrangement of an official stockbroker; should no stock exchange price exist, the shares of stock shall be sold at public auction. Section 226 (3), second through sixth sentences, of the Stock Corporation Act (AktG) shall apply *mutatis mutandis*.

### **Section 269**

#### **Resolutions adopted by the general meeting; authorised capital**

For as long as the shares of stock collected, or sold pursuant to section 268 (3), do not attain a minimum of six tenths of the nominal capital, in those instances in which the change of legal form was made to that of a stock corporation or that of a partnership limited by shares, the general meeting of the company having a new legal form cannot adopt any resolutions that, by law or by the stipulations of the by-laws, require a majority of the nominal capital. During this period, the representative body of the company may not exercise an authorisation to increase the nominal capital.

### **Section 270**

#### **Offer of compensation**

(1) The offer of compensation pursuant to section 207 (1), first sentence, shall apply also for each member that has lodged an objection to the change of legal form, by registered letter, by midnight of the third day prior to the day on which the resolution on change of legal form was adopted.

(2) An expert opinion regarding the offer of compensation is to be obtained from the confederation responsible for auditing cooperative societies. Section 30 (2), second and third sentences, shall have no application.

### **Section 271**

#### **Continuance of the obligation to provide additional funding**

Where insolvency proceedings are opened against the assets of the company having a new legal form within two (2) years after the date on which its entry in the register has been published by notice, each member having obtained the legal status of a shareholder with limited liability, or of a stockholder, as a result of the change of legal form shall be under obligation to provide additional funding, insofar as this is stipulated by the by-laws of the cooperative society changing its legal form (Section 6 no. 3 of the Act on Cooperative Societies (GenG)), also in those cases in which the member has sold his business share or his shares of stock. Sections 105 through 115a of the Act on Cooperative Societies shall apply *mutatis mutandis*, subject to the proviso that only such liabilities of the company are to be taken into account that were in existence already at the time the legal form was changed.

## **Chapter 4**

### **Change of legal form by associations having legal personality**

#### **Subchapter 1**

##### **General regulations**

### **Section 272**

#### **Eligibility for a change of legal form**

(1) An association having legal personality may obtain, based on a resolution on change of legal form, solely the legal form of a company limited by shares or of a registered cooperative society.

(2) An association may change its legal form only if this is not contravened by its by-laws or by the regulations of *Land* law.

#### **Subchapter 2**

### **Change of legal form to that of a company limited by shares**

### **Section 273**

#### **Eligibility for a change of legal form**

The change of legal form is possible only if each member obtaining an ownership interest in the company having a new legal form is allotted, where the member is a shareholder with limited liability, a business share, the nominal value of which is denominated in full euros, or, where the member is a stockholder, at a minimum one (1) full share of stock.

#### **Section 274**

##### **Preparations for and conduct of the meeting of members**

(1) Section 229, section 230 (2), first and second sentences, section 231, first sentence, and section 260 (1) shall apply *mutatis mutandis* to the preparations for the meeting of members that is to adopt a resolution on change of legal form. Section 192 (2) shall remain unaffected.  
(2) Section 239 (1), first sentence, and subsection (2) shall apply *mutatis mutandis* to the meeting of members that is to adopt a resolution on change of legal form.

#### **Section 275**

##### **Resolution adopted by the meeting of members**

(1) If it is intended to change the purpose pursued by the legal entity (section 33 (1), second sentence, of the Civil Code (BGB)), the resolution on change of legal form adopted by the meeting of members shall require the consent of all members present; those members not in attendance must also consent to this resolution.  
(2) In other cases, the resolution on change of legal form shall require a majority of at least three quarters of the votes cast. It shall require a majority of, at a minimum, nine tenths of the votes cast if, at the latest by midnight of the third day prior to the meeting of members, a minimum of 100 members, and in the case of associations having fewer than 1,000 members, one tenth of the members, have raised an objection to the change of legal form, submitting it by registered letter. The by-laws may stipulate greater majority ratios and may impose further requirements.  
(3) Section 240 (2) shall apply *mutatis mutandis* to the change of legal form to that of a partnership limited by shares.

#### **Section 276**

##### **Substance of the resolution on change of legal form**

(1) Sections 218, 243 (3), section 244 (2) and section 263 subsection (2), second sentence, and subsection (3) shall also apply *mutatis mutandis* to the resolution on change of legal form.  
(2) The ownership interest of the members in the share capital or in the nominal capital of the company having a new legal form may only be stipulated based on one or several of the following measures if it is intended to not allot shares having equal value to all members:

1. in the case of associations whose assets are divided into transferable shares: the nominal value or the value of such shares;
2. the amount of the contributions;
3. in the case of associations maintaining contractual business relations with their members or with a part of their membership, the scope in which the members avail themselves of the services provided by the association or the scope in which the association avails itself of the services provided by the members;
4. a measure determined in the by-laws for the distribution of the surplus;
5. a measure determined in the by-laws for the distribution of the assets;
6. the duration of the membership.

#### **Section 277**

##### **Capital protection**

Section 264 shall also apply *mutatis mutandis* in applying the company formation rules governing the new legal form.

#### **Section 278**

##### **Application for entry in the register of the change of legal form**

(1) Section 222 subsections (1) and (3) shall apply *mutatis mutandis* to the application for entry in the register pursuant to section 198.

(2) Where the association changing its legal form has not been entered in a commercial register, its management board is to publish a notice of the impending change of legal form in the publication determined in the by-laws of the association as the publication of record for such notices, and where no such publication has been determined, it shall publish the notice in the publication serving the local court in the judicial district of which the association changing its legal form has its registered seat. The notification shall take the stead of the entry in the register of the transformation pursuant to section 198 (2), third sentence. Section 50 (1), fourth sentence, of the Civil Code (BGB) shall apply *mutatis mutandis*.

**Section 279  
(repealed)**

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**Section 280**

**Effects of the change of legal form**

By the change of legal form, the memberships thus far in place shall become shares in the company having a new legal form and fractional shares. Section 266 subsection (1), second sentence, and subsections (2) and (3) shall apply *mutatis mutandis*.

**Section 281**

**Notification of the owners of shares, sale of shares of stock, resolutions adopted by the general meeting**

(1) Sections 267 and 268 shall apply *mutatis mutandis* to the notification of the owners of shares by the company, to the instructions issued to stockholders to collect the stock to which they are entitled, and to the sale of shares of stock that are not so collected.

(2) Section 269 shall apply *mutatis mutandis* to resolutions adopted by the general meeting of the company having a new legal form as well as to an authorisation of the representative body to increase the nominal capital.

**Section 282**

**Offer of compensation**

(1) Section 270 (1) shall apply *mutatis mutandis* to the offer of compensation pursuant to section 207 (1), first sentence.

(2) Subsection (1) and sections 207 through 212 shall have no application to the change of legal form by a registered association that is released, pursuant to section 5 (1) no. 9 of the Corporation Income Tax Act (KStG), from the obligation to pay corporation income tax.

**Subchapter 3**

**Change of the legal form to that of a registered cooperative society**

**Section 283**

**Preparations for and conduct of the meeting of members**

(1) Section 229 and section 230 (2), first and second sentences, section 231, first sentence, and section 260 (1) shall apply *mutatis mutandis* to the preparations for the meeting of members that is to adopt a resolution on change of legal form. Section 192 (2) shall remain unaffected.

(2) Section 239 (1), first sentence, and subsection (2) shall apply *mutatis mutandis* to the meeting of members that is to adopt a resolution on change of legal form.

**Section 284**

**Resolution adopted by the meeting of members**

If it is intended to change the purpose pursued by the legal entity (section 33 (1), second sentence, of the Civil Code (BGB)), or if the by-laws of the cooperative society provide for an obligation of its members to provide additional funding, the resolution on change of legal form adopted by the meeting of members shall require the consent of all members present; those members not in attendance must also consent to this resolution. In all other cases, section 275 (2) shall apply *mutatis mutandis*.

### **Section 285**

#### **Substance of the resolution on change of legal form**

- (1) Section 253 subsection (1) and subsection (2), first sentence, shall also apply *mutatis mutandis* to the resolution on change of legal form.
- (2) Where it is intended to not have all members obtain an ownership interest comprising the same number of business shares, such an ownership interest in different amounts may only be stipulated in accordance with one or several of the measures designated in section 276 (2), first sentence.

### **Section 286**

#### **Application for entry in the register of the change of legal form**

Sections 254 and 278 (2) shall apply *mutatis mutandis* to the application for entry in the register pursuant to section 198.

### **Section 287**

**(repealed)**

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### **Section 288**

#### **Effects of the change of legal form**

- (1) Each member obtaining the legal status of a member of the cooperative society will hold an ownership interest in the cooperative society in accordance with the stipulations of the resolution on change of legal form. An obligation to assume further business shares shall remain unaffected. Section 255 (1), third sentence, shall apply *mutatis mutandis*.
- (2) The court may not mandate the cooperative society to be wound up, *ex officio*, pursuant to section 80 of the Act on Cooperative Societies (GenG) before one (1) year has lapsed after the change of legal form has entered into force.

### **Section 289**

#### **Amounts of the members' capital contributions; notification of the members**

- (1) The maximum amount that may be credited, based on the change of legal form, to each member of the cooperative society as the amount of his capital contribution to the cooperative society is the aggregate nominal value of the business shares comprising that member's ownership interest in the cooperative society.
- (2) Section 256 (3) shall apply *mutatis mutandis*.

### **Section 290**

#### **Compensation offer**

Section 270 (1) as well as section 282 (2) shall apply *mutatis mutandis* to the offer of compensation pursuant to section 207 (1), second sentence.

## **Chapter 5**

### **Change of the legal form of mutual insurance companies**

#### **Section 291**

##### **Eligibility for a change of legal form**

- (1) A mutual insurance company that is not a smaller mutual insurance company in the sense of section 210 of the Act on the Supervision of Insurance Companies (VAG) may obtain, based on a resolution on change of legal form, solely the legal form of a stock corporation.
- (2) The change of legal form is possible only if each member of the mutual insurance company that obtains an ownership interest in the stock corporation is allotted, at a minimum, one (1) full share of stock.

#### **Section 292**

##### **Preparations for and conduct of the assembly of the most senior representative committee**

(1) Sections 229 and 230 (2), first and second sentences, section 231, first sentence, and section 260 (1) shall apply *mutatis mutandis* to the preparations for the assembly of the most senior representative committee that is to adopt a resolution on change of legal form.

(2) Section 239 (1), first sentence, and subsection (2) shall apply *mutatis mutandis* to the conduct of the assembly of the most senior representative committee that is to adopt a resolution on change of legal form.

### **Section 293**

#### **Resolution adopted by the most senior representative committee**

The resolution on change of legal form adopted by the most senior representative committee shall require a majority of at least three quarters of the votes cast. It shall require a majority of nine tenths of the votes cast if, at the latest by midnight of the third day prior to the assembly of the most senior representative committee, a minimum of 100 members of the mutual insurance company have raised an objection to the change of legal form, submitting it by registered letter. The by-laws may stipulate greater majority ratios and may impose further requirements.

### **Section 294**

#### **Substance of the resolution on change of legal form**

(1) Section 218 (1) and section 263 (3), second and third sentences, shall also apply *mutatis mutandis* to the resolution on change of legal form. The resolution on change of legal form may determine that members who have been members of the mutual insurance company changing its legal form for less than three (3) years prior to the change of legal form shall be prohibited from obtaining an ownership interest in the stock corporation.

(2) The nominal capital of the stock corporation is to be specified in the amount of the nominal capital of comparable insurers having the legal form of the stock corporation. Where the supervisory authority would grant permission to an insurance stock corporation that is to be newly founded only if a higher nominal capital were to be set, then the nominal capital is to be set in that amount inasmuch as this is feasible for the mutual insurance company changing its legal form, based on its assets and financial circumstances. Where no such specification is possible in light of the mutual insurance company's assets and financial circumstances, the aggregate nominal value of the nominal capital is to be specified such that, wherever possible, full shares of stock are allotted to each member obtaining the legal status of a stockholder.

(3) The ownership interest of the members in the nominal capital of the stock corporation may only be stipulated based on one or several of the following measures if it is intended to not allot ownership interests having equal value to all members:

1. the amount insured,
2. the amount of the contributions,
3. the amount of the premium reserve made in the life insurance policy,
4. the measure determined in the by-laws for the distribution of the surplus,
5. a measure determined in the by-laws for the distribution of the assets,
6. the duration of the membership.

### **Section 295**

#### **Capital protection**

Section 264 subsections (1) and (3) shall also apply *mutatis mutandis* in applying the company formation rules of the Stock Corporation Act (AktG).

### **Section 296**

#### **Application for entry in the register of the change of legal form**

Sections 246 subsections (1) and (2) shall apply *mutatis mutandis* to the application for entry in the register pursuant to section 198.

**Section 297  
(repealed)**

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**Section 298  
Effects of the change of legal form**

By the change of legal form, the memberships thus far in place shall become shares of stock and fractional shares. Section 266 subsection (1), second sentence, and subsections (2) and (3) shall apply *mutatis mutandis*.

**Section 299  
Notification of the stockholders, sale of shares of stock, resolutions adopted by the general meeting**

(1) Sections 267 shall apply *mutatis mutandis* to the notification of the stockholders by the company, while section 268 shall apply *mutatis mutandis* to the instructions issued to stockholders to collect the stock to which they are entitled and to the sale of shares of stock that are not so collected.

(2) Section 269 shall apply *mutatis mutandis* to resolutions adopted by the general meeting of the stock corporation as well as to an authorisation of the management board to increase the nominal capital. The supervisory authority may permit exceptions to the corresponding application of section 269, first sentence, if this is required in order to prevent the stock corporation from suffering significant disadvantages.

**Section 300  
Offer of compensation**

Section 270 (1) shall apply *mutatis mutandis* to the offer of compensation pursuant to section 207 (1), first sentence.

**Chapter 6  
Change of the legal form of corporations under public law and public-law institutions**

**Section 301  
Eligibility for a change of legal form**

(1) Unless otherwise provided for by law, a corporation under public law or a public-law institution may only obtain the legal form of a company limited by shares by a change of legal form.

(2) The change of legal form is possible only if the corporation or institution has legal personality and the laws of the Federation or *Land* law governing it provides for a change of legal form or permits it.

**Section 302  
Applicable regulations**

The regulations of Part 1 are to be applied to the change of legal form only insofar as the laws of the Federation or *Land* law governing the corporation or institution changing its legal form do not provide otherwise. Said laws shall govern in particular the manner in which the articles of association or the by-laws of the company having a new legal form are concluded or established, who will obtain an ownership interest in this company as an owner of shares and which person, or which persons, is or are equivalent to the founders of the company; sections 28 and 29 of the Stock Corporation Act (AktG) shall have no application.

**Section 303  
Capital protection; consents required**

(1) In addition to the company formation rules governing the new legal form, section 220 shall also apply *mutatis mutandis*.

(2) A change of legal form to that of a partnership limited by shares shall require the consent of all owners of shares who are to have the position of a personally liable shareholder in this company. Section 221 shall apply *mutatis mutandis* to the accession of personally liable shareholders.

#### **Section 304**

##### **Entry into force of the change of legal form**

The change of legal form shall enter into force upon the entry of the company limited by shares in the commercial register. Defects of the change of legal form shall not prejudice the effects of the entry in the register.

#### **Sections 305 through 312 (repealed)**

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#### **Book 6**

##### **Penal provisions and coercive fines**

#### **Section 313**

##### **False representations of facts**

(1) Anyone shall be liable to a term of imprisonment not exceeding three (3) years or to payment of a fine who, as a member of the representative body of a legal entity involved in the transformation, as a shareholder or partner authorised to represent said legal entity, as a member of a supervisory board, or as the liquidator of a legal entity involved in the transformation, commits any of the acts set out below in the course of said transformation:

1. incorrectly represents or conceals the circumstances of the legal entity, including its relations with affiliated enterprises, in a report provided for by this Act (merger report, report on the division, transfer report, report on the change of legal form), in presentations or summaries of the legal entity's net asset position, in presentations to the assembly of the owners of shares, or in informational statements made to same, unless the deed is liable to punishment under section 331 no. 1 or no. 1a of the Commercial Code (HGB); or who
2. provides incorrect information, or incorrectly represents or conceals the circumstances of the legal entity, including its relations with affiliated enterprises, in any clarification statement or documentary proof that is to be provided, according to the regulations of the present law, to a merger auditor, an auditor responsible for reviewing the division into several enterprises, or an auditor responsible for reviewing the transfer.

(2) Likewise, anyone shall be liable to punishment who, as a managing director of a limited liability company, as a member of the management board of a stock corporation, as a personally liable shareholder authorised to represent a partnership limited by shares, or as the liquidator of such a company, provides incorrect information in a declaration pursuant to section 52 as to the consent by the owners of shares in this legal entity, or in a declaration pursuant to section 140 or section 146 (1) regarding the funds maintaining the share capital or the nominal capital of the company being acquired, or who bases his declaration on such incorrect information.

#### **Section 314**

##### **Violation of reporting obligations**

(1) Anyone who, as the merger auditor, auditor responsible for reviewing the division into several enterprises, or auditor responsible for reviewing the transfer, or as the agent of such an auditor, provides an incorrect report of the results obtained in an audit required on the occasion of a transformation, or who fails to disclose significant circumstances in the audit report shall be liable to a term of imprisonment not exceeding three (3) years or to payment of a fine.



(2) Where the perpetrator has acted in return for remuneration or with the intention of enriching himself or some other party, or of causing damage to some other party, the punishment shall consist of a term of imprisonment not exceeding five (5) years or of the payment of a fine.

**Section 314a**  
**Incorrect information**

Anyone who makes an incorrect affirmation in violation of the stipulations of section 122k (1), third sentence, shall be liable to a term of imprisonment not exceeding three (3) years or to a payment of a fine.

**Section 315**  
**Violation of the obligation to maintain confidentiality**

(1) Anyone disclosing a secret of any legal entity involved in a transformation without having been authorised to do so, namely a trade or business secret, of which he has become aware in his capacity as

1. a member of the representative body, a shareholder or partner authorised to represent the enterprise, a member of a supervisory board, or a liquidator of this or some other legal entity involved in the transformation,

2. a merger auditor, an auditor reviewing the division into several enterprises, or an auditor responsible for reviewing the transfer, or the agent of such auditor,

shall be liable to a term of imprisonment not exceeding one (1) year or to payment of a fine provided that the offence, in the case of number 1, is not punishable pursuant to section 85 of the Limited Liability Companies Act (GmbHG), section 404 of the Stock Corporation Act (AktG), or section 151 of the Act on Cooperative Societies (GenG), and in the case of number 2, is not punishable pursuant to section 333 of the Commercial Code (HGB).

(2) Where the perpetrator is acting in return for remuneration or with the intention of enriching himself or some other party, or of causing damage to some other party, he shall be liable to a term of imprisonment not exceeding two (2) years or to payment of a fine.

Likewise, anyone shall be liable to punishment who, without having been authorised to do so, exploits a secret of the type designated in subsection (1), namely a trade or business secret, of which he has become aware subject to the pre-requisites set out in subsection (1).

(3) The offence shall be prosecuted only upon an application having been filed by one of the legal entities involved in the transformation. Where a member of a representative body, a shareholder or partner authorised to represent the enterprise or a liquidator has committed the deed, a supervisory board member or a shareholder or partner not authorised to represent the enterprise shall be entitled to file the corresponding petition. Where a member of a supervisory board has committed the deed, the members of the management board, the shareholders or partners authorised to represent the enterprise, or the liquidators shall be entitled to file the corresponding petition.

**Section 316**  
**Coercive penalty payments**

(1) Where the members of a representative body, the shareholders or partners authorised to represent the company, or the liquidators fail to observe the stipulations of section 13 (3), third sentence, as well as section 125, first sentence, section 176 (1), section 177 (1), section 178 (1), section 179 (1), section 180 (1), section 184 (1), section 186, first sentence, section 188 (1), and section 189 (1), in each case in conjunction with section 13 (3), third sentence, as well as section 193 (3), second sentence, the court maintaining the register and having jurisdiction is to induce them to comply with said regulations by levying a coercive fine against them; section 14 of the Commercial Code (HGB) shall remain unaffected hereby. The individual coercive fine may not be levied in an amount in excess of 5,000 euros.

(2) No coercive fine shall be levied in order to force applications to be made for entry of a transformation in the register having jurisdiction pursuant to section 16 (1), section 38, section 122k (1), section 122l (1), section 129, section 137 subsections (1) and (2), section 176 (1), section 177 (1), section 178 (1), section 179 (1), section 180 (1), section 184 (1), section 186, section 188 (1), section 189 (1), sections 198, 222, 235, 246, 254, 265, section 278 (1), section 286, and section 296.

## **Book 7**

### **Transitional regulations and final regulations**

#### **Section 317**

##### **Transformation of pre-existing legal persons**

A legal person in the sense of Article 163 of the Introductory Act of the Civil Code (EGBGB) may be transformed in accordance with the regulations of the present Act applying to commercial associations. Where such a legal person has no members, it may be transformed in accordance with the regulations of the present Act applying to foundations.

#### **Section 318**

##### **Transformations already initiated. Changeover to the single currency**

(1) The regulations of the present Act are not applicable to those transformations for the preparation of which an agreement or a declaration has already been recorded or certified by a notary prior to 1 January 1995, or regarding which an assembly of the owners of shares has been convened prior to 1 January 1995. The regulations applying until this date shall continue to be applicable to these transformations.

(2) Where a transformation is entered in the commercial register after 31 December 1998, the nominal values of the shares in a company limited by shares as the acquiring legal entity, the shares of which still correspond to the denomination of the nominal values applicable until that point in time, shall be redefined in accordance with the regulations applicable until that point in time. Where the present Act refers to the respectively applicable company formation rules as regards a newly formed legal entity, or a legal entity in its new legal form, or where, in the case of a change of legal form to that of a company limited by shares having a different legal form, the present Act leaves unaffected the regulations of other acts concerning the modification of the share capital or of the nominal capital, this shall also apply to the corresponding transitional regulations on the introduction of the single currency set out in the Introductory Act to the Stock Corporation Act (EGAktG) and in the Limited Liability Companies Act (GmbHG); where an application has been filed for entry in the register of a new legal entity, or a legal entity in its new legal form, until 31 December 1998, the company formation rules applying until this date shall continue to be applicable.

#### **Section 319**

##### **Release from liability for pre-existing obligations**

Section 45, section 133 subsection (1) and subsections (3) to (5), sections 157, 167, 173, 224, 237, 249, and 257 are applicable also to liabilities in existence since before 1 January 1995 if

1. the transformation is entered in the register thereafter, and
2. the liabilities become due no later than four (4) years after the point in time at which the transformation's entry in the register has been published by notice, or if they have come into existence after the Act on the Limitation in Time of the Continuing Liability of Shareholders (*Gesetz zur zeitlichen Begrenzung der Nachhaftung von Gesellschaftern*) of 18 March 1994 (published in the Federal Law Gazette (BGBl.) I p. 560) has entered into force.

Section 45, section 49 (4), section 56, section 56f (2), section 57 (2) and section 58 (2) of the Transformation Act in the version promulgated on 6 November 1969 (published in the Federal Law Gazette (BGBl.) I p. 2081) and modified by Article 10 (8) of the Act of 19

December 1985 (published in the Federal Law Gazette (BGBl.) I p. 2355) shall be applicable to liabilities falling due at a later time that had been in existence before the Act on the Limitation in Time of the Continuing Liability of Shareholders of 18 March 1994 (published in the Federal Law Gazette (BGBl.) I p. 2081) entered into force, subject to the proviso that the period of limitation shall amount to one (1) year. In those cases in which the laws applicable thus far did not provide for the possibility of transformation, the liabilities set out in the second sentence shall become statute-barred in accordance with the regulations cited therein.

**Section 320**  
**Repeal of the Transformation Act 1969**

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**Section 321**  
**Transitional regulation on the Act Transposing into National Law the Directive on the Exercise of Certain Rights of Shareholders in Listed Companies and on the Third Act Amending the Transformation Act**

- (1) In the case governed by section 15 (2), first sentence, the interest rate applicable for the period ending 1 September 2009 shall continue to apply.
- (2) Section 16 (3), third sentence, no. 2 in the version of the Act Transposing into National Law the Directive on the Exercise of Certain Rights of Shareholders in Listed Companies of 30 July 2009 (published in the Federal Law Gazette (BGBl.) I p. 2479) shall not be applied to procedures releasing certain measures for entry in the register in spite of their having been challenged before the courts, nor shall it be applied to complaint procedures pursued against court decisions, where these procedures were pending prior to 1 September 2009.
- (3) Section 62 subsections (4) and (5), section 63 (2), fifth through seventh sentences, section 64 (1), as well as section 143 in the version of the Third Act Amending the Transformation Act of 11 July 2011 (published in the Federal Law Gazette (BGBl.) I p. 1338) shall apply at the earliest to transformations for which the merger agreement or the agreement governing the division into several enterprises was concluded after 14 July 2011.

**Section 322**  
**Common business**

Where legal entities involved in a division into several enterprises, or in a partial transfer, in accordance with Book 3 or Book 4 jointly manage a business after said division into several enterprises or said partial transfer has entered into force, this common business shall be deemed to be a business in the sense of the term as used in the laws governing the protection against dismissal.

**Section 323**  
**Status under the laws governing the protection against dismissal**

- (1) Where an employee is in a work relationship, prior to a division into several enterprises or a partial transfer in accordance with Book 3 or Book 4 entering into force, with the legal entity transferring assets, the status of such employee under the laws governing the protection against dismissal shall not deteriorate as a result of the division into several enterprises or as a result of the partial transfer; this shall apply for the duration of two (2) years from the point in time at which the division or partial transfer enters into force.
- (2) Where arrangements are made as to the reconciliation of interests in the context of a merger, division into several enterprises, or asset transfer, whereby those employees are listed by name who, following the transformation, are to be assigned to a certain business or part of a business, this assignment of employees may be reviewed by the labour court only for serious flaws.

**Section 324**  
**Rights and obligations in cases of a business being transferred**

Section 613a subsection (1) and subsections (4) through (6) of the Civil Code (BGB) shall not be prejudiced by the effects of a merger, a division into several enterprises, or an asset transfer having been entered in the register.

### **Section 325**

#### **Retention of co-determination rights**

(1) Where, as a result of a spin-off or hive-down in the sense of section 123 subsections (2) and (3), the statutory pre-requisites for the involvement of the employees in the supervisory board cease to exist in a legal entity transferring assets or being acquired, the regulations applying prior to the division into several enterprises shall continue to apply for a period of five (5) years after the spin-off or hive-down has entered into force. This shall not apply if the regulations concerned are based on the pre-requisite of a minimum number of employees comprising the workforce and if the number of employees of the legal entity transferring assets or being acquired that is calculated in accordance with said regulations has been reduced to fewer than, as a general rule, one quarter of this minimum number.

(2) Where the consequence of a division into several enterprises or partial transfer of a legal entity is that a business is divided into several enterprises, and where the rights of the works council, or its right to participation, cease to exist for the businesses that have resulted from the division into several enterprises, it may be agreed in a works agreement or a collective agreement that these rights, and these rights to participation, are to continue in force.

Sections 9 and 27 of the Works Constitution Act (BetrVG) shall remain unaffected.