

Übersetzung durch Samson Übersetzungen GmbH, Dr. Carmen von Schöning.
Translation provided by Samson Übersetzungen GmbH, Dr. Carmen von Schöning.
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Stock Corporation Act

Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), as last amended by Article 9 of the Act of 17 July 2017 (Federal Law Gazette I p. 2446)

Book 1 Stock corporation

Part 1 General regulations

Section 1 Nature of the stock corporation

- (1) The stock corporation is a company having a legal personality of its own. Solely the company's assets shall be liable to the creditors of the company for its obligations.
- (2) The share capital of the stock corporation is divided up into shares of stock.

Section 2 Number of founders

One or several of the individuals acquiring the shares of stock in return for payment of a contribution must be involved in establishing the articles of association (the by-laws).

Section 3 Merchant status conferred by law. Stock exchange listing

- (1) The stock corporation is deemed a trading company even if the purpose of the enterprise does not consist of carrying on a trade.
- (2) Companies listed on the stock exchange in the sense of the present Act are companies whose shares of stock are admitted to trading on a market that is regulated and monitored by officially recognised bodies, that takes place on a regular basis, and that is indirectly or directly accessible to the general public.

Section 4 Business name

The business name of the stock corporation must include the designation "*Aktiengesellschaft*" (stock corporation), or a generally understandable abbreviation of this designation, regardless of whether or not the business name continues to be used pursuant to section 22 of the Commercial Code (HGB) or pursuant to any other statutory regulations.

Section 5 Seat

The company's seat is that location within Germany that has been determined as such in the by-laws.

Section 6

Share capital

The nominal amount of the share capital must be denominated in euros.

Section 7

Minimum nominal amount of the share capital

The minimum nominal amount of the share capital is fifty thousand euros.

Section 8

Form and minimum values of shares of stock

- (1) The shares of stock may be created either as par-value shares or as no-par-value shares.
- (2) Par-value shares must have a value of at least one (1) euro. Any shares of stock having a lower nominal amount are null and void. The issuers of shares of stock shall be liable as joint and several debtors to the holders of such shares for any damages resulting from the issuance. Where the nominal amounts of the shares of stock are higher, they must be denominated in full euros.
- (3) No nominal amount shall attach to no-par-value shares. The no-par-value shares of a company represent equal portions of its share capital. The stake in the share capital allocated to the individual no-par-value share may not be lower than one (1) euro. Subsection (2), second and third sentences, shall apply *mutatis mutandis*.
- (4) For par-value shares, the portion of the share capital they represent shall be determined based on the ratio between their nominal amount and the share capital, while for no-par-value shares, it shall be determined based on the number of shares of stock.
- (5) The shares of stock shall be indivisible.
- (6) The above regulations shall also apply to share participation certificates allotted to stockholders prior to the issuance of the shares of stock (temporary share certificates).

Section 9

Issue price of the shares of stock

- (1) Shares of stock may not be issued at a price lower than their nominal amount or lower than the stake in the share capital allocated to the no-par-value share (minimum issue price).
- (2) Shares of stock may permissibly be issued at a higher price.

Section 10

Shares of stock and temporary share certificates

(1) The shares of stock are registered in the names of their holders. They may be issued as bearer shares if

1. The company is listed on the stock exchange, or
2. The claim to individual certification of the ownership interest is precluded and the global certificate is deposited with any one of the following bodies:
 - a) A securities clearing and deposit bank in the sense of section 1 (3), first sentence, of the Securities Deposit Act (*Depotgesetz*),
 - b) An accredited central securities depository or a recognised third-country central securities depository pursuant to Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 236/2012 (OJ L 257 of 28 August 2014, p. 1), or
 - c) Some other foreign depository complying with the pre-requisites set out in section 5 (4), first sentence, of the Securities Deposit Act.

For as long as, in the case described in the second sentence, no. 2, hereof, the global certificate has not been deposited, section 67 shall apply *mutatis mutandis*.

(2) The shares of stock must be registered in the names of their holders if they are issued prior to the issue price having been fully paid in. The share certificate is to set out the amount of the partial payments made.

(3) Temporary share certificates must be registered in the names of their holders.

(4) Temporary share certificates issued as bearer certificates are null and void. The issuers shall be liable as joint and several debtors to the holders for any damages resulting from the issuance.

(5) The by-laws may preclude or restrict the entitlement of a stockholder to claim individual certification of the ownership interest held.

Section 11

Shares of particular classes of stock

The shares of stock may confer different rights, namely as concerns the distribution of profits and the company's assets. Shares of stock having the same rights shall form a class of stock.

Section 12

Voting right. No multiple voting rights

(1) Each share of stock shall confer the right to vote. According to the regulations of the present Act, preferential stock may be issued as shares of stock without a voting right.

(2) Multiple voting rights are impermissible.

Section 13

Signature on share certificates

It shall suffice for shares of stock and temporary share certificates to be signed by a reproduced signature. The validity of the signature may be made dependent on the observance of a particular form. The requirement as to form must be set out in the certificate.

Section 14

Jurisdiction

Unless otherwise determined, the term "court" as used in the present Act shall refer to the court having jurisdiction at the company's seat.

Section 15

Affiliated enterprises

Affiliated enterprises are legally independent enterprises that, in their relationship *inter se*, are enterprises in which a majority ownership interest is held and enterprises which hold a majority of the ownership interest (section 16), controlled and controlling enterprises (section 17), group member companies (section 18), cross-shareholding enterprises (section 19), or parties to an inter-company agreement (sections 291, 292).

Section 16

Enterprises in which a majority ownership interest is held and enterprises holding a majority of the ownership interest

(1) Where the majority of the shares in a legally independent enterprise belongs to some other enterprise, or where some other enterprise is entitled to the majority of the voting rights (majority interest), the legally independent enterprise is an enterprise in which a majority ownership interest is held, while the other enterprise is an enterprise holding a majority of the ownership interest in same.

(2) The question of which portion of the shares belongs to an enterprise shall be determined, for share capital companies, based on the ratio between the aggregate nominal amount of the shares owned by the enterprise and the nominal capital of the company limited by shares, and for companies that have issued no-par-value shares, it shall be determined based on the number of shares of stock. Treasury shares are to be left unconsidered in

determining the nominal capital of share capital companies, and in determining the number of shares of stock in companies that have issued no-par-value shares. Those shares that belong to some other party for the account of the enterprise shall be equivalent to treasury shares of the enterprise.

(3) The portion of the voting rights to which an enterprise is entitled shall be determined based on the ratio between the number of voting rights that the enterprise may exercise based on the shares belonging to it and the aggregate number of all voting rights. The voting rights conferred by treasury shares and by shares that are equivalent to treasury shares according to subsection (2), third sentence, are not to be included in the aggregate number of all voting rights.

(4) Shares will be deemed to be treasury shares of an enterprise also if they belong to an enterprise controlled by that enterprise, or if they belong to another party for the account of that enterprise, or for the account of an enterprise under its control; where the owner of the enterprise is a sole trader, those shares forming the owner's other assets likewise will be deemed to be treasury shares.

Section 17

Controlled and controlling enterprises

(1) Controlled enterprises are legally independent enterprises on which some other enterprise (controlling enterprise) is able to directly or indirectly exert a controlling influence.

(2) Where a majority ownership interest is held in an enterprise, the assumption is that said enterprise is controlled by the enterprise holding a majority ownership interest in same.

Section 18

Group of enterprises and group member companies

(1) Where a controlling enterprise and one or several controlled enterprises are combined under the common management of the controlling enterprise, they form a group; the individual enterprises are group member companies. Where a control agreement is in place between enterprises (section 291), or where one enterprise has been integrated into another (section 319), the enterprises are to be regarded as enterprises combined under common management. The assumption is that a controlled enterprise forms a group with the controlling enterprise.

(2) Where legally independent enterprises are combined under common management without one enterprise being controlled by the other, they likewise form a group of enterprises; the individual enterprises are group member companies.

Section 19

Cross-shareholding enterprises

(1) Cross-shareholding enterprises are enterprises legally structured as a share capital company that have their seat in Germany and are affiliated with each other as a result of each enterprise owning more than one quarter of the shares of stock in the respective other enterprise. Section 16 subsection (2), first sentence, and subsection (4) shall apply in establishing whether or not an enterprise owns more than one quarter of the shares of stock in the respective other enterprise.

(2) Where a cross-shareholding enterprise holds a majority interest in the other enterprise, or where one enterprise is able to indirectly or directly exert a controlling influence on the other enterprise, the former is to be regarded as the controlling enterprise and the latter is to be regarded as the controlled enterprise.

(3) Where each of the cross-shareholding enterprises holds a majority interest in the respective other enterprise, or where each enterprise is able to indirectly or directly exert a controlling influence on the respective other enterprise, both enterprises shall be deemed to be controlling and controlled enterprises.

(4) Section 328 does not apply to enterprises that are controlling or controlled enterprises pursuant to subsection (2) or subsection (3).

Section 20

Notification obligations

(1) As soon as more than one quarter of the shares in a stock corporation having its seat in Germany belongs to an enterprise, said enterprise is to notify the company of this fact without undue delay and in writing. Section 16 subsection (2), first sentence, and subsection (4) shall apply in establishing whether more than one quarter of the shares of stock belongs to an enterprise.

(2) For purposes of the notification obligation pursuant to subsection (1), the shares of stock belonging to the enterprise shall also include those shares of stock

1. Regarding which the enterprise, an enterprise under its control, or some other party acting for the account of the enterprise, or for the account of an enterprise under its control, may demand that title to such shares be transferred;

2. That the enterprise, an enterprise under its control, or some other party acting for the account of the enterprise, or for the account of an enterprise under its control, is obliged to purchase.

(3) Where the enterprise is a share capital company, it is to also notify the company, without undue delay and in writing, as soon as it holds more than a quarter of the shares of stock, not including the shares governed by subsection (2).

(4) As soon as the enterprise holds a majority interest (section 16 (1)), it is to notify the company of this fact as well, and shall do so without undue delay and in writing.

(5) Where the ownership interest ceases to exist in the amount requiring notification pursuant to subsections (1), (3), or (4), the company is to be notified of this fact without undue delay and in writing.

(6) The company is to give notice of the existence of an ownership interest, of which it has been notified pursuant to subsection (1) or (4), in its publications of record and shall do so without undue delay; in this context, the enterprise holding said ownership interest is to be identified. If the company is notified that the ownership interest has ceased to exist in an amount requiring notification pursuant to subsection (1) or (4), notice of this fact as well shall be given without undue delay in the company's publications of record.

(7) No rights attaching to shares of stock belonging to an enterprise that is subject to the notification obligation pursuant to subsection (1) or (4) shall exist, neither for the enterprise nor for an enterprise under its control, nor for some other party acting for the account of the enterprise, or for the account of an enterprise under its control, for as long as the enterprise fails to comply with the notification obligation. This shall not apply to any claims governed by section 58 (4) and section 271, provided the failure to provide notification was not intentional and the notification has been subsequently provided.

(8) Subsections (1) to (7) shall not apply to shares of stock of an issuer in the sense of section 33 (4) of the Securities Trading Act (WpHG).

Section 21

Notification obligations of the company

(1) As soon as the company holds more than a quarter of the shares in some other share capital company having its seat in Germany, it is to notify the respective enterprise in which it holds such ownership interest, and shall do so without undue delay and in writing. Section 16 subsection (2), first sentence, and subsection (4) shall apply *mutatis mutandis* in establishing whether the company owns more than a quarter of the shares.

(2) As soon as the company holds a majority interest (section 16 (1)) in some other enterprise, it is to notify the enterprise in which it holds such majority interest, and shall do so without undue delay and in writing.

(3) Where the ownership interest has ceased to exist in the amount requiring notification pursuant to subsection (1) or (2), the company is to notify the other enterprise, and shall do so without undue delay and in writing.

(4) No rights attaching to shares belonging to a company that is subject to the notification obligation pursuant to subsection (1) or (2) shall exist for as long as the company fails to comply with the notification obligation. Section 20 (7), second sentence, shall apply *mutatis mutandis*.

(5) Subsections (1) to (4) shall not apply to shares of stock of an issuer in the sense of section 33 (4) of the Securities Trading Act (WpHG).

Section 22

Proof of ownership interest regarding which a notification has been issued

An enterprise that has been notified pursuant to section 20 subsections (1), (3), or (4), or pursuant to section 21 subsection (1) or (2), may demand at any time that it be provided with proof of the existence of the ownership interest.

Part 2

Formation of the company

Section 23

Establishment of the by-laws

(1) The by-laws must be established by way of being recorded by a notary. Authorised representatives may act only if they have a power of attorney certified by a notary.

(2) The deed is to set out the following particulars:

1. The founders;
2. For par-value shares: the nominal amount; for no-par-value shares: their number, the issue price, and, if several classes of stock exist, the classes of the stock that each founder will acquire;
3. The amount of the share capital that has been paid in.

(3) The by-laws must determine:

1. The company's business name and its seat;
2. The purpose of the enterprise; specifically, industrial and trade enterprises are to provide details regarding the nature of the products and goods that are to be manufactured and traded;
3. The amount of the share capital;
4. The division of the share capital either into par-value shares or into no-par-value shares; for par-value shares, their nominal amounts and the number of the shares per nominal amount are to be cited; for no-par-value shares, their number; furthermore, if several classes of stock exist, the class of the stock and the number of shares of stock making up each class.
5. Whether the shares of stock are issued as bearer shares or registered in the names of their holders;
6. The number of members the management board is to have, or the rules according to which this number will be established.

(4) Furthermore, the by-laws must include determinations as to the formal requirements applying to the company's publications by notice.

(5) The by-laws may deviate from the regulations of the present Act only where this has been expressly permitted. Supplementing the by-laws by additional determinations is permissible unless the present Act provides conclusively for the matter.

Section 24

(repealed)

Section 25

Publications of the company by notice

Where the law or the by-laws determine that a notice by the company is to be published in the company's publications of record, such notice is to be given in the Federal Gazette (*Bundesanzeiger*).

Section 26

Special benefits. Formation expenses

- (1) Any special benefit granted to an individual stockholder or to a third party must be specified in the by-laws, with the beneficiary being designated.
- (2) The total cost charged to the company by way of providing indemnification or granting a reward to stockholders or other persons for the formation of the company, or for the preparations for same, is to be specified separately in the by-laws.
- (3) Without this specification, the contracts as well as the legal transactions serving their implementation shall have no validity vis-à-vis the company. Following the entry of the company in the Commercial Register, it will not be possible to remedy such invalidity by amending the by-laws.
- (4) It is possible to amend the specifications only once the company has been entered in the Commercial Register for five (5) years.
- (5) Only once the company has been entered in the Commercial Register for thirty (30) years and at least five (5) years have lapsed since the legal relationships on which the specifications are based have been wound up will it be possible to cancel, by way of amending the by-laws, the determinations made in the by-laws regarding the specifications.

Section 27

Contributions in kind, acquisitions of assets; repayment of contributions

- (1) Where stockholders are to make contributions that do not consist of paying in the issue price of the shares (contributions in kind), or where the company is to acquire facilities or other assets that already exist or that are yet to be created (acquisitions of assets), the by-laws must specify the following: the object of the contribution in kind or of the acquisition of assets, the person from whom the company is acquiring such object, and the nominal amount – in the case of no-par-value shares: the number – of the shares of stock to be granted for the contribution in kind, or the remuneration to be granted for the acquisition of assets. Where the company is to acquire an asset for which remuneration is granted that is to be set off from the contribution made by a stockholder, this shall be deemed a contribution in kind.
- (2) Contributions in kind or acquisitions of assets may consist only of such assets the economic value of which it is possible to establish; obligations to provide services cannot serve as contributions in kind or acquisitions of assets.
- (3) Where the cash contribution made by a stockholder, when seen in economic terms and by reason of an arrangement made in the context of the acquisition of the cash contribution, is to be assessed as a contribution in kind, either as a whole or in part (hidden contribution in kind), this shall not release the stockholder from the obligation to make a contribution. However, the contracts concluded for the contribution in kind and the legal transactions serving their implementation shall not be invalid. The value of the asset as given at the time an application is filed with the Commercial Register for entry of the company in same, or at the time at which the asset is made available to the company should this be later, shall be set off from the continuing obligation of the stockholder to make a cash contribution. Such set-off shall not be performed prior to the company's having been entered in the Commercial Register. It is incumbent on the stockholder to prove that the asset is of sound value.
- (4) Where an agreement has been made with the stockholder prior to the contribution having been made, according to which he is to receive performance that is tantamount, in economic terms, to repayment of the contribution, and this performance is not to be adjudged a hidden contribution in kind in the sense of subsection (3), then this shall release the stockholder from his obligation to make a contribution only in those cases in which the performance is

covered by a fully recoverable claim to restitution that is due at any point in time, or that may become due by the company issuing a termination with immediate effect. Such performance, or the agreement of such performance, is to be set out in the application for entry in the register pursuant to section 37.

(5) Section 26 (4) shall apply to the amendment of specifications that have been made in a legally effective manner, while section 26 (5) shall apply to the cancellation of the determinations made in the by-laws.

Section 28

Founders

The stockholders who have established the by-laws are the founders of the company.

Section 29

Constitution of the company

The company is constituted upon all shares of stock having been acquired by the founders.

Section 30

Appointment of the supervisory board, of the management board, and of the auditor of the annual accounts

(1) The founders are to appoint the first supervisory board of the company and the auditor of the accounts for the first complete or incomplete financial year. The appointment must be recorded by a notary.

(2) The regulations governing the appointment of members of the supervisory board representing the company's employees shall not apply to the composition and appointment of the first supervisory board.

(3) The members of the first supervisory board may not be appointed for a term of office extending beyond the time at which that general meeting is closed that has adopted a resolution regarding the approval of the management's actions during the first complete or incomplete financial year and regarding the discharge to be granted to the management. The management board is to publish by notice, in due time prior to expiry of the first supervisory board's term of office, the statutory regulations that, in its view, are to govern the composition of the next supervisory board; sections 96 to 99 shall apply.

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

Section 31

Appointment of the supervisory board where the company is formed on the basis of contributions in kind

(1) Where the by-laws specify, as the object of a contribution in kind or of an acquisition of assets, the contribution or acquisition of an enterprise or a part of an enterprise, the founders are to appoint only such number of members to the supervisory board that the general meeting is to elect following the contribution or acquisition, without being bound by nominations, and are to do so according to the statutory regulations that, in the founders' view, govern the composition of the supervisory board. However, if that number is no more than two (2) members of the supervisory board, the founders are to appoint three (3) members of the supervisory board.

(2) Unless the by-laws stipulate otherwise, the supervisory board appointed pursuant to subsection (1), first sentence, shall have a quorum if half of its members, at a minimum, however, three (3) of its members, participate in the adoption of resolutions.

(3) Without undue delay following the contribution or acquisition of the enterprise or of the part of an enterprise, the management board is to publish by notice the statutory regulations governing, in its view, the composition of the supervisory board. Sections 97 to 99 shall apply *mutatis mutandis*. The members of the supervisory board then in office shall cease to so hold office only if the supervisory board is to be constituted according to other regulations than those the founders believed to govern, or if the founders appointed three (3) members

of the supervisory board, while the supervisory board in fact is to also comprise members of the supervisory board representing the employees.

(4) Subsection (3) shall not apply if the enterprise or the part of an enterprise is contributed or acquired only after the management board has published the notice pursuant to section 30 (3), second sentence.

(5) Section 30 (3), first sentence, shall not apply to members of the supervisory board representing the employees who are appointed pursuant to subsection (3).

Section 32

Formation report

(1) The founders are to submit a written report regarding the process by which the company was formed (formation report).

(2) The formation report shall set out the significant circumstances governing the assessment of the performance for contributions in kind or acquisitions of assets as being a fair equivalent. In this context, the formation report is to include the following information.

1. The preceding legal transactions that were targeted at the acquisition by the company;
2. The acquisition costs and production costs incurred in the past two (2) years;
3. In the case of an enterprise being transferred to the company: the operating profits generated in the past two (2) financial years.

(3) Furthermore, the formation report is to set out whether and in which scope shares of stock have been acquired, in the context of the formation, for the account of a member of the management board or of the supervisory board and whether a member of the management board or of the supervisory board has claimed a special benefit for himself, or an indemnification or reward for the formation or the preparations for same, and if so, which manner of benefit, indemnification, or reward was so claimed.

Section 33

Audit of the formation. General provisions

(1) The members of the management board and of the supervisory board are to audit the process by which the company was formed.

(2) Moreover, an audit is to be performed by one or several auditors (formation auditors) where

1. A member of the management board or of the supervisory board is among the founders, or
2. Shares of stock have been acquired at formation for the account of a member of the management board or of the supervisory board, or
3. A member of the management board or of the supervisory board has claimed a special benefit for himself, or an indemnification or reward for the formation or the preparations for same, or
4. The formation involves contributions in kind or acquisitions of assets.

(3) In the cases governed by subsection (2) nos. 1 and 2, the officiating notary (section 23 (1), first sentence) may, on the instructions of the founders, perform the audit in the stead of a formation auditor; the provisions governing the formation audit shall apply *mutatis mutandis*. Where it is not the notary performing the audit, the court shall appoint the formation auditors. A complaint may permissibly be lodged against the decision taken.

(4) Solely the following should be appointed as formation auditors where the audit does not require any other knowledge:

1. Persons having sufficient prior training and experience in accounting;

2. Auditing firms, provided that at least one of their legal representatives has sufficient prior training and experience in accounting.

(5) No-one may be appointed as formation auditor who is not eligible pursuant to section 143 (2) to serve as a special auditor. The same shall apply where the founders or persons for the account of whom the founders have acquired shares of stock are able to substantially influence on how the persons or auditing firms manage their business affairs.

Section 33a

Formation of the company on the basis of contributions in kind without the formation being subjected to an external audit

(1) Where the formation involves contributions in kind or acquisitions of assets (section 33 (2) no. 4), its audit by formation auditors may be refrained from insofar as the following are to be contributed:

1. Transferable securities or money market instruments in the sense of section 2 subsections (1) and (2) of the Securities Trading Act (WpHG), provided such securities or instruments are valued at the weighted average price at which they were traded, in the course of the last three (3) months prior to the day of their in fact being contributed, on one or several organised markets in the sense of section 2 (11) of the Securities Trading Act (WpHG),

2. Other assets than those set out in no. 1, if a valuation is used as basis that an independent expert having sufficient prior training and experience has identified in accordance with generally accepted valuation principles, using the fair value, and if the valuation cut-off date does not precede by more than six (6) months the date on which the contribution was in fact made.

(2) Subsection (1) shall have no application where the weighted average price of the securities or money market instruments (subsection (1) no. 1) has been significantly influenced by exceptional circumstances, or if it is to be assumed that due to new circumstances, or circumstances that have become newly known, the fair value of the other assets (subsection (1) no. 2) will be significantly lower, on the date on which they are in fact contributed, than the value assumed by the expert.

Section 34

Scope of the formation audit

(1) The audit by the members of the management board and of the supervisory board, as well as the audit by the formation auditors, is to cover in particular the following questions:

1. Whether or not the information provided by the founders regarding the acquisition of the shares of stock, regarding the contributions to the share capital, and regarding the specifications pursuant to sections 26 and 27, is accurate and complete;

2. Whether or not the value of the contributions in kind or acquisitions of assets is at least equivalent to the minimum issue price of the shares of stock to be allotted in return for said contributions or acquisitions, or to the value of the performance to be provided therefor.

(2) A written report is to be submitted regarding each audit, with the above circumstances being presented therein. The report is to describe the object of each contribution in kind or acquisition of assets and is to state which valuation methods were used in assessing the value. Inasmuch as an external formation audit is refrained from pursuant to section 33a, providing this information may be forgone in the audit report prepared by the members of the management board and of the supervisory board, as may the observations set out in subsection (1) no. 2.

(3) One copy of the report by the formation auditors is to be submitted to each of the court and the management board. Any entity or individual may inspect the report at the court.

Section 35

Differences of opinion between founders and formation auditors. Remuneration and expenditures of the formation auditors

- (1) The formation auditors may demand that the founders provide them with all clarification statements and proof necessary to perform the audit with the requisite skill and care.
- (2) In the case of differences of opinion between the founders and the formation auditors as regards the scope in which the founders are to provide clarification statements and proof, the court shall take the final decision. There shall be no right of appeal against the court's decision. For as long as the founders refuse to comply with the decision, no audit report shall be submitted.
- (3) The formation auditors shall be entitled to reimbursement for their reasonable cash expenditures and to remuneration for their activities. The court shall establish the expenditures and the remuneration. A complaint may permissibly be lodged against the decision taken; a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement may be pursued in accordance with the Code of Civil Procedure (ZPO).

Section 36

Application for entry of the company in the register

- (1) All founders and members of the management board and of the supervisory board are to file the application with the court for having the company entered in the Commercial Register.
- (2) The application for entry in the register may be filed only when the amount called has been duly and properly paid in for each share of stock, unless contributions in kind have been agreed (section 54 (3)), and when it is definitively available to be disposed over by the management board at its discretion, unless said amount has already been used to pay the taxes and fees accruing at formation.

Section 36a

Payment or rendering of contributions

- (1) In the case of contributions in cash, the amount called (section 36 (2)) must comprise at least one quarter of the minimum issue price and, where the shares of stock are issued at a price higher than the minimum issue price, also the additional amount.
- (2) Contributions in kind are to be rendered in full. Where the contribution in kind consists of the obligation to transfer an asset to the company, it must be possible to render this contribution within five (5) years of the company having been entered in the Commercial Register. The value must correspond to the minimum issue price and, where the shares of stock are issued at a price higher than the minimum issue price, also the additional amount.

Section 37

Content of the application for entry in the register

- (1) The application for entry in the register is to include the declaration as to the pre-requisites set out in section 36 (2) and section 36a having been met; in this context, the amount in which the shares of stock are issued and the amount paid in therefor are to be stated. Proof is to be submitted as to the amount paid in definitively being available to be disposed over by the management board at its discretion. Where the amount has been paid in, pursuant to section 54 (3), by being credited to an account, such proof is to consist of a corresponding confirmation from the institution maintaining the account. Said institution shall be liable to the company for the confirmation being accurate. Where the amount paid in has been used to pay taxes and fees, proof is to be submitted as regards the nature and amount of such payments made.
- (2) In the application for entry in the register, the members of the management board are to give an assurance that no circumstances are given that would disqualify them from being appointed pursuant to section 76 (3), second sentence, nos. 2 and 3, or pursuant to the third sentence of said provision, and that they have been instructed concerning their unrestricted

obligation to provide information to the court. Their instruction pursuant to section 53 (2) of the Act on the Federal Central Criminal Register (BZRG) may be performed in writing; they may also be instructed by a notary or a notary appointed in a foreign country, by a representative of a comparable profession in the field of legal advisory services, or by a consular officer.

(3) Furthermore, the application for entry in the register is to state the following:

1. A business address within Germany,
2. The nature and scope of the power of representation conferred upon the members of the management board.

(4) The following are to be attached to the application for entry in the register:

1. The by-laws as well as the records and documents by which the by-laws have been established and by which the shares of stock have been acquired by the founders;
2. In the case governed by sections 26 and 27, the contracts on which the determinations are based, or that were concluded by way of implementing them, and a calculation of the formation expenses the company is to bear; the calculation is to set out the remuneration in each case by its nature and amount, and is to individually list the recipients;
3. The records and documents as to the appointment of the management board and of the supervisory board;
- 3a. A list of the members of the supervisory board, providing their family name, first name, profession exercised, and place of residence;
4. The formation report and the audit reports prepared by the members of the management board and of the supervisory board as well as the audit reports prepared by the formation auditors, along with the supporting records and documents.
5. (repealed)

(5) Section 12 (2) of the Commercial Code (HGB) shall apply *mutatis mutandis* to the submission of documents pursuant to the present Act.

(6) (repealed)

Section 37a

Application for entry in the register in the case of the company being formed on the basis of contributions in kind without the formation being subjected to an external audit

(1) Where an external audit of the formation is refrained from pursuant to section 33a, this is to be declared in the application for entry in the register. The object of each contribution in kind or acquisition of assets is to be described. The application for entry in the register must include the declaration that the value of the contributions in kind or acquisitions of assets is at least equivalent to the minimum issue price of the shares of stock to be allotted in return for said contributions or acquisitions, or to the value of the performance to be provided therefor. The value, the source of the valuation, and the valuation method applied are to be stated.

(2) Furthermore, the parties filing the application for entry in the register are to also give an assurance that they have not become aware of any exceptional circumstances that, in the course of the last three (3) months prior to the day on which the securities or money market instruments were in fact contributed, might have significantly influenced the weighted average price of said securities or money market instruments in the sense of section 33a (1) no. 1, nor of any circumstances indicating that as a result of new circumstances, or circumstances that have become newly known, the fair value for the assets in the sense of

section 33a subsection (1) no. 2 is significantly lower, on the date on which they are in fact contributed, than the value assumed by the expert.

(3) The following are to be attached to the application for entry in the register:

1. Documents regarding the assessment of the weighted average price at which the securities or money market instruments to be contributed were traded on an organised market in the course of the last three (3) months prior to the day on which they were in fact contributed,
2. Any expert opinion on which the valuation is based in the cases governed by section 33a (1) no. 2.

Section 38 **Court review**

(1) The court is to review whether or not the company has been duly and properly established and an application for its entry in the register has been duly filed. Where this is not the case, the court is to refuse to enter the company in the register.

(2) The court may also refuse to enter the company in the register if the formation auditors declare, or if it is obvious, that the formation report or the audit report prepared by the members of the management board and of the supervisory board is inaccurate or incomplete or does not comply with statutory regulations. The same shall apply if the formation auditors declare, or if the court is of the opinion, that the value of the contributions in kind or acquisitions of assets is less, to a greater than negligible degree, than the minimum issue price of the shares to be allotted therefor or than the value of the performance to be provided therefor.

(3) Where the application for entry in the register includes the declaration pursuant to section 37a (1), first sentence, the court is to exclusively review whether or not the pre-requisites set out in section 37a have been met in determining whether the contributions in kind or acquisitions of assets are of sound value. Solely in cases of an obvious and significant over-valuation does the court have the option of refusing to enter the company in the register.

(4) The court may refuse to enter the company in the register pursuant to subsection (1) by reason of an inadequate provision having been made in the by-laws, of a provision having been omitted therein, or a provision being null and void, only inasmuch as this provision, its omission or the fact that it is null and void

1. Concerns facts or legal relationships that must be provided for in the by-laws pursuant to section 23 (3) or as a result of other, mandatory statutory regulations, or that are to be entered in the Commercial Register or to be published by notice by the court,
2. Violates regulations that exclusively serve, or mainly serve, to protect the creditors of the company or that otherwise serve the public interest, or
3. Will cause the by-laws to be null and void.

Section 39 **Content of the entry in the register**

(1) In entering the company in the register, the following particulars are to be included: the business name and the seat of the company, a business address within Germany, the purpose of the enterprise, the amount of the share capital, the day on which the by-laws were established, and the members of the management board. Where an application is filed to enter in the Commercial Register a person authorised to receive declarations of intent and to accept documents served to the company and such person has an address within Germany, this information is to be entered as well; vis-à-vis third parties, the authorisation to receive declarations of intent and to accept service of documents shall be deemed to continue in force until it is cancelled in the Commercial Register and such cancellation has been published by notice unless the third party was aware of the fact that no authorisation to receive service of documents existed. Furthermore, the type of power of representation

conferred upon the members of the management board is to be entered in the Commercial Register as well.

(2) Where the by-laws include provisions governing the duration of the company or its authorised capital, these provisions as well are to be entered in the register.

Section 40 (repealed)

Section 41

Actions taken in the name of the company prior to its entry in the register. Prohibited issuance of shares of stock

(1) Prior to entry in the Commercial Register, a stock corporation shall not exist as such. Anyone acting in the name of the company prior to its having been entered in the register shall be personally liable; where several individuals take any action, they shall be jointly and severally liable.

(2) Where the company assumes an obligation that was entered into on its behalf prior to the company having been registered, and does so by way of a contract with the debtor such that the company takes the stead of the current debtor, this assumption of the obligation shall not require the consent of the creditor in order to be valid if the assumption of the obligation is agreed within three (3) months of the company having been entered in the register and the creditor is notified of this assumption of the obligation by the company or the debtor.

(3) The company may not assume any obligations arising from contracts that have not been specified in the by-laws and that concern special benefits, formation expenses, contributions in kind, or acquisitions of assets.

(4) Prior to entry of the company in the register, share interests may not be transferred, while shares of stock or temporary share certificates may not be issued. Any shares of stock or temporary share certificates issued previously shall be null and void. The issuers shall be jointly and severally liable to the holders for any damages resulting from the issuance.

Section 42 Single-member company

Where all shares of stock belong to a single stockholder, or to one stockholder other than the company, a corresponding notice is to be submitted to the Commercial Register without undue delay, providing the family name, first name, date of birth, and place of residence of the sole stockholder.

Sections 43 and 44 (repealed)

Section 45 Relocation of the seat

(1) Where the company's seat is moved to another location within Germany, an application for entry of this relocation is to be filed with the court at the company's current seat.

(2) Where the seat is moved to a location outside of the judicial district of the court at the company's current seat, this court is to give notice of the relocation, *ex officio*, to the court at the new seat, and shall do so without undue delay. The entries made for the current seat as well as the records and documents kept safe by the court thus far having jurisdiction are to be attached to the notification; where the register is maintained in electronic form, the entries and the documents are to be transmitted by means of electronic communication. The court at the new seat is to review whether the relocation was resolved upon in due and proper manner and whether section 30 of the Commercial Code (HGB) has been observed. Where this is the case, the court is to enter the relocation of the seat in the register and is to include the entries of which it has been notified without performing any further reviews. The relocation of the seat shall enter into force upon its being entered in the register. The court at the company's current seat is to be notified of the entry. This court is to perform, *ex officio*, the requisite cancellations.

(3) Where the seat is moved to a different location within the judicial district of the court at the company's current seat, the court is to review whether the relocation of the seat was resolved upon in due and proper manner and whether section 30 of the Commercial Code (HGB) has been observed. Where this is the case, the court is to enter the relocation of the seat in the register. The relocation of the seat shall enter into force upon its being entered in the register.

Section 46

Liability and responsibilities of the founders

(1) The founders shall be liable as joint and several debtors to the company for the accuracy and completeness of the statements that were made for purposes of forming the company, such statements concerning the acquisition of the shares of stock, amounts paid in for the shares of stock, appropriation of the amounts paid in, special benefits, formation expenses, contributions in kind, and acquisitions of assets. Furthermore, they shall be responsible for ensuring that any entity determined as the entity that is to accept payments towards the share capital (section 54 (3)) is suited for this purpose and that the amounts paid in are available to be disposed over by the management board at its discretion. Notwithstanding their obligation to provide compensation for the damage that may otherwise accrue, they are to make payments that have been failed to be made and are to provide compensation for any remuneration that is not included as part of the formation expenses.

(2) Where the company's founders intentionally or grossly negligently cause damage to same through contributions, acquisitions of assets, or formation expenses, all founders shall be liable as joint and several debtors to compensate the company for such damage.

(3) A founder shall be released from these obligations if he was neither aware of the facts giving rise to the obligation to provide compensation nor had reason to be aware of them in exercising the due care of a prudent businessperson.

(4) Where the company suffers a loss because a stockholder is unable to pay his debts as they become due or because he is unable to make a contribution in kind, those founders shall be liable as joint and several debtors to provide compensation to the company who accepted the stockholder's taking an ownership interest in the company in spite of being aware of his inability to pay his debts as they become due or his inability to perform in accordance with his obligations.

(5) Besides the founders, those persons shall be liable and responsible in like manner for the account of whom the founders have acquired shares of stock. They cannot rely on their own lack of knowledge of any circumstances of which a founder acting for their account was aware or had reason to be aware.

Section 47

Liability and responsibilities of other persons besides the founders

Besides the founders and the persons for the account of whom the founders have acquired shares of stock, the following shall be liable as joint and several debtors to provide compensation to the company for its damages:

1. Anyone who knew or, in light of the circumstances given, had reason to assume at the time he received any remuneration that is not included, contrary to regulations, as part of the formation expenses, that the concealment was intentional or that it occurred, or anyone who knowingly cooperated in and assisted with the concealment;

2. Anyone who, in the case of damage caused intentionally or grossly negligently to the company through contributions or acquisitions of assets, knowingly cooperated in and assisted with causing such damage;

3. Anyone who publicly announces the shares of stock prior to the company having been entered in the Commercial Register, or in the first two (2) years following the company's being entered in the register, in order to place such shares of stock on the market, if he was aware of the inaccuracy or incompleteness of the statements that were

made for the purpose of the company's formation (section 46 (1)), or if he was aware or had reason to be aware, in exercising the due care of a prudent businessperson, of the damage caused to the company by contributions or acquisitions of assets.

Section 48

Liability and responsibilities of the management board and of the supervisory board

Any members of the management board and of the supervisory board violating their obligations in the course of the company's formation shall be liable as joint and several debtors to compensate the company for the damage resulting therefrom; in particular, they shall be responsible for ensuring that an entity determined as the entity that is to accept payments towards the share capital (section 54 (3)) is suited for this purpose and that the amounts paid in are available to be disposed over by the management board at its discretion. Sections 93 and 116, to the exception of section 93 subsection (4), third and fourth sentences, and subsection (6) of said section, shall apply in all other cases as regards the duty to exercise skill and care as well as the liability and responsibilities at formation of the members of the management board and of the supervisory board.

Section 49

Liability and responsibilities of the formation auditors

Section 323 subsections (1) to (4) of the Commercial Code (HGB) governing the liability and responsibilities of the auditor of the annual accounts shall apply *mutatis mutandis*.

Section 50

Waiver and compromise

The company may waive its claims to compensation, or conclude a compromise regarding these claims, vis-à-vis the founders, the persons liable besides the founders, and the members of the management board and of the supervisory board (sections 46 to 48) only once three (3) years have lapsed since entry of the company in the Commercial Register, and only in those cases in which the general meeting approves this being done and no minority, the aggregate of whose shares is at least equivalent to one tenth of the share capital, raises an objection and has it recorded in the minutes. The above limitation in time shall not apply where the party obligated to provide compensation is unable to pay his debts as they become due and concludes a compromise with his creditors in order to avert insolvency proceedings or if the compensation obligation is provided for in an insolvency plan.

Section 51

Prescription of the claims to compensation

The company's claims to compensation pursuant to sections 46 to 48 shall become statute-barred within five (5) years. The period of prescription shall commence running upon the company being entered in the Commercial Register or, if the measure obligating the party to provide compensation was taken at a later time, upon the measure being so taken.

Section 52

Post-formation agreements

(1) Agreements of the company with founders or with stockholders participating in the company with an ownership interest of more than 10 percent of the share capital, pursuant to which agreements the company is to purchase existing facilities or facilities yet to be created or other assets in return for remuneration that is in excess of one tenth of the share capital, and which agreements are concluded in the course of the first two (2) years following the company's entry in the Commercial Register, shall enter into force only if the general meeting has consented to same and by being entered in the Commercial Register. Where the general meeting has not granted its consent or the purchase has not been entered in the Commercial Register, the legal transactions serving its implementation shall likewise be invalid.

(2) Unless different requirements as to form have been stipulated, an agreement pursuant to subsection (1) must be made in writing. From the time onwards at which the general meeting is convened that is to adopt a resolution as to the consent, the agreement is to be kept available at the company's business premises for inspection by the stockholders. Upon a corresponding demand being made, each stockholder is to be provided with a copy without undue delay. The obligations pursuant to the second and third sentences shall not be applicable if the agreement is accessible, for the same period of time, via the company's website. The agreement is to be made accessible at the general meeting. At the outset of the meeting, the management board is to give a presentation on the agreement. The agreement is to be attached to the minutes of the meeting as an annex.

(3) Prior to the general meeting adopting a resolution, the supervisory board is to review the agreement and is to submit a written report (report on post-formation agreements). Section 32 subsections (2) and (3) governing the formation report shall apply *mutatis mutandis* to the report on post-formation agreements.

(4) Furthermore, an audit is to be performed by one or several formation auditors prior to the adoption of the resolution. Section 33 subsections (3) to (5), sections 34, 35 governing the formation audit shall apply *mutatis mutandis*. Subject to the pre-requisites set out in section 33a, the audit by the formation auditors may be refrained from.

(5) The resolution adopted by the general meeting shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. Where the agreement is concluded in the first year following the company's entry in the Commercial Register, the shares of the consenting majority must furthermore be equivalent at a minimum to one quarter of the aggregate share capital. The by-laws may stipulate a greater majority ratio of capital instead of the above majorities and may impose further requirements.

(6) Following consent having been granted by the general meeting, the management board is to file an application for entry of the agreement in the Commercial Register. The report on post-formation agreements and the report of the formation auditors, along with the supporting records and documents, are to be attached to the application for entry in the register. Where an external formation audit is refrained from pursuant to subsection (4), third sentence, section 37a shall apply *mutatis mutandis*.

(7) Where there are concerns regarding the entry in the register because the formation auditors declare, or because it is obvious, that the report on post-formation agreements is inaccurate or incomplete or does not comply with statutory regulations or that the remuneration granted for the assets to be purchased is excessive, the court shall have the option of refusing to enter the company in the register. Where the application for entry in the register includes the declaration pursuant to section 37a (1), first sentence, section 38 (3) shall apply *mutatis mutandis*.

(8) The date on which the agreement was concluded and the consent granted by the general meeting are to be entered in the register, as well as the party or parties concluding the agreement with the company.

(9) The above regulations shall not apply if the assets are purchased in the normal course of the company's business, by way of compulsory enforcement, or by trading on the stock exchange.

(10) (repealed)

Section 53

Claims to compensation in the context of post-formation agreements

Sections 46, 47, 49 to 51 governing the company's claims to compensation shall apply *mutatis mutandis* to post-formation agreements. The members of the management board and of the supervisory board shall take the stead of the founders. They are to exercise the due care of a prudent manager faithfully complying with his duties. Inasmuch as periods commence running upon the company being entered in the Commercial Register, the entry of the post-formation agreement in the register shall take the stead of the company's entry in same.

Part 3

Legal relationships of the company and of the shareholders

Section 53a

Equal treatment of stockholders

Subject to the same pre-requisites being given, stockholders are to be treated equally.

Section 54

Principal duty of stockholders

- (1) The duty of the stockholders to make contributions is limited by the issue price of the shares of stock.
- (2) Unless the by-laws specify contributions in kind, the stockholders are to pay in the issue price of the shares of stock.
- (3) The amount called in prior to application for entry of the company in the register may only be paid in in legal tender or by crediting the amount to an account maintained by the company, or the management board, with a credit institution or an enterprise pursuing activities governed by section 53 (1), first sentence, or section 53b subsection (1), first sentence, or subsection (7) of the Banking Act (KWG), such that it is available to be disposed over by the management board at its discretion. Receivables of the management board resulting from these payments towards the contributions shall be deemed receivables of the company.
- (4) The company's claim to having the contributions made shall become statute-barred ten (10) years after it has arisen. Where insolvency proceedings are opened for the company's assets, the prescription shall not commence prior to the expiry of six (6) months after the time at which said proceedings were opened.

Section 55

Incidental duties of the stockholders

- (1) Where the transfer of the shares of stock is bound to the company's consent, the by-laws may impose on stockholders the duty to perform on a recurrent basis, such performance not consisting of money, in addition to making contributions to the share capital. In this context, the by-laws are to determine whether such performance is to be provided in return for monetary consideration or without such monetary consideration. The duty to perform and its scope are to be set out in the share certificates and temporary share certificates.
- (2) The by-laws may stipulate contractual penalties for any case of failure to comply with the duty, or to properly comply with it.

Section 56

No subscription of a company's own shares of stock. Acquisition of shares of stock for the account of the company or by a controlled enterprise or an enterprise in which a majority ownership interest is held

- (1) The company may not subscribe to its own shares of stock.
- (2) A controlled enterprise may not acquire shares of stock in the controlling company, and an enterprise in which a majority ownership interest is held may not acquire shares of stock in the company holding such majority ownership interest, neither as founders nor as subscribers nor by way of exercising a right of exchange or pre-emptive right for newly issued shares of stock conferred in the context of a conditional capital increase. A violation of this regulation will not cause the acquisition to be invalid.
- (3) Anyone who has acquired, as a founder or as a subscriber or by way of exercising a right of exchange or pre-emptive right for newly issued shares of stock conferred in the context of a conditional capital increase, a share of stock for the account of the company or for the account of a controlled enterprise, or of an enterprise in which a majority ownership interest is held, may not rely on the fact that he has not acquired such share of stock for his own account. He shall be liable for the contribution in its full amount, irrespective of any agreements with the company or the controlled enterprise or enterprise in which a majority

ownership interest is held. Prior to his having acquired the share of stock for his own account, he shall not be entitled to any rights attaching to the share of stock.

(4) Where shares of stock are subscribed to in the context of a capital increase such that subsection (1) or (2) is violated, each member of the company's management board shall be liable for the contribution in its full amount. This shall not apply if the member of the management board proves that there is no fault on his part.

Section 57

No restitution of the contributions, no interest accruing to same

(1) The contributions may not be restituted to the stockholders. The payment of the purchase price in the context of a permissible purchase of treasury shares of stock shall not be deemed a restitution. The first sentence shall not apply to performance made where a control agreement or profit and loss absorption agreement (section 291) is in place, or where such performance is covered by a fully recoverable claim vis-à-vis the stockholder to counter-performance or to restitution. Moreover, the first sentence shall not apply to the restitution of a stockholder's loan, nor shall it apply to performance under claims arising from legal transactions that correspond to a stockholder's loan in economic terms.

(2) No commitment may be made to stockholders to pay interest, nor may such interest be disbursed.

(3) Prior to the company being dissolved, solely the net income may be distributed among the stockholders.

Section 58

Appropriation of the surplus for the year

(1) The by-laws may determine that amounts from the surplus for the year are to be allocated to other revenue reserves only in the event that the general meeting approves and establishes the annual accounts. At a maximum, solely half of the surplus for the year may be allocated to other revenue reserves based on such a stipulation of the by-laws. In this context, amounts to be allocated to the statutory reserves and a loss carried forward are to be deducted in advance from the surplus for the year.

(2) Where it is incumbent on the management board and the supervisory board to approve and establish the annual accounts, they may allocate a part of the surplus for the year to other revenue reserves, but no more than half of the surplus for the year. The by-laws may grant authority to the management board and the supervisory board to so allocate a larger or smaller portion of the surplus for the year. The management board and the supervisory board may not allocate any amounts to other revenue reserves on the basis of such stipulation of the by-laws if the other revenue reserves are in excess of half of the share capital, or inasmuch as they would exceed half of the share capital following such allocation. Subsection (1), third sentence, shall apply *mutatis mutandis*.

(2a) Notwithstanding subsections (1) and (2), the management board and the supervisory board may allocate to the other revenue reserves the share of equity capital made up by revaluations for items forming part of the fixed and current assets. The amount of these reserves is to be reported separately on the balance sheet; it may also be stated in the notes.

(3) In the resolution adopted as to the appropriation of the net income, the general meeting may allocate further amounts to the retained income or may carry forward such amounts as profits. Furthermore, the general meeting may also resolve on a different appropriation than that set out the first sentence, or than the distribution among the stockholders, provided the by-laws grant it authority to do so.

(4) The stockholders are entitled to the net income unless its distribution among the stockholders is prohibited by the law or in the by-laws, by a resolution adopted by the general meeting pursuant to subsection (3) or, where the resolution adopted as to the appropriation of the net income has appropriated same to additional expenses, by reason of said resolution. The claim shall be due on the third business day following the resolution

adopted by the general meeting. The resolution adopted by the general meeting or the by-laws may stipulate a due date that is later.

(5) Where the by-laws so provide, the general meeting may also resolve to make a distribution in kind.

Section 59

Interim payment towards the net income

(1) The by-laws may grant authority to the management board to make an interim payment to the stockholders out of the prospective net income once the financial year has expired.

(2) The management board may make an interim payment only if the preliminary accounts drawn up for the expired financial year result in a surplus for the year. At a maximum, the interim payment may consist of half of the amount that remains after those amounts have been deducted from the surplus for the year that, by law or according to the by-laws, are to be allocated to retained income. Furthermore, the interim payment may not exceed half of the net income for the preceding year.

(3) Where an interim payment is planned to be made, this shall require the consent of the supervisory board.

Section 60

Distribution of profits

(1) The stockholders' shares in the profits are determined based on their shares in the share capital.

(2) Where the contributions to the share capital have not been paid in for all shares of stock in the same ratio, the stockholders shall receive in advance, out of the profits eligible for distribution, an amount of four (4) percent of the contributions made. Where the profits do not suffice for this purpose, the amount shall be determined based on a correspondingly lower rate. Contributions made in the course of the financial year shall be taken into account pro-rated by the time that has lapsed since they were made.

(3) The by-laws may stipulate a different type of distribution of profits.

Section 61

Remuneration of collateral performance

Remuneration may be paid for any recurrent performance to which the stockholders are obligated pursuant to the by-laws, in addition to the contributions to the share capital, provided such remuneration is not in excess of the value of the performance, regardless of whether or not net income has been recognised for the year.

Section 62

Liability of stockholders in case of the receipt of prohibited performance

(1) The stockholders are to return to the company any performance they may have received from it in contravention of the regulations of the present Act. Where they have received amounts constituting a participation in the profits, this duty shall be given only if they were aware, or negligently unaware, that they were not entitled to receive such performance.

(2) The company's claim may also be asserted by the creditors of the company inasmuch as they are unable to obtain satisfaction from same. Where insolvency proceedings have been opened for the company's assets, the insolvency administrator or the insolvency monitor shall exercise the right of the company's creditors against the stockholders for the duration of said proceedings.

(3) The claims governed by the present regulations shall become statute-barred after ten (10) years have lapsed since receipt of the performance. Section 54 (4), second sentence, shall apply *mutatis mutandis*.

Section 63

Consequences of late payment of contributions

- (1) The stockholders are to pay in the contributions upon these being called in by the management board. Unless stipulated otherwise in the by-laws, notice of the call letter is to be given in the company's publications of record.
- (2) Stockholders who fail to make payment, in due time, of the amount called in shall pay interest from the date on which said amount falls due at a rate of five (5) percent *per annum*. The assertion of further damages is not precluded.
- (3) The by-laws may specify contractual penalties for the case of contributions not being paid in in due time.

Section 64 **Expulsion of defaulting stockholders**

- (1) Stockholders who fail to make payment, in due time, of the amount called may be set a period of grace, with a reminder being issued previously warning that, once the period has expired to no avail, their shares of stock will be declared forfeited, as will the amounts they have paid in.
- (2) Notice of the period of grace must be given thrice in the company's publications of record. The first notice must be published at least three (3) months, the last at least one (1) month prior to expiry of the period of grace. A period of at least three (3) weeks must lapse between each of the individual notices. Where the transfer of the shares of stock is bound to the consent of the company, then it shall suffice to send, instead of publishing the notices, a single call letter individually addressed to the defaulting stockholders; in this context, a period of grace must be granted amounting to at least one (1) month from receipt of the call letter.
- (3) The shares of stock held by stockholders who, despite the above measures, fail to pay in the amount called, as well as the amounts they have paid in, will be declared forfeited by notice in the company's publications of record; the shares of stock and the amounts paid in shall inure to the benefit of the company. The notice published is to list the shares of stock that have been forfeited along with their distinctive features.
- (4) Instead of the old share certificates, new ones shall be issued; these shall set out, besides the partial payments made, the amount in arrears. Should the company fail to make payment in this amount or in the amounts called in at a later time, the expelled stockholder shall be liable to the company for these amounts.

Section 65 **Payment obligation of preceding endorsers**

- (1) Each of the expelled stockholder's preceding endorsers entered in the share register shall be liable to the company for payment of the amount in arrears inasmuch as this cannot be obtained from the expelled stockholder's subsequent endorsers. The company is to notify the endorser immediately preceding a former stockholder of a call for payment it has issued. It shall be assumed that payment cannot be obtained if this is not received in the course of one (1) month following the call for payment and the notification of the preceding endorser. The new certificate shall be delivered in return for payment of the amount in arrears.
- (2) Each preceding endorser shall be obligated to pay only those amounts that are called in in the course of two (2) years. The period shall commence running on that day on which an application is filed to have the transfer of the share of stock entered in the share register of the company.
- (3) Where no payment of the amount in arrears can be obtained from preceding endorsers, the company is to sell the share of stock without undue delay at the stock exchange price and, should no stock exchange price exist, the company is to sell the shares of stock at public auction. If a public auction at the company's seat does not hold out reasonable prospects of success, the share of stock is to be sold at a location that is suitable. The time and location of the sale at public auction as well as the items to be sold at same are to be published by notice. The expelled stockholder and his preceding endorsers are to be notified separately; the notification may be refrained from if it is not expedient. The publication by

notice must be made and the notification must be issued at least two (2) weeks prior to the sale at public auction.

Section 66

No relief of the stockholders from their obligations to perform

(1) The stockholders and their preceding endorsers cannot be relieved of their obligations to perform pursuant to sections 54 and 65. A claim of the company pursuant to sections 54 and 65 may not permissibly be set off.

(2) Subsection (1) shall apply *mutatis mutandis* to the duty to provide restitution for performance received in contravention of the regulations of the present Act, to the liability of the expelled stockholder in the event of a default, as well as to the obligation of the stockholders to provide compensation for damages resulting from contribution in kind that has not been properly rendered.

(3) Where an ordinary capital reduction is performed, or a capital reduction by way of redeeming shares of stock, such relief will concern, at a maximum, that amount by which the share capital has been reduced.

Section 67

Entry in the share register

(1) Independently of whether or not the ownership interest has been certificated, registered shares of stock are to be entered in the company's share register stating the family name, date of birth, and address of the stockholder, as well as the number of shares held or the share certificate number, and, in the case of par-value shares, their amount. The stockholder is under obligation to provide to the company the particulars set out in the first sentence. The by-laws may stipulate further details as to which pre-requisites must be met for shares of stock belonging to some other party permissibly being entered in a holder's own name.

Shares of stock belonging to a German, EU, or foreign investment entity in accordance with the Investment Code (KAGB), the shares or shares of stock in which are not exclusively held by professional or semi-professional investors, shall be deemed shares of the German, EU, or foreign investment entity also in those cases in which they are co-owned by the investors; where the investment entity does not have a legal personality of its own, they shall be deemed shares of stock in the management company of the investment entity.

(2) Only those parties shall be deemed to be stockholders of the company in their relationship with same who have been entered as such in the share register. However, no voting rights shall attach to entries that are in excess of a maximum threshold specified in the by-laws pursuant to subsection (1), third sentence, or regarding which the by-laws stipulate a disclosure obligation as to the fact that the shares of stock belong some other party, and this obligation has not been complied with. Furthermore, no voting rights shall attach to shares for as long as a demand for information pursuant to subsection (4), second or third sentence, has not been complied with following expiry of the period set.

(3) Where the registered share of stock devolves to some other party, it shall be cancelled and newly entered in the share register upon the corresponding notification having been provided and proof having been submitted.

(4) The credit institutions cooperating in and assisting with the transfer or safekeeping of registered shares of stock are under obligation to transmit to the company the particulars required for maintaining the share register and shall be reimbursed for the costs necessarily incurred. The party entered in the register is to notify the company within a reasonable period, upon the latter's corresponding demand, of the extent to which the shares of stock regarding which he is entered in the share register as a holder in fact belong to him; should this not be the case, he is to provide the particulars set out in subsection (1), first sentence, regarding that party on behalf of whom he is holding the shares. This shall apply *mutatis mutandis* for that party whose data are transmitted pursuant to the second sentence or pursuant to this sentence. Subsection (1), fourth sentence, shall apply *mutatis mutandis*; the first sentence shall apply to the allocation of costs. Where the holder of registered shares of stock is not entered in the share register, the depositary financial institution is under

obligation, upon a corresponding demand being made by the company, to have itself separately entered in the share register, in the stead of the holder, in return for reimbursement by the company for the costs necessarily incurred. Section 125 (5) shall apply *mutatis mutandis*. Where a credit institution is separately entered in the share register only temporarily in the context of registered shares of stock being transferred, this entry shall not trigger any obligations as a result of subsection (2) or pursuant to section 128 and shall not lead to the application of restrictions set out in the by-laws pursuant to subsection (1), third sentence.

(5) Where, in the view taken by the company, someone has been incorrectly entered in the share register as a stockholder, the company may cancel this entry only if it has previously notified the parties involved of the intended cancellation and has set a reasonable period within which said parties may lodge an objection. Where a party involved objects within the period set, no cancellation shall be made.

(6) The stockholder may demand that the company inform him about the data concerning his person that have been entered in the share register. In the case of companies not listed on the stock exchange, the by-laws may make further provisions. The company may use the data contained in the register as well as the data provided pursuant to subsection (4), second and third sentences, in order to fulfil the tasks incumbent on it in its relationship with the stockholders. It may use the data to advertise the enterprise only insofar as the stockholder does not object to this being done. The stockholders are to be appropriately informed on their right to lodge an objection.

(7) The above regulations shall apply *mutatis mutandis* to temporary share certificates.

Section 68

Transfer of registered shares of stock. Restrictions on transferability

(1) Registered shares of stock may also be transferred by endorsement. Articles 12, 13, and 16 of the Bills of Exchange Act (WG) shall apply *mutatis mutandis* as regards the form of the endorsement, the legitimisation of the holder, and his duty to surrender.

(2) The by-laws may make the transfer contingent upon consent being granted by the company. Such consent is to be granted by the management board. However, the by-laws may stipulate that the supervisory board or the general meeting is to adopt a resolution on whether or not to grant consent. The by-laws may specify the reasons for which consent may be refused.

(3) In the case of transfers by endorsement, the company shall be under obligation to review whether the sequence of endorsements corresponds to formal and regulatory requirements; however, the company shall not be obligated to review the signatures.

(4) The above regulations shall apply *mutatis mutandis* to temporary share certificates.

Section 69

Joint holding of a share of stock

(1) Where several beneficiaries are entitled to one share of stock, they may exercise the rights attaching to the share of stock only through a common representative.

(2) They shall be liable as joint and several debtors for the performance under the share of stock.

(3) In cases in which the company is to make a declaration of intent to the stockholder, it shall suffice, where the beneficiaries have not provided the company with the name of a common representative, to make such declaration to one of the beneficiaries. In cases involving several heirs of a stockholder, this shall apply only to declarations of intent made after expiry of one (1) month since the accrual of the estate.

Section 70

Calculation of the period of possession of the share of stock

Where the exercise of rights attaching to the share of stock is contingent upon the stockholder having been holder of the share of stock for a specified period of time, a claim to transfer of title against a credit institution, a financial services provider, or an enterprise

pursuing activities in accordance with section 53 (1), first sentence, or section 53b (1), first sentence, or subsection (7) of the Banking Act (KWG) shall be equivalent to ownership of the share of stock. The period of ownership of a predecessor in title shall be attributed to the stockholder if he has purchased the share of stock in any of the following manners: without monetary consideration, from his trustee, as a universal successor, in the course of a distribution of assets among a community, or as part of a portfolio transfer pursuant to section 13 of the Insurance Supervisory Act (VAG) or section 14 of the Act on Savings and Loan Associations (BauSparkG).

Section 71 **Purchase of treasury shares of stock**

(1) The company may purchase treasury shares of stock solely in the following cases:

1. If the purchase is necessary in order for the company to avert serious and imminent damage;
2. If the shares of stock are to be offered for sale to persons who are or were in an employment relationship with the company or an enterprise affiliated with it;
3. Where the purchase is made in order to compensate stockholders pursuant to section 305 (2), section 320b of the present Act or pursuant to section 29 (1), section 125, first sentence, in conjunction with section 29 (1), section 207 (1), first sentence, of the Transformation Act (UmwG);
4. If the purchase is made without monetary consideration or if a credit institution is executing a buying commission by making such purchase;
5. By way of universal succession;
6. Based on a resolution adopted by the general meeting to redeem shares of stock in accordance with the regulations governing the reduction of the share capital;
7. If it is a credit institution, financial services provider, or financial enterprise: based on a resolution adopted by the general meeting for purposes of securities trading. The resolution must stipulate that, at the end of any given day, the trading portfolio of the shares of stock to be purchased for this purpose must not exceed five (5) percent of the share capital; the resolution must stipulate the lowest and highest equivalent value. The authorisation may be valid for a maximum of five (5) years; or
8. Based on an authorisation granted by the general meeting that is valid for a maximum of five (5) years and that stipulates the lowest and highest equivalent value as well as the portion of the share capital, which must not exceed ten (10) percent. It is prohibited to have as a purpose the trade in treasury shares of stock. Section 53a shall apply to purchases and disposals. Purchases and disposals via the stock exchange shall be compliant with this stipulation. The general meeting may adopt a resolution as to different manners of disposing over the shares; in such event, section 186 subsections (3) and (4) and section 193 (2) no. 4 are to be correspondingly applied. The general meeting may grant authority to the management board to redeem the treasury shares of stock without any further resolution having been adopted by the general meeting.

(2) The shares of stock purchased for the purposes set out in subsection (1) nos. 1 to 3, 7, and 8 may not, in the aggregate with the other shares of stock in the company that the company has already purchased and of which it is still in possession, amount to more than ten (10) percent of the share capital. Furthermore, such purchase shall be permissible only if the company were able, at the time at which the purchase is made, to form reserves in the amount of the expenditures for the purchase, without reducing the share capital or any reserves that are to be formed under law or in accordance with the by-laws and that may not be used to make payment to the stockholders. In the cases governed by subsection (1) nos.

1, 2, 4, 7, and 8, the purchase shall be permissible only if the issue price for the shares of stock has been paid in the full amount.

(3) In the cases governed by subsection (1) nos. 1 and 8, the management board is to notify the next general meeting of the reasons for the purchase and the purpose pursued by such purchase, the number of the shares of stock purchased and the amount of the share capital allocated to them, the portion of the share capital they represent, as well as the equivalent value of the shares of stock. In the case governed by subsection (1) no. 2, the shares of stock are to be issued to the employees in the course of one (1) year after they have been purchased.

(4) A violation of subsection (1) or (2) shall not result in the purchase of treasury shares of stock becoming invalid. However, a transaction under the law of obligations regarding the purchase of treasury shares of stock shall be null and void should the purchase violate subsection (1) or (2).

Section 71a

Transactions serving purposes of circumvention

(1) Any legal transaction having as its object the payment of an advance or the granting of a loan or the provision of security by the company to some other party for purposes of purchasing shares of stock in this company is null and void. This shall not apply to legal transactions entered into in the normal course of business of credit institutions or financial services providers, nor shall it apply to the payment of an advance or the granting of a loan or the provision of security for purposes of company employees or employees of an enterprise affiliated with same purchasing shares; however, the legal transaction shall be null and void in these cases as well if, at the time of the purchase, the company were unable to form reserves in the amount of the expenditures for the purchase without reducing the share capital or any reserves that are to be formed under law or in accordance with the by-laws that may not be used to make payment to the stockholders. Moreover, the first sentence shall not apply to legal transactions where a control agreement or profit and loss absorption agreement is in place (section 291).

(2) Furthermore, a legal transaction entered into by the company and some other party shall be null and void, according to which this party is to be entitled or obligated to purchase shares of stock in the company for the account of the company or for the account of a controlled enterprise, or of an enterprise in which the company holds a majority of the ownership interest, insofar as the company would violate section 71 subsection (1) or (2) by making this purchase.

Section 71b

Rights attaching to treasury shares of stock

The company shall not be entitled to any rights attaching to its treasury shares of stock.

Section 71c

Disposal of treasury shares of stock and redemption of same

(1) Where the company has purchased treasury shares of stock in violation of section 71 subsection (1) or (2), these shares of stock must be disposed of within one (1) year of having been purchased.

(2) Where the shares of stock which the company has purchased pursuant to section 71 (1) in a permissible manner and which continue to be in its possession amount to more than ten (10) percent of the share capital, that portion of the shares of stock that is in excess of said ratio must be disposed of within three (3) years of having been purchased.

(3) Where treasury shares of stock have not been disposed of within the periods stipulated in subsections (1) and (2), they shall be redeemed pursuant to section 237.

Section 71d

Purchase of treasury shares of stock by third parties

A third party acting in his own name, but for the account of the company, may only purchase or possess shares of stock in the company insofar as the company would be permitted to do so pursuant to section 71 (1) nos. 1 to 5, 7, and 8, and subsection (2). The same shall apply to the purchase or possession of shares of stock in the company by a controlled enterprise, or an enterprise in which the company holds a majority of the ownership interest, as well as to the purchase or possession by a third party acting in his own name, but for the account of a controlled enterprise, or an enterprise in which the company holds a majority of the ownership interest. In computing the portion of the share capital pursuant to section 71 (2), first sentence, and section 71c (2), these shares shall be deemed to be shares of stock in the company. In all other cases, section 71 subsections (3) and (4), sections 71a to 71c shall apply *mutatis mutandis*. The third party or the enterprise is to procure ownership in the shares of stock to the company should the company so demand. The company is to reimburse him for the equivalent value of the shares of stock.

Section 71e

Accepting treasury shares of stock in pledge

(1) Where treasury shares of stock are accepted in pledge, this shall be equivalent to the purchase of treasury shares of stock pursuant to section 71 subsections (1) and (2) and section 71d. However, a credit institution or financial services provider may, in the normal course of its business, accept treasury shares of stock in pledge up to the portion of the share capital as determined in section 71 (2), first sentence. Section 71a shall apply *mutatis mutandis*.

(2) A violation of subsection (1) will cause the acceptance in pledge of treasury shares of stock to be invalid if the issue price for them has not yet been fully paid in. A transaction under the law of obligations as to the acceptance in pledge of treasury shares of stock shall be null and void insofar as the purchase violates subsection (1).

Section 72

Invalidation of shares of stock by way of judicial public notice

(1) Where a share of stock or a temporary share certificate is lost or stolen, or has been destroyed, the certificate may be declared invalid in a judicial public notice procedure pursuant to the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG). Section 799 (2) and section 800 of the Civil Code (BGB) shall apply *mutatis mutandis*.

(2) Where profit participation certificates have been issued to the bearer, the invalidation of the share of stock or of the temporary share certificate shall also cause the claim to expire that attaches to the profit participation certificates that have not yet fallen due.

(3) The invalidation of a share of stock pursuant to sections 73 or 226 shall not contravene the invalidation of the certificate pursuant to subsection (1).

Section 73

Invalidation of share certificates by the company

(1) Where the content set out in share certificates has become inaccurate as a result of the legal circumstances having changed, the company may declare, with the authorisation of the court, those shares certificates to be invalid that have not been produced to it for correction or exchange in spite of a corresponding call having been made. Where the inaccuracy is the result of a change of the nominal amount of the shares of stock, the certificates may be invalidated only if the shares' nominal amount has been reduced for purposes of reducing the share capital. Certificates of registered shares of stock cannot be invalidated on the grounds of the designation of the stockholder having become inaccurate. A complaint may permissibly be lodged against the decision taken by the court; there shall be no right of appeal against the decision granting the authorisation.

(2) The call to produce the share certificates shall include a warning that they may otherwise be invalidated; the call shall indicate the authorisation granted by the court. The invalidation is subject to the pre-requisite of the call having been published by notice in the manner

stipulated for the period of grace in section 64 (2). The invalidation shall be effected by notice in the company's publications of record. The notice shall designate the invalidated share certificates such that it is readily apparent from the notice whether or not a share of stock has been invalidated.

(3) Subject to a provision having been made in the by-laws pursuant to section 10 (5), new share certificates are to be issued to take the stead of the invalidated share certificates and are to be physically handed over to the beneficiary or, should a right to deposit exist, to be so deposited. The court is to be notified of the handover or deposit.

(4) Insofar as shares of stock are merged in order to reduce the share capital, section 226 shall apply.

Section 74

New certificates replacing damaged or defaced share certificates or temporary share certificates

Where a share certificate or a temporary share certificate has been damaged or defaced to such a degree that the certificate is no longer suited for circulation, the beneficiary may demand that the company provide him with a new certificate in return for his producing the old one, provided that the substantial content and the distinctive features of the certificate are still clearly recognisable. The beneficiary shall bear the costs arising in this regard and shall advance them.

Section 75

New profit participation certificates

New profit participation certificates may not be issued to the holder of the renewal coupon if the party in possession of the share certificate or of the temporary share certificate objects to such issuance; they are to be delivered to the party in possession of the share certificate or of the temporary share certificate upon that party producing such principal certificate.

Part 4

Constitution of the stock corporation

Chapter 1

Management board

Section 76

Management of the stock corporation

(1) The management board is to manage the affairs of the company on its own responsibility.

(2) The management board may consist of one or several persons. In the case of companies having a share capital of more than three million euros, the management board is to be comprised of at least two (2) persons unless the by-laws stipulate that it is to consist of one (1) person. The regulations governing the appointment of a member of the board responsible for human resources and social welfare matters (*Arbeitsdirektor*) shall remain unaffected.

(3) Solely a natural person having legal capacity without any restrictions may be a member of the management board. No-one may be a member of the management board who

1. As a person under custodianship as concerns matters of his property, is subject wholly or in part to a reservation of consent (section 1903 of the Civil Code (BGB));

2. Based on a court ruling or an enforceable decision by an administrative authority, is prohibited from exercising a profession, a professional activity, a trade, or commercial activities, inasmuch as the purpose of the stock corporation corresponds, as a whole or in part, to the subject matter addressed by the prohibition;

3. Has been convicted for one or several criminal offences committed intentionally and consisting of any of the following:

- a) Failure to file the application for opening insolvency proceedings (delay in filing a petition for insolvency),
- b) Criminal offences pursuant to sections 283 to 283d of the Criminal Code (StGB) (insolvency offences),
- c) Provision of false information pursuant to section 399 of the present Act or section 82 of the Limited Liability Companies Act (GmbHG),
- d) False representation of facts pursuant to section 400 of the present Act, section 331 of the Commercial Code (HGB), section 313 of the Transformation Act (UmwG), or section 17 of the Act on the Financial Accounting by Certain Enterprises and Corporate Groups (PublG), or who
- e) Has been convicted pursuant to sections 263 to 264a or sections 265b to 266a of the Criminal Code (StGB) to imprisonment of at least one (1) year;

This disqualification shall apply for the duration of five (5) years from the date on which the corresponding judgment has become final and conclusive; in this context, that period shall not be included in the computation in which the perpetrator was detained in an institution upon the order of governmental authorities.

The second sentence, no. 3 shall apply *mutatis mutandis* in the case of a conviction being handed down abroad for an offence that is comparable to the offences set out in no. 3 of the second sentence.

(4) The management board of companies that are listed on the stock exchange or that are subject to co-determination rights shall stipulate target values for the percentage of women working in positions at the first and second management levels below the management board. Where the percentage of women is lower than 30 percent at the time the target values are stipulated, the target values stipulated may not be lower than the percentage respectively attained at that time. Concurrently, periods are to be set within which the target values are to be attained. In each case, the periods may not be longer than five years.

Section 77 Management

(1) Where the management board consists of several persons, any and all members of the management board shall have authority to manage the affairs of the company only jointly. The by-laws or the rules of procedure of the management board may make determinations in derogation herefrom; however, they may not stipulate that, in the case of differences of opinion in the management board, one or several members of the management board may take a decision overriding the view held by the majority of its members.

(2) Unless the by-laws stipulate that it is incumbent on the supervisory board to establish rules of procedure, or the supervisory board so establishes rules of procedure for the management board, the management board may itself establish its rules of procedure. The by-laws may bindingly provide for individual aspects of the rules of procedure. Resolutions adopted by the management board regarding the rules of procedure must be adopted unanimously.

Section 78 Representation

(1) The management board shall represent the company before the courts and outside of court. Where a company does not have a management board (lack of management), the company shall be represented by the supervisory board for the case that declarations of intent are made to it or documents served.

(2) Where the management board consists of several persons, any and all members of the management board shall have authority to represent the company only jointly, unless the by-laws stipulate otherwise. Where a declaration of intent is to be made to the company, it shall

suffice for such declaration to be made to a member of the management board or, in the case governed by subsection (1), second sentence, to a member of the supervisory board. Declarations of intent to the company may be made, and documents for the company may be served, to the company's representatives set out in subsection (1) at the address entered in the Commercial Register. Notwithstanding the above, the declarations may be made and the documents served also at the registered address of the person authorised to receive service of documents pursuant to section 39 (1), second sentence.

(3) The by-laws may also stipulate that individual members of the management board shall have authority to represent the company alone or jointly with an officer of the company vested with full commercial power of attorney (*Prokurist*). The supervisory board may make the same stipulation provided the by-laws have granted it authority to do so. In these cases, subsection (2), second sentence, shall apply *mutatis mutandis*.

(4) Members of the management board having authority to represent the company jointly may grant authority to individual members to engage in specific transactions or specific types of transactions. This shall apply *mutatis mutandis* if an individual member of the management board has authority to represent the company jointly with an officer of the company vested with full commercial power of attorney (*Prokurist*).

Section 79 (repealed)

Section 80

Particulars shown on business letters

(1) All business letters, regardless of the format they may have, that are addressed to a specific recipient must set out the following particulars: the legal structure and the seat of the company, the court of registration at the seat of the company and the number under which the company has been entered in the Commercial Register, as well as all members of the management board and the chairman of the supervisory board, providing their family names and at least one fully spelled-out first name. The chairman of the management board is to be designated as such. Where information is provided regarding the company's capital, then its share capital must be set out in any case, as must be the aggregate amount of the contributions still outstanding if the issue price has not been fully paid for the shares of stock.

(2) The particulars pursuant to subsection (1), first sentence, and subsection (2) need not be provided in the case of notifications or reports issued in the context of an existing business relationship and for which pre-printed forms are customarily used that simply are to be completed by the filling in the specific information respectively required for the individual case.

(3) Order forms shall be deemed to be business letters in the sense of subsection (1).

Subsection (2) shall have no application in their regard.

(4) All business letters and order forms used by a branch office of a stock corporation having its seat abroad must set out the register in which the branch office is entered and the number under which it is entered in each register; in all other cases the regulations of subsections (1) to (3) shall apply regarding the particulars concerning the principal place of business and the branch office unless foreign law necessitates deviations herefrom. Where the foreign company is in the process of being wound up, this fact is to be stated, as are all liquidators.

Section 81

Modifications to the composition of the management board and changes to the power of representation of its members

(1) The management board is to file an application for entry in the Commercial Register of each modification to the composition of the management board or change of the power of representation conferred upon a member of the management board.

(2) The records and documents concerning the modification or change are to be attached, as the original or as a publicly certified copy, to the application for entry in the register.

(3) The new members of the management board are to give an assurance in the application for entry in the register that no circumstances are given that would disqualify them from being appointed pursuant to section 76 (3), second sentence, no. 2 and 3, or pursuant to the third sentence of said provision, and that they have been instructed concerning their unrestricted obligation to provide information to the court. Section 37 (2), second sentence, shall apply.

(4) (repealed)

Section 82

Restrictions on the power to represent the company and to manage its affairs

(1) It is not possible to restrict the power of representation of the management board.

(2) In their relationship to the company, the members of the management board are under obligation to comply with the restrictions on the authority to manage the affairs of the company that have been established, in the context of creating the regulations governing the stock corporation, in the by-laws, by the supervisory board, the general meeting, as well as by the rules of procedure of the management board and of the supervisory board.

Section 83

Preparations for and implementation of resolutions adopted by the general meeting

(1) Upon the general meeting's corresponding demand, the management board shall be under obligation to make preparations for measures falling within the sphere of responsibility of the general meeting. The same shall apply to the preparations for contracts and the conclusion of same that will enter into force only with the consent of the general meeting. The resolution must be adopted by those majority ratios of the votes cast at the general meeting that are required for the measures themselves or for the consent to the contract.

(2) The management board is under obligation to implement the measures that the general meeting has resolved upon within the framework of its powers.

Section 84

Appointment of members of the management board and removal from office

(1) The supervisory board shall appoint members of the management board for a maximum term of five (5) years. A re-appointment or extension of the term of office, in each case for a maximum of five (5) years, shall be permissible. This shall require a new resolution to be adopted by the supervisory board, which may be so adopted at the earliest one (1) year prior to expiry of the current term of office. Solely for appointments for a term shorter than five (5) years may an extension of the term of office be provided for without a new resolution being adopted by the supervisory board, the pre-requisite being that this does not result in a total term of office longer than five (5) years. This shall apply *mutatis mutandis* to the employment agreement; however, the employment agreement may provide that it shall continue in force until the expiry of the term where the term of office is extended.

(2) Where several persons are appointed as members of the management board, the supervisory board may designate one member as chairman of the management board.

(3) The supervisory board may revoke the appointment as member of the management board and the designation as chairman of the management board for grave cause. Such grave cause shall consist of, in particular, gross dereliction of duties, inability to properly manage the company's affairs, or a vote of no confidence by the general meeting, unless the confidence has been withdrawn on grounds that are manifestly irrelevant. This shall apply also to the management board appointed by the first supervisory board. The withdrawal is valid until its invalidity has been finally and conclusively determined by a court's declaratory judgment. The claims attaching to the employment agreement shall be governed by the general regulations.

(4) The regulations of the Act on the Co-Determination by Employees in the Supervisory Boards and Management Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry, in the clean version published in the Federal Law Gazette (*Bundesgesetzblatt*) Part III, classification number 801-2, (MontanMitbestG) regarding the

special majority required for a resolution to be adopted by the supervisory board regarding the appointment of a member of the board responsible for human resources and social welfare matters (*Arbeitsdirektor*) or the revocation of his appointment shall remain unaffected.

Section 85 **Appointment by the court**

(1) Where the management board lacks a required member, then in urgent cases the court is to appoint such member upon the corresponding petition by a party involved. A complaint may permissibly be lodged against the decision taken.

(2) The office of the court-appointed member of the management board shall expire in any case once the deficiency has been remedied.

(3) The court-appointed member of the management board shall be entitled to reimbursement for his reasonable cash expenditures and to remuneration for his activities. Where the court-appointed member of the management board and the company do not come to an agreement, the court shall determine the expenditures and the remuneration. A complaint may permissibly be lodged against the decision taken; filing a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement may be pursued in accordance with the Code of Civil Procedure (ZPO).

Section 86 **(repealed)**

Section 87

Principles applying to the emoluments of the members of the management board

(1) In establishing the overall emoluments of the individual member of the management board (salary, profit-sharing, expense allowances, insurance premiums, commissions, incentive-based remuneration commitments such as, for example, stock options and collateral performance of any kind), the supervisory board is to ensure that they are appropriate in relation to the tasks and performance of the member of the management board and to the economic situation of the company and that, unless particular reasons so require, the customary remuneration is not exceeded. For companies listed on the stock exchange, the remuneration structure is to be oriented towards the promotion of a sustainable development of the enterprise. Accordingly, a multi-year assessment basis should govern the variable remuneration components; the supervisory board should agree a means of providing for limitations in order to take account of extraordinary developments. The first sentence shall apply *mutatis mutandis* to pensions, surviving dependents' pension benefits, and benefits of a similar nature.

(2) Where the economic situation of the company deteriorates at a time following the above determinations such that the continued granting of the emoluments pursuant to subsection (1) would be inequitable for the company, the supervisory board or, in the case governed by section 85 subsection (3), the court is to reduce the emoluments to a reasonable amount upon a corresponding petition having been filed by the supervisory board. Pensions, surviving dependents' pension benefits, and benefits of a similar nature may only be reduced pursuant to the first sentence in the first three (3) years following the date on which the management board member ceases to work for the company. Such reduction shall not affect the employment agreement in any other regard. However, the member of the management board may terminate his employment agreement with effect as per the end of the following calendar quarter, observing a period of notice of six (6) weeks.

(3) Where insolvency proceedings are opened for the company's assets and the insolvency administrator terminates the employment agreement of a member of the management board, such member may demand compensation for the damages suffered, as a result of the service relationship having been cancelled, only for the two (2) years following the date on which the service relationship has expired.

Section 88

Prohibition of competition

(1) The members of the management board may not carry on a trade without the consent of the supervisory board, nor may they pursue any business in the company's line of business, regardless of whether this is for their own account or that of others. Unless they have obtained such consent, they may also not be members of the management board of some other trading company, or managing directors or general partners thereof. The consent of the supervisory board may be granted only for specific trading activities or trading companies or for specific types of transactions.

(2) Where a member of the management board violates this prohibition, the company may demand compensation of its damages. It may instead demand of the member of the management board that he shall allow the transactions he has entered into for his own account to be considered transactions entered into for the account of the company, and that he surrender the remuneration obtained for the transactions entered into for the account of some other party, or that he assign his claim to the remuneration.

(3) The company's claims shall become statute-barred following the expiry of three (3) months from the point in time at which the other members of the management board and the members of the supervisory board become aware of the measure resulting in the obligation to provide compensation for damages, or have reason, barring gross negligence, to become aware of same. Such claims shall become statute-barred, irrespective of this awareness, or grossly negligent lack of awareness, following the expiry of five (5) years from the date on which they have arisen.

Section 89

Loans granted to members of the management board

(1) The company may grant loans to the members of its management board only on the basis of a resolution adopted by the supervisory board. Such resolution may be adopted only for specific loan transactions, or types of loan transactions, and may not be adopted longer than three (3) months in advance of same. The resolution is to provide for the interest accruing on the loan and the repayment of same. Allowing members of the management board to draw amounts in excess of the emoluments to which they are entitled, namely also allowing them to draw advances towards emoluments, shall be equivalent to granting a loan. This shall not apply to loans not exceeding a monthly salary.

(2) The company may grant loans to its officers vested with full commercial power of attorney (*Prokurist*) and its agents empowered to bind the company in all aspects of its business (*Handlungsbevollmächtigte*) only with the consent of the supervisory board. Only upon having obtained the consent of its supervisory board may a controlling company grant loans to any of the following of the controlled company: the legal representatives, officers vested with full commercial power of attorney, or agents empowered to bind the company in all aspects of its business; only upon having obtained the consent of the supervisory board of the controlling enterprise may a controlled company grant loans to any of the following of the controlling company: the legal representatives, officers vested with full commercial power of attorney, or agents empowered to bind the company in all aspects of its business. Subsection (1), second to fifth sentences, shall apply *mutatis mutandis*.

(3) Subsection (2) shall apply also to loans granted to spouses, partners in a civil union, or a minor child of a member of the management board, of some other legal representative, of an officer vested with full commercial power of attorney (*Prokurist*), or of an agent empowered to bind the company in all aspects of its business (*Handlungsbevollmächtigte*). Said subsection furthermore shall apply to loans granted to a third party acting for the account of these persons or for the account of a member of the management board, of some other legal representative, of an officer vested with full commercial power of attorney, or of an agent empowered to bind the company in all aspects of its business.

(4) Where a member of the management board, an officer vested with full commercial power of attorney (*Prokurist*) or an agent empowered to bind the company in all aspects of its

business (*Handlungsbevollmächtigte*) concurrently is a legal representative or member of the supervisory board of some other legal entity or partner of a commercial partnership, the company may grant a loan to such legal entity or commercial partnership only with the consent of the supervisory board; subsection (1), second and third sentences, shall apply *mutatis mutandis*. This shall not apply if the legal entity or the commercial partnership is affiliated with the company or if the loan is granted in order to enable the payment for goods that the company delivers to the legal entity or the commercial partnership.

(5) Where a loan is granted in contravention of the stipulations of subsections (1) to (4), the loan is to be repaid immediately, irrespective of any agreements to the contrary, unless the supervisory board retroactively grants its consent.

(6) Where the company is a credit institution or financial services provider to which section 15 of the Banking Act (KWG) is to be applied, the regulations of the Banking Act shall apply instead of subsections (1) to (5).

Section 90

Reports to the supervisory board

(1) The management board shall report to the supervisory board on the following topics:

1. The business policy it intends to pursue and other fundamental matters of corporate planning (in particular financial planning, investment planning, and human resources planning), in which context any instances are to be addressed in which actual developments deviate from the targets previously reported and the reasons therefor are to be provided;
2. The company's profitability, in particular the return on equity;
3. The course of business, in particular the sales of the company, and its economic situation;
4. Transactions that may have a significant impact on the profitability or liquidity of the company.

Where the company is a parent company (section 290 subsections (1), (2) of the Commercial Code (HGB)), the report is to also address subsidiary companies and joint ventures (section 310 (1) of the Commercial Code (HGB)). Furthermore, a report also is to be submitted to the chairman of the supervisory board on the occasion of other important events; a business process ongoing at an affiliated enterprise of which the management board has become aware and which is suited to significantly influence the economic situation of the company is likewise to be regarded as an important event occasioning such a report.

(2) The reports pursuant to subsection (1), first sentence, nos. 1 to 4 are to be submitted as follows:

1. The reports set out in no. 1: at least once a year, unless changes of the situation or new issues mandate that a report be submitted without undue delay;
2. The reports set out in no. 2: at the meeting of the supervisory board at which the annual accounts are deliberated;
3. The reports set out in no. 3: regularly, at least once per quarter;
4. The reports set out in no. 4: if possible, in such good time that the supervisory board has the opportunity to state its position prior to the transactions in question being entered into.

(3) The supervisory board may demand at any point in time that the management board submit a report to it concerning matters of the company, its legal and business relations with affiliated enterprises, as well as business processes ongoing at these enterprises that are suited to significantly influence the economic situation of the company. An individual member

may demand as well that such a report be submitted, however, the addressee shall be solely the supervisory board.

(4) The reports are to correspond to the principles of conscientious and faithful accounting. They are to be submitted in as good a time as possible and, to the exception of the report set out in subsection (1), third sentence, as a rule are to be provided in text form.

(5) Each member of the supervisory board is entitled to obtain knowledge of the reports. Insofar as the reports have been submitted in text form, they shall also be transmitted to each member of the supervisory board upon a corresponding demand being made, unless the supervisory board has resolved otherwise. The chairman of the supervisory board is to notify the members of the supervisory board concerning the reports pursuant to subsection (1), third sentence, at the latest at the next meeting of the supervisory board.

Section 91 Organisation; accounting

(1) The management board is to ensure that the required journal, required general ledger, and other required records are kept.

(2) The management board is to take suitable measures, and in particular is to institute a monitoring system, in order to allow developments jeopardising the company's continued existence to be identified at an early point in time.

Section 92 Obligations of the management board in the case of loss, over-indebtedness, or inability to pay debts as they fall due

(1) Should it become apparent in the course of drawing up the annual balance sheet or an interim balance sheet, or if it is to be assumed in duly assessing the circumstances, that a loss amounting to half of the share capital has been incurred, the management board is to convene the general meeting without undue delay and is to notify it of this fact.

(2) Upon the company having become unable to pay its debts as they fall due, or upon its over-indebtedness having become apparent, the management board shall be prohibited from making any payments. This shall not apply to any payments that, also after this time, are in keeping with the due care of a prudent manager faithfully complying with his duties. The management board shall be under the same obligation for payments to stockholders insofar as these would have caused the company, without fail, to become unable to pay its debts as they fall due, unless this was not recognisable even if the skill and care designated in section 93 (1), first sentence, had been exercised.

Section 93 Duty of the members of the management board to exercise skill and care, liability and responsibilities

(1) In managing the affairs of the company, the members of the management board are to exercise the due care of a prudent manager faithfully complying with his duties. No dereliction of duties shall be given in those instances in which the member of the management board, in taking an entrepreneurial decision, was within his rights to reasonably assume that he was acting on the basis of adequate information and in the best interests of the company. The members of the management board are to respect the secrecy of any confidential information and secrets of the company, particularly trade secrets or business secrets, of which they have become aware in the context of their activities in the management board. The obligation set out in the third sentence shall not apply vis-à-vis an audit and enforcement panel recognised pursuant to section 342b of the Commercial Code (HGB) in the context of an audit performed by this panel.

(2) Members of the management board acting in dereliction of their duties are liable as joint and several debtors to compensate the company for any damage resulting therefrom. Where it is in dispute whether or not they exercised the due care of a prudent manager faithfully complying with his duties, the onus of proof shall be on them. Where the company has taken out insurance to protect a member of the management board against risks arising from his

professional activities for the company, the insurance policy is to provide for a deductible of at least ten (10) percent of the damage, up to a minimum of one hundred and fifty (150) percent of the annual fixed remuneration of the member of the management board.

(3) The members of the management board shall be under obligation to provide compensation particularly in those instances in which, in contravention of the present Act,

1. Contributions are restituted to the stockholders,
2. Stockholders are paid interest or participate in the profits,
3. Treasury shares of stock in the company or in some other company have been subscribed to, purchased, accepted in pledge, or redeemed,
4. Shares of stock are issued prior to the issue price for them having been fully paid in,
5. The company's assets are distributed,
6. Payments are made in contravention of section 92 (2),
7. Remunerations are granted to members of the supervisory board,
8. Loans are granted,
9. Shares of a new issue are issued in the context of the conditional capital increase and this is done outside of the purpose specified therefor or prior to the equivalent value having been fully paid.

(4) The obligation to provide compensation shall not arise vis-à-vis the company where the action taken is based on a lawful resolution adopted by the general meeting. The fact that the supervisory board has endorsed the action does not preclude the obligation to provide compensation. The company may waive its claims to compensation, or conclude a compromise regarding these claims, only once three (3) years have lapsed since the arising of the claim, and only in those cases in which the general meeting approves this being done and no minority, the aggregate of whose shares is at least equivalent to one tenth of the share capital, raises an objection and has it recorded in the minutes. The limitation in time shall not apply where the party obligated to provide compensation is unable to pay his debts as they become due and concludes a compromise with his creditors in order to avert insolvency proceedings or if the compensation obligation is provided for in an insolvency plan.

(5) The company's claim to compensation may also be asserted by its creditors insofar as they cannot obtain satisfaction from the company. However, this shall apply in cases other than those governed by subsection (3) only in those instances in which members of the management board have grossly violated their duty to exercise the due care of a prudent manager faithfully complying with his duties; subsection (2), second sentence, shall apply *mutatis mutandis*. The obligation to provide compensation shall not be cancelled vis-à-vis the creditors by a waiver by the company or by its concluding a compromise, nor shall the fact that the action is based on a resolution adopted by the general meeting cancel this obligation. Where insolvency proceedings have been opened for the company's assets, the insolvency administrator or the insolvency monitor shall exercise the right of the company's creditors against the members of the management board for the duration of said proceedings.

(6) The claims governed by the present regulations shall become statute-barred, in the case of companies that were listed on a stock exchange at the time at which the dereliction of duties occurred, after ten (10) years; in the case of other companies after five (5) years.

Section 94

Deputy members of the management board

The regulations applying to the members of the management board shall also apply to their deputies.

Chapter 2 Supervisory board

Section 95

Number of members of the supervisory board

The supervisory board shall consist of three (3) members. The by-laws may specify a certain higher number. Where necessary in order to comply with the requirements of the laws governing co-determination rights, the number must be divisible by three. The maximum number of members of the supervisory board shall be as set out below for companies having a share capital

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

The above regulations shall not affect any regulations in derogation herefrom made in the Employee Co-Determination Act (MitbestG) of 4 May 1976 (Federal Law Gazette (*Bundesgesetzblatt*) I p. 1153), the Act on the Co-Determination by Employees in the Supervisory Boards and Management Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry (MontanMitbestG), and the Act Amending the Act on the Co-Determination by Employees in the Supervisory Boards and Management Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry (MontanMitbestGErgG) in the clean version published in the Federal Law Gazette Part III, classification number 801-3.

Section 96

Composition of the supervisory board

(1) The supervisory board shall be composed as follows:

In the case of companies to which the Employee Co-Determination Act (MitbestG) applies: of members of the supervisory board representing the stockholders and the employees;

In the case of companies to which the Act on the Co-Determination by Employees in the Supervisory Boards and Management Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry (MontanMitbestG) applies: of members of the supervisory board representing the stockholders and the employees and of further members;

In the case of companies to which sections 5 to 13 of the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG) apply: of members of the supervisory board representing the stockholders and the employees and of one further member;

In the case of companies to which the Act on One-Third Employee Representation in the Supervisory Board (DrittelbG) applies: of members of the supervisory board representing the stockholders and the employees;

In the case of companies to which the Act on Employee Co-Determination in the Case of a Cross-Border Merger (MgVG) of 21 December 2006 (Federal Law Gazette (*Bundesgesetzblatt*) I p. 3332) applies: of members of the supervisory board representing the stockholders and the employees;

In the case of any other companies: solely of members of the supervisory board representing the stockholders.

(2) In the case of companies listed on the stock exchange, to which the Employee Co-Determination Act (MitbestG), the Act on the Co-Determination by Employees in the Supervisory Boards and Management Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry (MontanMitbestG) or the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG) applies, the supervisory board shall be composed of women at a minimum ratio of 30 percent and of men

at a minimum ratio of 30 percent. The minimum ratio is to be fulfilled by the supervisory board as a whole. Where, prior to the election, the side of the shareholder representatives or the side of the employee representatives raises an objection with the chairman of the supervisory board, based on a resolution adopted by a majority, against the fulfilment of the ratio by the supervisory board as a whole, the minimum ratio for that election is to be fulfilled separately by the side of the shareholder representatives and by the side of the employee representatives. In all cases, the ratio is to be mathematically rounded up or down in order to achieve full numbers of persons. If, in the case of the ratio being fulfilled by the supervisory board as a whole, the higher ratio of women of one side is reduced subsequently and that side then objects to the fulfilment of the ratio by the supervisory board as a whole, this shall not cause the composition of the respective other side to be invalid. Where an election of members of the supervisory board by the general meeting and their delegation to the supervisory board violates the requirement as to the minimum ratio, this election shall be null and void. Where an election is declared to be null and void for other reasons, the elections performed in the meantime do not violate the requirement as to the minimum ratio in this regard. The acts governing co-determination set out in the first sentence are to be applied to the election of members of the supervisory board representing the employees.

(3) In the case of companies listed on the stock exchange that have resulted from a cross-border merger, whose supervisory or administrative organ consists, in accordance with the Act on Employee Co-Determination in the Case of a Cross-Border Merger (MgVG), of the same number of shareholder representatives and of employee representatives, the ratio of women and men sitting on the supervisory or administrative organ must constitute at least 30 percent. Subsection (2), second, fourth, sixth, and seventh sentences, shall apply *mutatis mutandis*.

(4) The composition of the supervisory board may be governed by other than the statutory regulations last applied only in cases in which, pursuant to section 97 or pursuant to section 98, the statutory regulations set out in the notice published by the management board or set out in the court decision are to be applied.

Section 97

Publication by notice of the composition of the supervisory board

(1) Where the management board takes the view that the supervisory board is not composed in accordance with the statutory regulations relevant in this regard, it is to give notice of this view, without undue delay, in the company's publications of record and is to concurrently post such notice by displaying it in any and all of the company's operations and the group member companies. The notice is to cite the statutory regulations that are relevant in the view taken by the management board. The notice is to indicate that the supervisory board will be constituted in accordance with these regulations unless parties entitled to file a petition pursuant to section 98 (2) refer the matter to the court having jurisdiction pursuant to section 98 (1) within one (1) month of the notice having been published in the Federal Gazette (*Bundesanzeiger*).

(2) Where the matter has not been referred to the court having jurisdiction pursuant to section 98 (1) within one (1) month of the notice having been published in the Federal Gazette (*Bundesanzeiger*), the new supervisory board is to be constituted in accordance with the statutory regulations cited in the notice published by the management board. The stipulations of the by-laws regarding the composition of the supervisory board, the number of members of the supervisory board, as well as concerning the election, removal from office, and delegation of members of the supervisory board shall cease to have effect at the closure of the first general meeting convened following expiry of the period for referring the matter to the court, and at the latest six (6) months following expiry of said period, inasmuch as they contradict the statutory regulations that are then to be applied. At the same point in time, the office of the current members of the supervisory board shall expire. A general meeting taking place within the six-month period may adopt, by a simple majority of the votes cast, new

stipulations for the by-laws that are to take the stead of the ineffective stipulations of the by-laws.

(3) For as long as court proceedings pursuant to sections 98, 99 are pending, no notice may be published regarding the composition of the supervisory board.

Section 98

Court decision on the composition of the supervisory board

(1) Where it is in dispute or uncertain which statutory regulations are to govern the composition of the supervisory board, exclusively that regional court (*Landgericht*) shall take a decision on the matter, upon a corresponding petition having been filed, in the judicial district of which the company has its seat.

(2) The following parties are entitled to file such a petition:

1. The management board,
2. Each member of the supervisory board,
3. Each stockholder,
4. The central works council of the company or, where only a single works council exists for the company, the works council,
5. The central committee, or corporate council, representing the executive staff of the company or, where only a single council representing the executive staff exists for the company, the council representing the executive staff,
6. The central works council of some other enterprise, the employees of which themselves vote, pursuant to the statutory regulations the application of which is in dispute or uncertain, to elect members of the company's supervisory board, or who vote through delegates, or, where only a single works council exists in the other enterprise, the works council,
7. The central committee representing the executive staff, or the corporate council representing the executive staff, of some other enterprise, the employees of which themselves vote, pursuant to the statutory regulations the application of which is in dispute or uncertain, to elect members of the company's supervisory board, or who vote through delegates, or, where only a council representing the executive staff exists in the other enterprise, the council representing the executive staff,
8. At least one tenth or one hundred of the employees who themselves vote, pursuant to the statutory regulations the application of which is in dispute or uncertain, to elect members of the company's supervisory board, or who vote through delegates,
9. Umbrella organisations of the unions that would have a nomination right pursuant to the statutory regulations the application of which is in dispute or uncertain,
10. Unions that would have a nomination right pursuant to the statutory regulations the application of which is in dispute or uncertain.

Where the application of the Employee Co-Determination Act (MitbestG) or the application of regulations of the Employee Co-Determination Act is in dispute or uncertain, then besides the parties entitled to file a petition pursuant to the first sentence, one tenth, in each case, of the employees designated in section 3 (1) no. 1 of the Employee Co-Determination Act having voting rights or of the executives having voting rights in the sense of the Employee Co-Determination Act shall also be entitled to file a petition.

(3) Subsections (1) and (2) shall apply *mutatis mutandis* if it is in dispute whether or not the auditor of the annual accounts has correctly assessed the ratio of the turnover that is relevant pursuant to section 3 or section 16 of the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG).

(4) Where the composition of the supervisory board does not correspond to the decision taken by the court, the new supervisory board is to be constituted in accordance with the statutory regulations set out in the decision. Section 97 (2) shall apply *mutatis mutandis* subject to the proviso that the period of six (6) months is to commence running upon the ruling having become final and conclusive.

Section 99 Procedure

(1) Unless stipulated otherwise in subsections (2) to (5), the procedure shall be governed by the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG).

(2) The regional court (*Landgericht*) is to give notice of the petition in the company's publications of record. The management board and each member of the supervisory board as well as the works councils, councils representing the executive staff, umbrella organisations, and unions that are entitled to file a petition pursuant to section 98 (2) shall be heard.

(3) The regional court (*Landgericht*) shall issue its decision by way of a court order setting out the reasons for such decision. A complaint may be lodged against the decision taken by the regional court. Such complaint may be based solely on a violation of the law; section 72 (1), second sentence, and section 74 subsections (2) and (3) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG) as well as section 547 of the Code of Civil Procedure (ZPO) shall apply *mutatis mutandis*. The complaint may be lodged only by filing a brief on appeal signed by a lawyer. 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.

(4) The court is to serve its decision to the petitioner and to the company. Further, it is to give notice of same, without providing the reasoning, in the company's publications of record. Any party entitled to file a petition pursuant to section 98 (2) may lodge a complaint. The period within which a complaint must be lodged shall commence running upon the decision being published by notice in the Federal Gazette (*Bundesanzeiger*); however, it shall not commence running for the petitioner and the company prior to the decision having been served to them.

(5) The decision shall enter into force only once it becomes final and conclusive. It shall take effect for and against all parties. The management board is to submit the final and conclusive decision to the Commercial Register without undue delay.

(6) The costs may be imposed, as a whole or in part, on the petitioner where this is equitable. The parties involved shall not be reimbursed for their costs.

Section 100

Personal pre-requisites to be fulfilled by members of the supervisory board

(1) Solely a natural person having legal capacity without any restrictions may be a member of the supervisory board. A person who, as a person under custodianship as concerns matters of his property, is subject wholly or in part to a reservation of consent (section 1903 of the Civil Code (BGB)), is prohibited from being a member of the supervisory board.

(2) No-one may be a member of the supervisory board who

1. Is already a member of the supervisory boards of ten (10) trading companies obligated by law to form a supervisory board;
2. Is a legal representative of an enterprise controlled by the company;

3. Is a legal representative of some other share capital company, the supervisory board of which counts a member of the management board of the company among its members; or

4. Was a member of the management board of the same company listed on the stock exchange in the course of the past two (2) years unless he is elected upon having been nominated by stockholders holding more than 25 percent of the voting rights in the company.

A number of up to five (5) of the seats on the supervisory board shall not be included in computing the maximum number pursuant to the first sentence, no. 1, that a legal representative (in the case of a sole trader: the business owner) of the controlling enterprise of a group of enterprises will hold in the trading companies forming part of the group that are under obligation to form a supervisory board. The memberships in supervisory boards in the sense of no. 1, in which the member in question has been elected chairman, are to be counted double in establishing the maximum number pursuant to the first sentence, no. 1.

(3) The other personal pre-requisites to be fulfilled by the members of the supervisory board representing the employees as well as the further members are governed by the Employee Co-Determination Act (MitbestG), the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG), the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG), the Act on One-Third Employee Representation in the Supervisory Board (DrittelbG), and the Act on Employee Co-Determination in the Case of a Cross-Border Merger (MgVG).

(4) The by-laws may demand the fulfilment of personal pre-requisites only by those members of the supervisory board who are elected by the general meeting without the latter being bound by nominations, or who are delegated to the supervisory board by reason of the by-laws.

(5) In the case of companies that are publicly traded in the sense of section 264d of the Commercial Code (HGB), which are credit institutions as defined by the Capital Requirements Regulation (CRR) in the sense of section 1 (3d), first sentence, of the Banking Act (KWG), to the exception of the institutions named in section 2 (1) nos. 1 and 2 of the Banking Act, or which are insurance undertakings in the sense of Article 2 paragraph 1 of Council Directive 91/674/EEC of 19 December 1991 on the annual account and consolidated accounts of insurance undertakings (OJ L 374 of 31 December 1991, p. 7), last amended by Directive 2006/46/EC (OJ L 224 of 16 August 2006, p. 1), at least one member of the supervisory board must have expertise in the fields of accounting or auditing; the members of the supervisory board as a whole must be familiar with the sector in which the company pursues its activities.

Section 101

Appointment of members to the supervisory board

(1) The members of the supervisory board shall be elected by the general meeting unless they are to be delegated to the supervisory board or are to be elected as members of the supervisory board representing the employees pursuant to the Employee Co-Determination Act (MitbestG), the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG), the Act on One-Third Employee Representation in the Supervisory Board (DrittelbG), or the Act on Employee Co-Determination in the Case of a Cross-Border Merger (MgVG). The general meeting shall be bound by nominations exclusively pursuant to sections 6 and 8 of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG).

(2) Solely the by-laws may establish a right to delegate members to the supervisory board, and this only for certain stockholders or for the respective holders of certain shares of stock. The delegation right may be conferred upon the holders of certain shares of stock only if the shares of stock are registered in the names of their holders and their transfer is bound to the consent of the company. The shares of stock held by the parties entitled to delegate

representatives shall not be deemed a special class of stock. The delegation rights may be conferred, in the aggregate, for at most a third of the number of members of the supervisory board representing the stockholders as stipulated by the law or the by-laws.

(3) No deputies of members of the supervisory board may be appointed. However, a substitute member may be appointed for each member of the supervisory board, to the exception of the further member elected at the nomination of the remaining members of the supervisory board pursuant to the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG) or the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG); this substitute member shall become a member of the supervisory board if the member of the supervisory board ceases to hold such office prior to expiry of his term of office. The substitute member may be appointed only concurrently with the member of the supervisory board. The regulations applying to the member of the supervisory board are to be applied to the appointment of the substitute member, as well as to cases in which the appointment is invalid or an action is brought to set it aside as null and void.

Section 102

Term of office of the supervisory board members

(1) The members of the supervisory board may not be appointed for a term of office extending beyond the time at which that general meeting is closed that is to adopt a resolution regarding the approval of the management's actions taken in the fourth financial year following the commencement of their term of office and regarding the discharge to be granted to the management. The financial year in which the term of office begins shall not be counted.

(2) The office of a substitute member shall cease to exist at the latest upon expiry of the term of office of the supervisory board member who has ceased to hold office.

Section 103

Removal from office of supervisory board members

(1) Members of the supervisory board who have been elected by the general meeting without the latter having been bound by nominations may be removed from office prior to expiry of their term. The resolution adopted shall require a majority comprising at least three quarters of the votes cast. The by-laws may stipulate a greater majority ratio and may impose further requirements.

(2) A member of the supervisory board delegated to the supervisory board by reason of the by-laws may be removed from office at any point in time by the party entitled to delegate representatives and may be replaced by a different member. Where the pre-requisites of the by-laws for the right to delegate representatives have ceased to exist, the general meeting may remove the delegated member from office by a simple majority of the votes cast.

(3) Upon the supervisory board filing a corresponding petition, the court is to remove a member of the supervisory board from office if grave cause is given in the person of that member. The supervisory board shall adopt a resolution by simple majority on whether or not to file such a petition. Where the member of the supervisory board has been delegated to same on the basis of the by-laws, also those stockholders may file such petition whose shares of stock, in the aggregate, are at least equivalent to one tenth of the share capital, or to a stake of one million euros. A complaint may permissibly be lodged against the decision taken.

(4) For the removal from office of members of the supervisory board who were neither elected by the general meeting without being bound by a nomination, nor delegated to the supervisory board on the basis of the by-laws, the following shall apply besides subsection (3): the Employee Co-Determination Act (MitbestG), the Act on the Co-Determination by Employees in the Supervisory Boards and Management Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry (MontanMitbestG), the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG), the Act on One-Third Employee Representation in the Supervisory

Board (DrittelbG), the Act on the Involvement of Employees in a European Company (SEBG), and the Act on Employee Co-Determination in the Case of a Cross-Border Merger (MgVG).

(5) The regulations applying to the removal from office of the member of the supervisory board for whom the substitute member has been appointed shall apply to the removal from office of that substitute member.

Section 104

Appointment by the court

(1) Where the supervisory board is not comprised of the number of members required for it to have a quorum, the court is to appoint the additional members until the full number is obtained, upon a corresponding petition being filed by any of the following: the management board, by a member of the supervisory board, or by a stockholder. The management board is under obligation to file such petition without undue delay unless it is to be expected that the additional appointment will be made in due time prior to the next meeting of the supervisory board. Where the supervisory board is to be comprised also of members representing the employees, the following parties may also file the petition:

1. The central works council of the company or, where only a single works council exists for the company, the works council, as well as, in the case of the company being the controlling enterprise of a group of enterprises, the group works council,
2. The central committee, or corporate council, representing the executive staff of the company or, where only a single council representing the executive staff exists for the company, the council representing the executive staff, as well as, in the case of the company being the controlling enterprise of a group of enterprises, the group council representing the executive staff,
3. The central works council of some other enterprise, the employees of which vote themselves in the election, or vote through delegates, or, where only a single works council exists in the other enterprise, the works council,
4. The central committee representing the executive staff, or the corporate council representing the executive staff, of some other enterprise, the employees of which vote themselves or vote through delegates, or, where only a council representing the executive staff exists in the other enterprise, the council representing the executive staff,
5. At least one tenth or one hundred of the employees who vote themselves in the election or who vote through delegates,
6. Umbrella organisations of the unions that have the right to nominate members of the supervisory board representing the employees,
7. Unions that have the right to nominate members of the supervisory board representing the employees.

Where, pursuant to the Employee Co-Determination Act (MitbestG), the supervisory board is to consist also of members representing the employees, then besides the parties entitled to file a petition pursuant to the third sentence, one tenth, in each case, of the employees designated in section 3 (1) no. 1 of the Employee Co-Determination Act having voting rights or of the executives in the sense of the Employee Co-Determination Act having voting rights shall be entitled to file a petition. A complaint may permissibly be lodged against the decision taken.

(2) Where, for a period longer than three (3) months, the supervisory board is comprised of fewer members than the number stipulated by the law or in the by-laws, the court is to appoint the additional members, upon a corresponding petition having been filed, until the full number is obtained. In urgent cases, the court is to appoint the additional members to the supervisory board also prior to expiry of said period upon a corresponding petition having

been filed. The entitlement to file a petition shall be governed by subsection (1). A complaint may permissibly be lodged against the decision taken.

(3) Subsection (2) shall be applied to a supervisory board in which employees have a co-determination right pursuant to the Employee Co-Determination Act (MitbestG), the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG), or the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG), subject to the proviso

1. That the court may not make an appointment to the supervisory board to obtain the full number as regards the further member who is elected, pursuant to the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG) or the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG), upon being nominated by the other members of the supervisory board,

2. That any case will invariably be an urgent case if the supervisory board is not comprised of all members – to the exception of the further member set out in no. 1 – of which it is to be comprised by law or in accordance with the by-laws.

(4) Where the supervisory board is to include members of the supervisory board representing the employees as well, the court is to appoint additional members to same to obtain the full number such that the ratio relevant for its composition is obtained. Where additional members are appointed to the supervisory board in order to obtain the full number required for it to have a quorum, this shall apply only insofar as the number of members of the supervisory board required for it to so have a quorum enables this ratio to be maintained. Where a member of the supervisory board is to be replaced by a member who, according to the law or the by-laws, must meet particular pre-requisites as regards his person, the court-appointed member of the supervisory board must also meet these pre-requisites. Where a member of the supervisory board is to be replaced by a member regarding the election of whom an umbrella organisation of the unions, a union, or the works councils would have nomination rights, the court should consider the nominations made by these bodies unless overriding interests of the company or of the general public contravene the appointment of the person so nominated; the same shall apply, if the member of the supervisory board were to be elected by delegates, to common nominations submitted by the works councils of the enterprises in which delegates are to be elected.

(5) In the case of companies listed on the stock exchange, to which the Employee Co-Determination Act (MitbestG), the Act on the Co-Determination by Employees in the Supervisory Boards and Management Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry (MontanMitbestG), or the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG) applies, the appointment by the court of additional members to the supervisory board is to be performed subject to the stipulations of section 96 (2), first to fifth sentences.

(6) The office of the court-appointed member of the supervisory board shall cease to exist in any case as soon as the deficiency is remedied.

(7) The court-appointed member of the supervisory board shall be entitled to reimbursement for his reasonable cash expenditures and, if remuneration is granted to the members of the company's supervisory board, to remuneration for his activities. Upon the member of the supervisory board filing the corresponding petition, the court shall establish the expenditures and the remuneration. A complaint may permissibly be lodged against the decision taken; filing a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement may be pursued in accordance with the Code of Civil Procedure (ZPO).

Section 105

Incompatibility of membership in the management board and in the supervisory board

(1) A member of the supervisory board may not concurrently be a member of the management board, nor may he permanently be a deputy of members of the management board, an officer of the company vested with full commercial power of attorney (*Prokurist*), or an agent of the company empowered to bind the company in all aspects of its business (*Handlungsbevollmächtigter*).

(2) The supervisory board may appoint individual of its members as deputies of lacking members of the management board or of members of same who are prevented from serving as such, but may do so solely for a period of time limited in advance, and at a maximum for one (1) year. A re-appointment or extension of the term of office is permissible if this does not result in the term of office exceeding a total duration of one (1) year. During their term of office as deputies of members of the management board, the members of the supervisory board may not pursue any activities as a member of the supervisory board. The prohibition of competition set out in section 88 does not apply to them.

Section 106

Notice of modifications of the supervisory board's composition

The management board is to file with the Commercial Register, without undue delay following any change, a list of the members of the supervisory board showing the members' family names, first names, profession exercised, and places of residence; the court is to publish a notice pursuant to section 10 of the Commercial Code (HGB) indicating that the list has been filed with the Commercial Register.

Section 107

Internal organisation of the supervisory board

(1) In accordance with the more detailed provisions of the by-laws, the supervisory board is to elect from among its midst a chairman and at least one (1) deputy chairman. The management board is to file an application for entry in the Commercial Register of the persons elected. The deputy chairman shall have the rights and obligations of the chairman only when the latter is prevented from serving as such.

(2) Minutes are to be prepared of the supervisory board meetings that the chairman is to sign. The minutes are to state the place and date of the meeting, the persons in attendance, the business set out in the agenda, the essential content of the deliberations, and the resolutions adopted by the supervisory board. A violation of the first sentence or second sentence will not cause the resolution to be invalid. Upon a corresponding demand being made, a copy of the minutes of the meeting is to be physically handed over to each member of the supervisory board.

(3) The supervisory board may appoint from among its midst one or several committees, particularly for purposes of making preparations for its deliberations and resolutions, or in order to monitor the implementation of its resolutions. In particular, it may appoint an audit committee that is to monitor the accounting process, the effectiveness of the internal control system, the risk management system, and the internal accounting control system as well as the auditing of financial statements, and in this regard particularly the selection and the independence of the auditor of the annual accounts and the services additionally provided by the auditor of the annual accounts. The audit committee may make recommendations or suggestions on how to warrant the integrity of the accounting process. The adoption of resolutions on the tasks pursuant to subsection (1), first sentence, section 59 (3), section 77 (2), first sentence, section 84 (1), first and third sentences, subsections (2) and (3), first sentence, section 87 subsections (1) and (2), first and second sentences, section 111 (3), section 171, section 314 subsections (2) and (3), as well as resolutions to the effect that certain types of business transactions may only be implemented with the consent of the supervisory board may not be transferred to a committee instead of the supervisory board. Reports on the work done by the committees are to be submitted to the supervisory board on a regular basis.

(4) Where the supervisory board of a company that is publicly traded in the sense of section 264d of the Commercial Code (HGB), that is a credit institution as defined by the Capital

Requirements Regulation (CRR) in the sense of section 1 (3d), first sentence, of the Banking Act (KWG), to the exception of the institutions named in section 2 (1) nos. 1 and 2 of the Banking Act, or that is an insurance undertaking in the sense of Article 2 paragraph 1 of the Directive 91/674/EEA, institutes an audit committee in the sense of subsection (3), second sentence, then the pre-requisites set out in section 100 (5) must be met.

Section 108

Resolutions adopted by the supervisory board

- (1) The supervisory board shall take its decisions by way of adopting resolutions.
- (2) Unless this has been stipulated by law, the quorum of the supervisory board may be determined in the by-laws. Where the quorum has been stipulated neither by law nor in the by-laws, the supervisory board shall have a quorum only if at least one half of the members of which it must be comprised overall, according to the law or the by-laws, participates in the adoption of the resolution. In any case, at least three (3) members must participate in adopting the resolution. The supervisory board shall not be prevented from having a quorum by the fact that fewer members belong to the supervisory board than the number specified by law or in the by-laws even if the ratio relevant to its composition has not been maintained.
- (3) Absent members of the supervisory board may participate in the adoption of resolutions by the supervisory board and its committees by having written absentee votes delivered. The written absentee votes may be delivered by other members of the supervisory board. They may also be physically handed over by persons who are not members of the supervisory board if such persons are entitled to participate in the meeting pursuant to section 109 (3).
- (4) The supervisory board and its committees may permissibly adopt resolutions in writing, by telephone, or by other comparable forms, subject to a more detailed provision in the by-laws or in the rules of procedure of the supervisory board, only if no member objects to proceeding in this manner.

Section 109

Participation at meetings of the supervisory board and its committees

- (1) No persons should attend the meetings of the supervisory board and its committees if they are members neither of the supervisory board nor of the management board. Experts and persons delegated for purposes of furnishing information may be involved in the consultations on individual matters.
- (2) Members of the supervisory board who are not members of a committee may attend its meetings unless determined otherwise by the chairman of the supervisory board.
- (3) The by-laws may allow persons who are not members of the supervisory board to attend the meetings of the supervisory board and its committees instead of those members of the supervisory board who are unable to attend, provided the latter have granted authority to them in text form.
- (4) Any statutory regulations in derogation herefrom shall remain unaffected.

Section 110

Convening the supervisory board

- (1) Each member of the supervisory board or of the management board may demand, citing the purpose and the reasons for his demand, that the chairman of the supervisory board convene a meeting of the supervisory board without undue delay. The meeting must take place within two (2) weeks of having been convened.
- (2) Should this demand not be complied with, the member of the supervisory board or of the management board may himself convene a meeting of the supervisory board, including a notice of the facts and circumstances and an agenda with the invitation convening the supervisory board.
- (3) The supervisory board must come together for two (2) meetings per calendar half year. The supervisory board of companies not listed on the stock exchange may resolve that it is to come together for one (1) meeting per calendar half year.

Section 111

Tasks and rights of the supervisory board

- (1) The supervisory board is to supervise the management board.
- (2) The supervisory board may inspect and audit the books and records of the company as well as its assets, particularly the company's cash and the inventory of securities and goods. It may also instruct individual members to perform these tasks, or may commission special experts for certain tasks. The supervisory board shall instruct the auditor of the annual accounts to audit the annual accounts and consolidated financial statements pursuant to section 290 of the Commercial Code (HGB). Moreover, the supervisory board may instruct that an external audit be performed of the substance of the non-financial statement or of the separate non-financial report (section 289b of the Commercial Code (HGB)), or of the consolidated non-financial statement or the separate consolidated non-financial report (section 315b of the Commercial Code (HGB)).
- (3) The supervisory board is to convene a general meeting where this is required by the company's best interests. It shall suffice for the corresponding resolution to be adopted by a simple majority.
- (4) The measures to be taken by the management may not be transferred to the supervisory board. However, it is to be determined in the by-laws or by the supervisory board that certain types of business transactions may only be implemented with the supervisory board's consent. Where the supervisory board refuses to grant such consent, the management board may demand that the general meeting adopt a resolution concerning such consent. The resolution by which the general meeting grants its consent shall require a majority of at least three quarters of the votes cast. The by-laws may neither stipulate a greater majority ratio, nor may they impose further requirements.
- (5) The supervisory board of companies that are listed on the stock exchange or that are subject to co-determination rights shall stipulate target values for the percentage of women sitting on the supervisory board and the management board. Where the percentage of women is lower than 30 percent at the time the target values are stipulated, the target values stipulated may not be lower than the percentage respectively attained at that time. Concurrently, periods are to be set within which the target values are to be attained. In each case, the periods may not be longer than five years. Inasmuch as a quota pursuant to section 96 (2) already applies to the supervisory board, the stipulations shall be made solely for the management board.
- (6) The members of the supervisory board may not have others perform the tasks incumbent on them.

Section 112

Representation of the company vis-à-vis members of the management board

The supervisory board shall represent the company vis-à-vis members of the management board in court and outside of court. Section 78 (2), second sentence, shall apply *mutatis mutandis*.

Section 113

Remuneration of the members of the supervisory board

- (1) The members of the supervisory board may be granted remuneration for their activities. This may be specified in the by-laws or granted by the general meeting. The remuneration should be appropriate in relation to the tasks of the members of the supervisory board and to the company's economic situation. Where the remuneration is specified in the by-laws, the general meeting may adopt a resolution by a simple majority of the votes cast to amend the by-laws such that the remuneration is reduced.
- (2) Solely the general meeting may grant remuneration to the members of the first supervisory board for their activities. The corresponding resolution may be adopted only in that general meeting that resolves regarding the approval of the actions taken by the members of the first supervisory board and regarding the discharge to be granted to them.

(3) Where a participation in the company's profit for the year is granted to the members of the supervisory board, that participation shall be calculated based on the net income, reduced by an amount of at least four (4) percent of the contributions paid in for the minimum issue price of the shares of stock. Any contravening stipulations are null and void.

Section 114

Contracts with members of the supervisory board

(1) Where a member of the supervisory board enters into obligation vis-à-vis the company, outside of his activities in the supervisory board, under a service agreement that does not establish an employment relationship, or under a contract for work and services directed at the achievement of a particular result, to perform activities of a higher nature, then the contract's entry into force shall be contingent on the supervisory board's consent.

(2) Where, based on such contract, the company grants remuneration to the member of the supervisory board without the supervisory board having consented to the contract, the member of the supervisory board is to repay the remuneration unless the supervisory board authorises the contract. Any claim the member of the supervisory board may have vis-à-vis the company to having the enrichment achieved by the activities performed surrendered to him shall remain unaffected; however, this claim may not be set off from the claim to restitution.

Section 115

Loans granted to members of the supervisory board

(1) The company may grant loans to the members of its supervisory board only subject to the consent of the supervisory board. A controlling company may grant loans to the members of the supervisory board of a controlled enterprise only subject to the consent of the controlling company's supervisory board; a controlled company may grant loans to the members of the supervisory board of the controlling enterprise only subject to the consent of the supervisory board of the controlling enterprise. Such consent may be granted only for specific loan transactions, or types of loan transactions, and may not be adopted longer than three (3) months in advance of same. The resolution as to the consent is to provide for the interest accruing on the loan and the redemption of same. Where the member of the supervisory board pursues a trading activity as a sole trader, no such consent shall be required if the loan is granted in order to enable the payment for goods that the company delivers for the sole trader's trading business.

(2) Subsection (1) shall apply also to loans granted to spouses, partners in a civil union, or a minor child of a member of the supervisory board and to loans granted to a third party acting for the account of these persons or for the account of a member of the supervisory board.

(3) Where a member of the supervisory board concurrently is a legal representative of some other legal entity or partner of a commercial partnership, the company may grant a loan to such legal entity or commercial partnership only with the consent of the supervisory board; subsection (1), third and fourth sentences, shall apply *mutatis mutandis*. This shall not apply if the legal entity or the commercial partnership is affiliated with the company or if the loan is granted in order to enable the payment for goods that the company delivers to the legal entity or the commercial partnership.

(4) Where a loan is granted in contravention of the stipulations of subsections (1) to (3), the loan is to be repaid immediately, irrespective of any agreements to the contrary, unless the supervisory board retroactively grants its consent.

(5) Where the company is a credit institution or financial services provider to which section 15 of the Banking Act (KWG) is to be applied, the regulations of the Banking Act shall apply instead of subsections (1) to (4).

Section 116

Duty of the members of the supervisory board to exercise skill and care, liability and responsibilities

Section 93 shall apply *mutatis mutandis* to the duty of the members of the supervisory board to exercise skill and care as well as to their liability and responsibilities, to the exception of subsection (2), third sentence concerning the duty of the members of the management board to exercise skill and care as well as their liability and responsibilities. In particular, the members of the supervisory board shall be under an obligation of secrecy regarding any confidential reports they may have received as well as their confidential deliberations. Particularly, they shall be under obligation to provide compensation should they have established remuneration that is inappropriate (section 87 subsection (1)).

Chapter 3 **Exploitation of influence over the company**

Section 117

Obligation to provide compensation for damages

(1) Anyone who intentionally compels, by exploiting his influence on the company, a member of the management board or of the supervisory board, an officer of the company vested with full commercial power of attorney (*Prokurist*), or an authorised agent to act to the detriment of the company or its stockholders shall be under obligation to provide compensation to the company for the damage it has suffered as a result. Such party shall also be under obligation to compensate the stockholders for the damage they have suffered as a result, insofar as they have suffered damage above and beyond the damage that has been caused them by the damage caused to the company.

(2) In addition to that person, the members of the management board and of the supervisory board shall be liable as joint and several debtors if they have acted in dereliction of their duties. Where it is in dispute whether they have exercised the due care of a prudent manager faithfully complying with his duties, the onus of proof shall be upon them. The obligation of the members of the management board and of the supervisory board to provide compensation shall not arise vis-à-vis the company and also not vis-à-vis the stockholders if the action taken is based on a lawful resolution adopted by the general meeting. The fact that the supervisory board has endorsed the action does not preclude the obligation to provide compensation.

(3) In addition to that person, furthermore, those parties shall be liable as joint and several debtors who have obtained an advantage by the action causing damage, should such parties have intentionally instigated the influence being exerted.

(4) Section 93 (4), third and fourth sentences, shall apply *mutatis mutandis* to the release from the obligation to provide compensation vis-à-vis the company.

(5) The company's claim to compensation may also be asserted by its creditors inasmuch as they are unable to obtain satisfaction from the company. The company's waiving its claims to compensation, or concluding a compromise regarding these claims, shall not serve to release it from the obligation to provide compensation to the creditors, nor will it be so released from this obligation by the fact that the action is based on a resolution adopted by the general meeting. Where insolvency proceedings have been opened for the company's assets, the insolvency administrator or the insolvency monitor shall exercise the right of the company's creditors for the duration of said proceedings.

(6) The claims governed by the present regulations shall become statute-barred within five (5) years.

(7) The above regulations shall not apply if the member of the management board or of the supervisory board, the officer of the company vested with full commercial power of attorney (*Prokurist*), or the authorised agent has been compelled to take the action causing damage by either of the following being exercised:

1. The power of direction based on a control agreement, or
2. The power of direction of a principal company (section 319) into which the company is integrated.

Chapter 4 General meeting

Subchapter 1 Rights of the general meeting

Section 118 General provisions

(1) Unless stipulated otherwise by the law, the stockholders shall exercise their rights in matters pertaining to the company at the general meeting. The by-laws may provide, or may grant authority to the management board to provide, that the stockholders may attend the general meeting also without being physically present at the place at which it is being held and without an authorised representative, and that they may exercise the entirety of their rights, or individual of their rights, as a whole or in part, by means of electronic communication.

(2) The by-laws may provide, or may grant authority to the management board to provide, that stockholders may cast their votes also without attending the general meeting, in writing or by means of electronic communication (postal vote).

(3) The members of the management board and of the supervisory board should attend the general meeting. However, the by-laws may provide for certain cases in which the members of the supervisory board may attend by means of video and audio transmission.

(4) The by-laws or the rules of procedure pursuant to section 129 (1) may provide, or may grant authority to the management board or the person chairing the general meeting to provide, that the general meeting may be broadcast by means of video and audio transmission.

Section 119 Rights of the general meeting

(1) The general meeting shall adopt resolutions in the cases expressly determined by law and in the by-laws, particularly as regards the following:

1. The appointment of members of the supervisory board, unless they are to be delegated to the supervisory board or are to be elected as members of the supervisory board representing the employees pursuant to the Employee Co-Determination Act (MitbestG), the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG), the Act on One-Third Employee Representation in the Supervisory Board (DrittelbG), or the Act on Employee Co-Determination in the Case of a Cross-Border Merger (MgVG);

2. The appropriation of the net income;

3. The approval of the actions taken by the members of the management board and of the supervisory board and the granting of discharge to them;

4. The appointment of the auditor of the annual accounts;

5. Amendments of the by-laws;

6. Measures serving the procurement of capital and the reduction of capital;

7. The appointment of auditors who are to audit actions taken and events occurring in the course of the company's formation or of the management of its affairs;

8. The dissolution of the company.

(2) The general meeting may take a decision regarding matters of the management of the company's affairs only if the management board so demands.

Section 120

Approval of actions and granting of discharge; vote on the remuneration system

- (1) Every year in the first eight (8) months of the financial year, the general meeting shall adopt a resolution regarding the approval of the actions taken by the members of the management board and the approval of the actions taken by the members of the supervisory board, and the discharge to be granted to them. A separate vote is to be taken regarding the approval of the actions by an individual member, and the discharge granted to same, should the general meeting resolve that this be done, or should a minority so demand whose shares of stock, in the aggregate, are at least equivalent to one tenth of the share capital, or to a stake of one million euros.
- (2) By approving the actions taken and granting discharge, the general meeting endorses the management of the company by the members of the management board and of the supervisory board. The approval and discharge does not entail any waiver of claims to compensation.
- (3) The deliberations regarding the approval of actions and granting of discharge should be tied to the deliberations regarding the appropriation of the net income.
- (4) The general meeting of a company listed on the stock exchange may adopt a resolution regarding the endorsement of the system governing the remuneration of the members of the management board. The resolution shall not establish any rights or obligations; in particular, the duties of the supervisory board pursuant to section 87 shall remain unaffected thereby. No avoidance pursuant to section 243 may be sought regarding the resolution.

Subchapter 2

Convening the general meeting

Section 121

General provisions

- (1) The general meeting is to be convened in the cases determined by law and in the by-laws, as well as whenever the best interests of the company so require.
- (2) The general meeting shall be convened by the management board, which shall adopt a resolution in this regard by a simple majority of the votes cast. Persons entered in the Commercial Register as members of the management board shall be deemed to have authority. The right of other persons to convene the general meeting as stipulated by law or in the by-laws shall remain unaffected.
- (3) The invitation convening the general meeting must set out the business name of the company, its seat, as well as the time and place of the general meeting. Moreover, the agenda is to be provided. In the case of companies listed on the stock exchange, the management board or, in cases in which the supervisory board convenes the general meeting, the supervisory board is to provide the following information in the invitation convening the general meeting:
1. The pre-requisites for attending the general meeting and exercising the voting right as well as, if applicable, the record date pursuant to section 123 (4), second sentence, and its significance;
 2. The proceedings for votes to be cast
 - a) By an authorised representative, with reference being made to the forms to be used for granting a power of attorney to exercise voting rights and to the manner and form in which it is possible to electronically submit proof to the company regarding the appointment of an authorised representative, as well as
 - b) By postal vote or by means of electronic communication pursuant to section 118 (1), second sentence, insofar as the by-laws provide for a corresponding form of exercising the voting right;

3. The rights of the stockholders pursuant to section 122 (2), section 126 (1), as well as sections 127 and 131 (1); the information may be restricted to the periods granted for exercising the rights if the invitation convening the general meeting otherwise makes reference to further explanations made available on the company's website;

4. The website of the company on which the information pursuant to section 124a is accessible.

(4) Notice of the invitation convening the general meeting is to be given in the company's publications of record. Where the stockholders of the company are known by name, the general meeting may be convened by registered letter unless stipulated otherwise in the by-laws; the date on which the invitation is posted shall be deemed the date of the notice.

(4a) In the case of companies listed on the stock exchange that have not issued exclusively registered shares of stock or that do not directly send the invitation convening the general meeting to the stockholders pursuant to subsection (4), second sentence, the invitation convening the general meeting is to be forwarded, at the latest as per the time of the notice, to such media for publication regarding which it can be assumed that they will disseminate the information in the entire European Union.

(5) Unless stipulated otherwise in the by-laws, the general meeting should be held at the seat of the company. Where the shares of stock in the company are admitted to trading at a German stock exchange on the regulated market, then, unless stipulated otherwise in the by-laws, the general meeting may also be held at the seat of the stock exchange.

(6) Where all stockholders are present or represented by proxies, the general meeting may adopt resolutions without adhering to the provisions of the present subchapter insofar as no stockholder objects to the adoption of the resolution.

(7) In the case of periods and deadlines that are counted back from the date of the general meeting, the date of the general meeting itself is not to be counted. Rescheduling the general meeting from a Sunday, a Saturday, or a holiday to a preceding or subsequent business day is not an available option. Sections 187 to 193 of the Civil Code (BGB) shall have no corresponding application. In the case of companies not listed on the stock exchange, the by-laws may provide for a different calculation of the period.

Section 122

Convening the general meeting upon a corresponding demand being made by a minority

(1) The general meeting is to be convened wherever stockholders, whose shares of stock, in the aggregate, are at least equivalent to one twentieth of the share capital, demand that it be so convened, doing so in writing and citing the purpose and the reasons therefor; the demand is to be addressed to the management board. The by-laws may tie the right to demand that the general meeting be convened to a different form and to possession of a lesser portion of the share capital. The petitioners are to submit proof that they have been holders of the shares of stock since at least ninety (90) days prior to the date on which their demand is received, and that they will continue to so hold the shares until the management board takes a decision regarding their petition. Section 121 (7) shall apply *mutatis mutandis*.

(2) In like manner, stockholders whose shares of stock, in the aggregate, are at least equivalent to one twentieth of the share capital, or to a stake of 500 000 euros, may demand that items of business be set out in the agenda and be published by notice. Each item of business to be newly added to the agenda must include the reasons therefor or a proposal for a resolution. The demand in the sense of the first sentence must be received by the company at the latest twenty-four (24) days prior to the general meeting, in the case of companies listed on the stock exchange at the latest thirty (30) days prior to the general meeting; the date of its receipt shall not be included in calculating the period.

(3) Where the demand is not complied with, the court may grant authority to the stockholders who have raised the demand to convene the general meeting or to publish by notice the item of business. Concurrently, the court may determine the chairman of the general meeting.

The invitation convening the general meeting or the notice must indicate the authorisation by the court. A complaint may permissibly be lodged against the decision taken. The petitioners are to submit proof that they will continue to hold the shares of stock until the court hands down its decision.

(4) The company shall bear the costs of the general meeting and, in the case governed by subsection (3), also the court costs if the court has complied with the petition.

Section 123

Period, registration for the general meeting, proof

(1) The general meeting is to be convened at the latest thirty (30) days prior to the date set for it. The date on which the general meeting is convened shall not be included in calculating the period.

(2) The by-laws may make attendance at the general meeting or the exercise of the voting right contingent on the stockholders registering prior to the general meeting. The company must receive the registration at the address set out for this purpose in the invitation convening the general meeting at the latest six (6) days prior to the general meeting. The by-laws, or the invitation convening the general meeting issued on the basis of an authorisation in the by-laws, may provide for a shorter period, which is to be measured in days. The date on which the registration is received shall not be included in calculating the period. The minimum period set out in subsection (1) shall be extended by the days of the registration period.

(3) The by-laws may determine the manner in which proof is to be submitted of the entitlement to attend the general meeting or to exercise the voting right; in such event, subsection (2), fifth sentence, shall apply *mutatis mutandis*.

(4) In the case of bearer shares of companies listed on the stock exchange, it shall suffice for the depositary institution to issue separate proof, in text form, of the shares held. In the case of companies listed on the stock exchange, the proof is to reflect the circumstances given as per the commencement of the twenty-first day prior to the general meeting and must be received by the company, at the address set out for this purpose in the invitation convening the general meeting, at the latest six (6) days prior to the general meeting. The by-laws, or the invitation convening the general meeting issued on the basis of an authorisation in the by-laws, may provide for a shorter period, which is to be measured in days. The date on which the registration is received shall not be included in calculating the period. Only those parties shall be deemed to be stockholders of the company in their relationship with same, in terms of their attendance of the general meeting or in terms of the exercise of the voting right, who have submitted proof in this regard.

(5) In the case of registered shares of stock in companies listed on the stock exchange, the entitlement to attend the meeting or to exercise the voting right shall follow, pursuant to section 67 (2), first sentence, from entry in the share register.

Section 124

Notice by publication of demands for amendment; guidance regarding resolutions

(1) Where the minority pursuant to section 122 (2) has demanded that items of business be set out in the agenda, said items of business are to be published by notice either together with the invitation convening the general meeting or, if that is not the case, without undue delay after the demand has been received. Section 121 (4) shall apply *mutatis mutandis*; moreover, in the case of companies listed on the stock exchange, section 121 (4a) shall apply *mutatis mutandis*. The notice is to be published and forwarded in the same way as the invitation convening the general meeting.

(2) Where the election of members of the supervisory board has been included in the agenda, the notice is to cite the statutory regulations governing the composition of the supervisory board; where the general meeting is bound by nominations, the notice is to cite this as well. Where the notice concerns an election to the supervisory board of a company listed on the stock exchange, to which the Employee Co-Determination Act (MitbestG), the Act on the Co-Determination by Employees in the Supervisory Boards and Management

Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry (MontanMitbestG), or the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG) applies, it must furthermore provide the following information:

1. Whether an objection has been raised against the fulfilment of the ratio by the supervisory board as a whole pursuant to section 96 (2), third sentence, and
2. The number of seats on the supervisory board that must be filled, at a minimum, by women and men, respectively, in order to fulfil the requirement as to the minimum ratio pursuant to section 96 (2), first sentence.

Where the general meeting is to adopt a resolution as to an amendment of the by-laws or as regards a contract that shall enter into force only upon having been consented to by the general meeting, the wording of the proposed resolution to amend the by-laws is to be published by notice, or the substantial content of the contract

(3) In the notice published, the management board and the supervisory board are to provide guidance regarding the resolutions to be adopted on each item of business set out in the agenda regarding which the general meeting is to adopt a resolution; for the election of members of the supervisory board and auditors, such guidance shall be provided solely by the supervisory board. In the case of companies that are publicly traded in the sense of section 264d of the Commercial Code (HGB), that are credit institutions as defined by the Capital Requirements Regulation (CRR) in the sense of section 1 (3d), first sentence, of the Banking Act (KWG), to the exception of the institutions named in section 2 (1) nos. 1 and 2 of the Banking Act, or which are insurance undertakings in the sense of Article 2 paragraph 1 of the Directive 91/674/EEC, the nomination made by the supervisory board for the election of the auditor of the annual accounts is to be based on the recommendation of the audit committee. The first sentence shall not apply if, in electing members of the supervisory board, the general meeting is bound to nominations pursuant to section 6 of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG), or if the item of business regarding which a resolution is to be adopted has been included in the agenda upon a corresponding demand having been made by a minority. The nominations of candidates for the supervisory board or for auditors shall state their names, profession exercised, and places of residence. Where the supervisory board is to consist also of members representing the employees, the resolutions adopted by the supervisory board regarding the nomination of candidates for the supervisory board shall require solely the majority of the votes cast by the members of the supervisory board representing the stockholders; section 8 of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry shall remain unaffected.

(4) No resolutions may be adopted regarding items of business set out in the agenda that have not been duly and properly published by notice. No notice need be published for resolutions to be adopted regarding a motion made at the meeting to convene a general meeting, regarding motions made concerning items of business set out in the agenda, and regarding deliberations that do not result in a resolution being adopted.

Section 124a

Publications on the company's website

In the case of companies listed on the stock exchange, their website must make the following accessible promptly after the general meeting has been convened:

1. The content of the invitation convening the general meeting;
2. An explanation for those cases in which no resolution is to be adopted regarding an item of business set out in the agenda;
3. The documents to be made accessible to the general meeting;

4. The total number of the shares of stock and the voting rights as given at the time at which the general meeting is convened, including a separate listing of the total number for each class of stock;

5. If applicable, the forms to be used for having a vote cast by a proxy or casting a vote by means of a postal vote, unless these forms are not directly transmitted to the stockholders.

A demand made by stockholders in the sense of section 122 (2) that is received by the company after the general meeting has been convened is to be made accessible in like manner and without undue delay upon so having been received by the company.

Section 125

Notifications for the stockholders and to members of the supervisory board

(1) At the latest 21 days prior to the general meeting, the management board is to notify the credit institutions and the associations of stockholders that had exercised voting rights on behalf of stockholders at the last general meeting, or that had demanded that such notice be given them, that the general meeting is being convened. The date of the notification shall not be included in calculating the period. Where the agenda is to be amended pursuant to section 122 (2), then notice of the amended agenda is to be given if the general meeting is that of a company listed on the stock exchange. The notice is to indicate the option of exercising the voting right by proxy, as well as by an association of stockholders. In the case of companies listed on the stock exchange, information on the candidates' membership in other supervisory boards mandated by the law is to be attached to any nomination of candidates for the supervisory board; information on their membership in comparable supervisory committees of business enterprises within Germany and abroad should be attached.

(2) The management board is to provide the same notification to those stockholders who demand to be so notified or who have been entered, as of the start of the fourteenth day prior to the meeting, as stockholders in the company's share register. The by-laws may restrict the transmittal to the means of electronic communication.

(3) Each member of the supervisory board may demand that the management board send him the same notifications.

(4) Upon a corresponding demand being made, each member of the supervisory board and each stockholder is to be notified of the resolutions adopted at the general meeting.

(5) Financial services providers and the enterprises pursuing activities governed by section 53 (1), first sentence, or section 53b subsection (1), first sentence, or subsection (7) of the Banking Act (KWG) shall be equivalent to credit institutions.

Section 126

Motions by stockholders

(1) Motions by stockholders are to be made accessible to the beneficiaries set out in section 125 subsections (1) to (3), subject to the pre-requisites listed therein, including the name of the stockholder, the reasons for which the motions are being made, and a statement, if any has been made, by the management regarding its position, provided that the stockholder has sent, at the latest fourteen (14) days prior to the date of the general meeting, a counter-motion opposing a proposal or guidance by the management board and the supervisory board regarding a certain item of business set out in the agenda, specifying the reasons therefor, to the address set out for this purpose in the invitation convening the general meeting. The date on which the counter-motion is received shall not be included in calculating the period. In the case of companies listed on the stock exchange, the counter-motion shall be made accessible via the company's website. Section 125 (3) shall apply *mutatis mutandis*.

(2) A counter-motion and the reasons for which it is being made need not be made accessible:

1. Inasmuch as the management board would be liable to punishment under law, were it to make such proposal accessible;
2. If the counter-motion were to result in the general meeting adopting a resolution that is in violation of the law or of the by-laws;
3. If the reasons make manifestly false or misleading statements regarding essential aspects, or if they are insulting;
4. If a counter-motion made by the stockholder based on the same facts and circumstances has already been made accessible pursuant to section 125 for a general meeting of the company;
5. If the same counter-motion of the stockholder, citing essentially the same reasons, has been made accessible pursuant to section 125 in the past five (5) years to at least two (2) general meetings of the company, and if less than one twentieth of the share capital represented voted for this counter-motion at the general meeting;
6. If the stockholder indicates that he will not attend the general meeting and will not have a proxy represent him;
7. If, in the past two (2) years at two (2) general meetings, the stockholder has failed to propose or to have proposed a counter-motion regarding which he has informed the company.

The reasons need not be made accessible if they amount to more than 5,000 characters in total.

(3) Where several stockholders propose counter-motions regarding one and the same business to be resolved upon, the management board may combine the counter-motions and the reasons specified for them.

Section 127

Nominations by stockholders

Section 126 shall apply *mutatis mutandis* to nominations by stockholders of candidates for the supervisory board or for auditors of the annual accounts. No reasons need be specified for the nomination. The management board need not make accessible the nomination also in those cases in which the nomination does not include the information pursuant to section 124 (3), fourth sentence, and section 125 (1), fifth sentence. The management board is to supplement the nomination by a stockholder of candidates for the supervisory board of companies listed on the stock exchange, to which the Employee Co-Determination Act (MitbestG), the Act on the Co-Determination by Employees in the Supervisory Boards and Management Boards of Mining Enterprises and Enterprises in the Iron- and Steel-Producing Industry (MontanMitbestG), or the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG) applies, by the following substantive content:

1. Indication of the requirements stipulated by section 96 (2),
2. Whether an objection has been raised against the fulfilment of the ratio by the supervisory board as a whole pursuant to section 96 (2), third sentence, and
3. The number of seats on the supervisory board that must be filled, at a minimum, by women and men, respectively, in order to fulfil the requirement as to the minimum ratio pursuant to section 96 (2), first sentence.

Section 127a

Stockholders' forum

(1) Stockholders or associations of stockholders may call on other stockholders in the stockholder forum of the Federal Gazette (*Bundesanzeiger*) to act jointly or as proxies in

proposing a motion or making a demand in accordance with the present Act, or to exercise the voting right at a general meeting.

(2) The call is to include the following information:

1. The name and an address of the stockholder or the association of stockholders;
2. The company's business name;
3. The motion, the demand, or a suggestion on how to exercise the voting right regarding a certain item of business set out in the agenda;
4. The date of the general meeting concerned.

(3) The call may make reference to the reasons specified on the website of the party so calling on the other stockholders, and that party's electronic address.

(4) The company may indicate, in the Federal Gazette (*Bundesanzeiger*), the statement of its position published on its website concerning the call.

(5) The Federal Ministry of Justice and Consumer Protection (BMJV) has the authority to stipulate, by an ordinance having the force of law, the external design of the stockholders' forum and further details, particularly as regards the call, the indication, the fees, deletion periods, claim to deletion, cases of abuse, and inspection.

Section 128

Transmission of the notifications

(1) Where a credit institution is keeping safe, at the beginning of the twenty-first day prior to the general meeting, bearer shares of the company on behalf of stockholders, or where it is entered in the share register regarding registered shares of stock that it does not own, it is to transmit the notifications pursuant to section 125 (1) to the stockholders without undue delay. The by-laws of the company may restrict the transmittal to the means of electronic communication; in such event, the credit institution shall not be obligated to take any further measures, also not for other reasons.

(2) The duty of the credit institution to provide compensation for any damages arising from a violation of subsection (1) may not be precluded in advance, nor may it be limited in advance.

(3) The Federal Ministry of Justice and Consumer Protection (BMJV) has the authority, upon having coordinated the matter with the Federal Ministry for Economic Affairs and Energy (BMWi) and the Federal Ministry of Finance (BMF), to prescribe by an ordinance having the force of law that the company is to reimburse the credit institutions for the expenditures they incur for

1. Transferring the particulars pursuant to section 67 (4), and
2. Reproducing the notifications and for mailing them to the stockholders.

Blanket allowances may be established. The ordinance having the force of law does not require the consent of the Bundesrat.

(4) Section 125 (5) shall apply *mutatis mutandis*.

Subchapter 3

Minutes of the deliberations. Right to demand information

Section 129

Rules of procedure, list of attendees

(1) The general meeting may adopt rules of procedure, with a majority comprising at least three quarters of the share capital represented at the time such resolution is adopted, setting out the rules governing the preparations for the general meeting and the conduct of said meeting. At the general meeting, a list is to be prepared of the stockholders appearing in person or being represented by a proxy and of the proxies representing them, specifying their name and place of residence as well as, in the case of par-value shares, the amount,

and in the case of no-par-value shares, the number of shares represented by each proxy, while specifying their class of stock.

(2) Where powers of attorney to exercise the voting right have been granted to a credit institution or to a person designated in section 135 (8) and where the representative so authorised exercises the voting right on behalf of the party entitled to it, then in the case of par-value shares the amount, and in the case of no-par-value shares the number and class of stock for which the authorised party has been granted powers of attorney shall be specified separately for inclusion in the list. The names of the stockholders granting the powers of attorney need not be stated.

(3) Anyone who has been granted authority by a stockholder to exercise, in his own name, the voting right for shares not belonging to him is to separately specify the amount, in the case of par-value shares, and in the case of no-par-value shares the number and class of stock of such shares for inclusion in the list. This shall apply also to registered shares of stock, regarding which the authorised representative is entered as stockholder in the share register.

(4) Prior to the first vote, the list is to be made accessible to all attendees. Upon a corresponding demand being made, each stockholder is to be granted the right to inspect the list of attendees for up to two (2) years after the general meeting.

(5) Section 125 (5) shall apply *mutatis mutandis*.

Section 130 **Minutes**

(1) Each resolution adopted by the general meeting is to be recorded in minutes of the meeting prepared by a notary. The same shall apply to any demand made by a minority pursuant to section 120 (1), second sentence, and pursuant to section 137. In the case of companies not listed on the stock exchange, it shall suffice to have the minutes signed by the chairman of the supervisory board insofar as no resolutions are adopted for which the law stipulates a majority of three quarters of the votes cast, or a greater majority ratio.

(2) The minutes are to state the place and the date of the meeting, the name of the notary, as well as the manner of voting and the result of the vote, and the chairman's establishment of the respective resolution adopted. In the case of companies listed on the stock exchange, the establishment of the resolution adopted also shall comprise, for each such resolution,

1. The number of shares of stock for which valid votes were cast,
2. The portion of the registered share capital that is constituted by the share capital represented by the valid votes,
3. The number of the votes cast in favour of a resolution, the number of the votes opposing it, and, if applicable, the number of abstentions.

In derogation from the second sentence, the person chairing the meeting may limit the establishment of the resolution adopted in each case to the statement that the necessary majority was obtained, unless a stockholder demands a comprehensive establishment pursuant to the second sentence.

(3) The proof as to the general meeting having been convened is to be attached to the minutes as an annex unless it has been included in the minutes with a summary of its content.

(4) The minutes are to be signed by the notary. It shall not be necessary to involve witnesses.

(5) Without undue delay following the general meeting, the management board is to file with the Commercial Register a publicly certified copy of the minutes, or, in the case governed by subsection (1), third sentence, a copy of the minutes signed by the chairman of the supervisory board, in each case with a copy of its annexes.

(6) Companies listed on the stock exchange must publish on their website, within seven (7) days of the general meeting, the results of the voting as established, including the information pursuant to subsection (2), second sentence.

Section 131

Stockholder's right to request information

(1) The management board is to inform each stockholder at the general meeting, upon a corresponding request being made, concerning matters pertaining to the company insofar as this is required in order to appropriately adjudge the item of business set out in the agenda. The obligation to provide information shall also extend to include the legal and business relations of the company with an affiliated enterprise. Where a company avails itself of the eased requirements pursuant to section 266 (1), third sentence, section 276, or section 288 of the Commercial Code (HGB), then each stockholder may request that, at the general meeting deliberating on the annual accounts, the annual accounts be made available to him in the form that they would have without these eased requirements. The obligation of the management board of a parent company to provide information (section 290 subsections (1) and (2) of the Commercial Code (HGB)) at the general meeting to which the consolidated financial statements and the consolidated management report are submitted shall also extend to cover the situation of the group and the enterprises included in the consolidated financial statements.

(2) The information provided is to correspond to the principles of conscientious and faithful accounting. The by-laws or the rules of procedure pursuant to section 129 may grant authority to the person chairing the meeting to impose reasonable time limits on the stockholder's right to ask questions and to speak, and may also allow him to make further determinations concerning the details in this regard.

(3) The management board may refuse a request for information:

1. Inasmuch as the provision of the information, when adjudged applying prudent business judgment, is suited to cause a greater than insignificant disadvantage to the company or an affiliated enterprise;
2. Inasmuch as it refers to carrying values for tax purposes or the amount of individual taxes;
3. Regarding the difference between the value at which objects were stated in the annual balance sheet and a higher value of such objects, unless the general meeting approves and establishes the annual accounts;
4. Regarding the accounting and valuation methods insofar as it suffices to cite these methods in the notes in order to accurately represent the company's assets, financial position, and revenue situation in keeping with its actual circumstances in the sense of section 264 (2) of the Commercial Code (HGB); this shall not apply if the general meeting approves and establishes the annual accounts;
5. Inasmuch as the management board would be liable to punishment under law were it to provide the information;
6. Inasmuch as, in the case of a credit institution or financial services provider, no information need be provided regarding the accounting and valuation methods applied, nor regarding the netting performed in the annual accounts, management report, consolidated financial statements, or consolidated management report;
7. Inasmuch as such information is continuously accessible on the company's website for at least seven (7) days prior to commencement of the general meeting, and also in its course.

Any refusal to provide information for other than the grounds set out above is not permissible.

(4) Where information has been provided to a stockholder because of his capacity as such, and this was done outside of the general meeting, it is to be provided to every other stockholder making a corresponding request at the general meeting, even if such information is not required in order to appropriately adjudge the item of business set out in the agenda. The management board may not refuse to provide the information in accordance with subsection (3), first sentence, nos. 1 to 4. The first and second sentences shall not apply if a subsidiary company (section 290 subsections (1) and (2) of the Commercial Code (HGB)), a joint venture (section 310 (1) of the Commercial Code (HGB)) or an associated enterprise (section 311 (1) of the Commercial Code (HGB)) issues the information to a parent company (section 290 subsections (1) and (2) of the Commercial Code (HGB)) for purposes of including the company in the consolidated financial statements of the parent company and the information is required for this purpose.

(5) Where a stockholder's request for information is refused, he may demand that his question and the grounds for refusing to provide the information be included in the minutes of the meeting.

Section 132

Court decision regarding the right to request information

(1) Exclusively the regional court (*Landgericht*) in the judicial district of which the company has its seat shall decide, upon a corresponding petition being made, whether or not the management board is to provide the information.

(2) Each stockholder shall be entitled to file such a petition who has not been provided with the information requested; where a resolution has been adopted regarding the item of business set out in the agenda to which the information referred, each of the stockholders shall likewise be entitled to file such a petition who appeared at the general meeting and who raised an objection at the general meeting and had it recorded in the minutes. The petition is to be filed within two (2) weeks after the general meeting at which the request for information was refused.

(3) Section 99 subsections (1) and (3), first and second sentences as well as fourth to sixth sentences, and subsection (5), first and third sentences, shall apply *mutatis mutandis*. A complaint may be lodged only if the regional court (*Landgericht*) has declared it admissible in its decision. Section 70 (2) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG) shall be correspondingly applied.

(4) Where the court complies with the petition, the information is to be provided also outside of the general meeting. Compulsory enforcement may be pursued based on the decision in accordance with the regulations of the Code of Civil Procedure (ZPO).

(5) The court seised with the proceedings shall determine, at its equitably exercised discretion, on which of the parties involved to impose the costs of the proceedings.

Subchapter 4

Voting right

Section 133

Principle of the simple majority of the votes cast

(1) The resolutions adopted by the general meeting shall require the majority of the votes cast (simple majority) unless the law or the by-laws stipulate a greater majority ratio or impose further requirements.

(2) The by-laws may make other provisions for elections.

Section 134

Voting right

(1) The voting right is exercised based on the nominal amounts of the shares of stock, and in the case of no-par-value shares based on their number. In the event that a stockholder owns several shares of stock, the by-laws of a company not listed on the stock exchange may limit the voting right by specifying a maximum amount, or a set of threshold amounts.

Furthermore, the by-laws may determine that those shares of stock shall be counted as belonging to the stockholder that belong to some other party for the stockholder's account. In the case of the stockholder being an enterprise, the by-laws may further determine that those shares of stock shall be counted as shares of stock belonging to the stockholder that belong to an enterprise controlled by the stockholder, or an enterprise controlling the stockholder, or an enterprise affiliated with the stockholder in a group of companies, or that belong to a third party for the account of such enterprises. The restrictions may not be imposed for individual stockholders. The restrictions shall not be taken into account in calculating a majority ratio of capital required by law or the by-laws.

(2) The voting right shall commence upon the contribution having been made in full. Where the value of a hidden contribution in kind does not correspond to the value set out in section 36a (2), third sentence, then this shall not contravene the commencement of the voting right; this shall not apply to obvious differences in value. The by-laws may stipulate that the voting right commences upon the statutory minimum contribution having been made, or whichever higher minimum contribution is specified in the by-laws. In such event, making the minimum contribution shall grant one vote; in the case of higher contributions, the proportion of votes shall be governed by the amount of the contributions made. Where the by-laws do not stipulate that the voting right commences prior to the contribution having been made in full, and where the contribution has not yet been made in full for any share of stock, the proportion of votes shall be governed by the amount of the contributions made; in this context, making the minimum contribution shall grant one vote. Fractions of votes shall be taken into account in these cases only insofar as they result in full votes for the stockholder entitled to vote. The by-laws may not make any provisions pursuant to this subsection for individual stockholders or for individual classes of stock.

(3) The voting right may be exercised by an authorised representative. Where the stockholder authorises more than one person, the company may refuse to accept one or several of these proxies. The granting of the power of attorney, its revocation, and the proof regarding the authorisation to be submitted to the company all must be in text form, unless stipulated otherwise in the by-laws or in the invitation convening the general meeting based on an authorisation set out in the by-laws, and unless eased requirements have been established in the case of companies listed on the stock exchange. At a minimum, the company listed on the stock exchange is to offer a means of electronic communication for transmitting proof. Where representatives exercising voting rights who have been named by the company are authorised, the company is to keep a verifiable record of the declaration of power of attorney for three (3) years; section 135 (5) shall apply *mutatis mutandis*.

(4) The by-laws shall govern the form in which the voting right is exercised.

Section 135

Exercise of the voting right by credit institutions and commercial proxy services

(1) A credit institution may exercise the voting right for shares of stock that do not belong to it, and regarding which it is not entered in the share register as a holder, only if it has been granted power of attorney. The power of attorney may only be granted to a specified credit institution, which must keep a verifiable record of it. The declaration of power of attorney must be complete and may only set out declarations connected to the exercise of the voting right. Where the stockholder does not issue any express instructions, a general power of attorney may provide only that the credit institution is authorised to exercise the voting right:

1. In accordance with its own vote guidance (subsections (2) and (3)), or
2. In accordance with guidance from the management board or from the supervisory board or, in the case of the guidance from the management board deviating from that of the supervisory board, in accordance with guidance from the supervisory board (subsection (4)).

Where the credit institution offers to exercise the voting right pursuant to the fourth sentence, no. 1 or no. 2, then it is to concurrently tender the service, within the scope of what can be

reasonably be expected of it and until revoked, of forwarding to an association of stockholders or to any other representative for whom the stockholder may opt, the documents required for exercising the voting right. Each year, the credit institution is to indicate to the stockholder the opportunities available for revoking the power of attorney at any point in time and to change the authorised representative; this indication is to be set out prominently in the communication. The issuance of instructions as regards the individual items of business set out in the agenda, the granting and revocation of a general power of attorney pursuant to the fourth sentence, and the award of a contract pursuant to the fifth sentence, including any changes thereto, are to be facilitated for the stockholder by providing him with a form or an onscreen form.

(2) A credit institution intending to exercise the voting right on the basis of a power of attorney pursuant to subsection (1), fourth sentence, no. 1 is to make accessible to the stockholder, in due time, its own guidance for exercising the voting right as regards the individual items of business set out in the agenda. In developing this guidance, the credit institution is to be oriented by the interests of the stockholder and is to take organisational measures to ensure that no interests of other business units influence this guidance; it is to appoint a member of the management that is to supervise compliance with these obligations as well as the due and proper exercise of the voting right and its documentation. In providing its guidance, the credit institution is to indicate that it will exercise the voting right in accordance with its own guidance unless the stockholder issues other instructions in due time. Where a member of the management board or an employee of the credit institution is a member of the company's supervisory board or where a member of the management board or an employee of the company is a member of the credit institution's supervisory board, the credit institution is to indicate this fact. The same shall apply if the credit institution holds an ownership interest in the company that section 33 of the Securities Trading Act (WpHG) requires to be registered or if it was a member of a consortium that has assumed the last issuance, in terms of time, of securities of the company made in the past five (5) years.

(3) Where the stockholder has not issued any instructions to the credit institution on how to exercise the voting right, then the credit institution is to exercise the voting right, in the case governed by subsection (1), fourth sentence, no. 1 in accordance with its own guidance, unless it is in its rights to assume, based on the circumstances, that, were the stockholder aware of the facts and circumstances, he would endorse the voting rights being exercised in derogation from the credit institution's guidance. Where the credit institution has deviated, in exercising the voting right, from instructions issued by the stockholder or, if the stockholder has not issued any instructions, from its own guidance, it is to inform the stockholder of this fact while citing the grounds for doing so. At its own general meeting, the credit institution to which power of attorney has been granted may exercise the voting right conferred upon it by the power of attorney only insofar as the stockholder has issued express instructions concerning the individual items of business set out in the agenda. The same shall apply at the general meeting of a company in which the credit institution holds more than 20 percent, directly or indirectly, of the share capital; in computing the level of a holding, indirect holdings in the sense of section 35 subsection (3) through subsection (6) of the Securities Trading Act (WpHG) shall not be taken into account.

(4) A credit institution intending to exercise at a general meeting the voting right based on a power of attorney pursuant to subsection (1), fourth sentence, no. 2 must make accessible to the stockholders the guidance issued by the management board and the supervisory board, unless this is effected in some other manner. Subsection (2), third sentence, as well as subsection (3), first to third sentences, shall apply *mutatis mutandis*.

(5) Where the power of attorney so permits, the credit institution may grant sub-power of attorney to persons who are not its employees. Unless specified otherwise by the power of attorney, the credit institution shall exercise the voting right on behalf of the party entitled to such voting right. Where the company has permitted a postal vote to be submitted, the credit institution having been granted power of attorney may avail itself of this option. In order to provide the company with proof of its authorisation to vote, it shall suffice, in the case of

companies listed on the stock exchange, to submit proof of authorisation pursuant to section 123 (3); in all other cases, the requirements set out in the by-laws for exercising the voting right are to be met.

(6) A credit institution may exercise the voting right for registered shares of stock that do not belong to it, but regarding which it is entered in the share register as holder, only based on an authorisation. Subsections (1) to (5) are to be correspondingly applied to the authorisation.

(7) The validity of the vote will not be impaired by a violation of subsection (1), second to seventh sentences, or of subsections (2) to (6).

(8) Subsections (1) to (7) shall apply *mutatis mutandis* to associations of stockholders and to persons who tender the service commercially to stockholders of exercising their voting right at the general meeting; this shall not apply if the party intending to exercise the voting right is the legal representative, spouse, or partner in a civil union of the stockholder or is related within the fourth degree by consanguinity or affinity.

(9) The duty of the credit institution to provide compensation for any damage resulting from a violation of subsections (1) to (6) may not be precluded in advance, nor may it be limited in advance.

(10) Section 125 (5) shall apply *mutatis mutandis*.

Section 136

Suspension of the voting right

(1) No-one may exercise the voting right for himself or for some other party if the resolution to be adopted concerns the question of whether his actions are to be approved and he is to be granted discharge, or whether he is to be released from a liability, or whether the company is to assert a claim against him. The voting right for shares of stock not entitling the stockholder to exercise the voting right pursuant to the first sentence may not be exercised by some other party, either.

(2) Any contract is null and void by which a stockholder enters into obligation to exercise the voting right in accordance with instructions issued by the company or by the management board or the supervisory board of the company, or in accordance with instructions issued by a controlled enterprise. Likewise, a contract is null and void by which a stockholder enters into obligation to vote in accordance with the guidance provided by the management board or the supervisory board of the company.

Section 137

Votes on nominations by stockholders

Where a stockholder has nominated a candidate for the supervisory board pursuant to section 127 and moves at the general meeting that the candidate be elected, then his motion shall be resolved upon prior to the nomination made by the supervisory board, provided that a minority of the stockholders so demands whose shares of stock, in the aggregate, are at least equivalent to one tenth of the share capital represented.

Subchapter 5

Separate resolution

Section 138

Separate meeting. Separate vote

Any separate resolutions to be adopted by certain stockholders as prescribed by the present Act or in the by-laws are to be adopted either at a separate meeting of these stockholders or in the course of a separate vote, unless the present Act stipulates otherwise. The provisions governing the general meeting shall apply *mutatis mutandis* to convening the separate meeting and the attendance at same as well as to the right to request information, while the provisions governing resolutions adopted by the general meeting shall apply *mutatis mutandis* to separate resolutions. Where stockholders who are entitled to participate in the vote on the separate resolution demand that a separate meeting be convened, or that

business be published by notice that is subject to a separate vote, then it shall suffice if the aggregate of their shares of stock, which entitle them to participate in the vote on the separate resolution, is at least equivalent to one tenth of the shares entitling to the exercise of the voting right in voting on the separate resolution.

Subchapter 6

Preferential stock without voting rights

Section 139

Nature

(1) The voting right may be precluded for shares of stock that have been given a preferential right in the distribution of profits (preferential stock without voting rights). The preferential right in particular may consist of a participation in the profits allocated to the share in advance (advance dividend) or of an increased participation in the profits (additional dividend). Unless stipulated otherwise in the by-laws, an advance dividend is to be paid in addition.

(2) Preferential stock without voting rights may be issued only up to half of the share capital.

Section 140

Rights of holders of preferential stock

(1) To the exception of the voting right, preferential stock without voting rights grants each stockholder those rights to which he is entitled by a share of stock.

(2) Where the preferential right is to be paid in addition and the preferential amount is not paid in a given year, or not fully, and is not paid in the subsequent year in addition to the full preferential right for that year, the stockholders shall have voting rights until the arrears have been paid. Where the preferential right is not to be paid additionally and the preferential amount is not paid in a given year, or not fully, the holders of preferential stock shall have voting rights until the preferential right has been paid fully in a year. For as long as the voting right exists, the preferential stock is to be taken into account also in calculating a majority ratio of capital required by law or the by-laws.

(3) Unless stipulated otherwise in the by-laws, the fact that the preferential amount to be paid additionally has not been paid in a given year, or not fully, as such shall not give rise to a claim to the preferential amount in arrears, such claim being conditional upon later resolutions as to the distribution of profits.

Section 141

Cancellation or limitation of the preferential right to profits

(1) Any resolution cancelling or limiting the preferential right to profits shall require the consent of all stockholders affected in order to be valid.

(2) A resolution adopted regarding the issuance of preferential stock that is to take precedence or is to be equivalent to preferential stock without voting rights in the distribution of profits, or of the company's assets, shall likewise require the consent of the holders of preferential stock. No such consent need be obtained if the issuance was expressly reserved at the time the preferential right to profits was granted or, in cases in which the voting right was precluded at a later point in time, if such issuance was reserved at the time of the preclusion, and if the pre-emptive right of the holders of preferential stock for newly issued shares of stock is not precluded.

(3) The holders of preferential stock are to adopt a separate resolution at a separate meeting concerning their consent. This resolution shall require a majority of at least three quarters of the votes cast. The by-laws may neither stipulate a different majority ratio nor impose further requirements. Where the resolution as to the issuance of preferential stock that is to take precedence or is to be equivalent to preferential stock without voting rights in the distribution of profits or of the company's assets precludes, as a whole or in part, the pre-emptive right of the holders of preferential stock for such newly issued shares of preferential stock, then section 186 subsections (3) to (5) shall apply *mutatis mutandis* to the separate resolution.

(4) Where the preferential right to profits has been cancelled, the shares of stock shall grant voting rights.

Subchapter 7
Special audit. Assertion of claims to compensation

Section 142
Appointment of special auditors

(1) The general meeting may appoint auditors (special auditors) by a simple majority of the votes cast in order to audit the actions taken and events occurring at the company's formation or occurring in the course of the management of the company's affairs, particularly also in the case of measures serving the procurement of capital and the reduction of capital. In adopting the resolution, a member of the management board or of the supervisory board may not participate in the vote, neither for himself nor on behalf of some other party, where the audit is to cover actions and events that are connected to the approval of the actions taken by a member of the management board or of the supervisory board and discharge granted to same, or connected to the initiation of a legal dispute between the company and a member of the management board or of the supervisory board. The voting right of a member of the management board or of the supervisory board that may not participate in the vote pursuant to the second sentence may not be exercised by some other party on behalf of such member, either.

(2) Where a motion for the appointment of special auditors to audit an action taken or event occurring at formation, or an action taken or event occurring in the course of the management of the company's affairs that is not more than five (5) years in the past, is not carried at the general meeting, the court is to appoint special auditors upon a corresponding petition being filed by stockholders whose shares of stock, in the aggregate, are at least equivalent to one hundredth of the share capital, or to a stake of 100 000 euros, at the time the petition is filed, if there are facts justifying the suspicion that the action taken or event occurring involved dishonest conduct or gross violations of the law or of the by-laws; this shall also apply to actions and events in the past, provided they are not more than ten (10) years in the past, if the company was listed on the stock exchange at the time such actions were taken or events occurred. The petitioners are to submit proof of their having been holders of the shares of stock since at least three (3) months prior to the date of the general meeting, and of their continuing to hold the shares until a decision is taken regarding their petition. Section 149 shall apply *mutatis mutandis* to an agreement concluded in order to avoid such a special audit.

(3) Subsections (1) and (2) shall not apply to actions and events that may be the subject of special audits pursuant to section 258.

(4) Where the general meeting has appointed special auditors, the court is to appoint some other special auditor upon a corresponding petition being filed by stockholders, whose shares of stock, in the aggregate, are at least equivalent to one hundredth of the share capital, or to a stake in same of 100 000 euros, at the time the petition is filed, if this seems to be required for cause given in the person of the special auditor appointed; this shall be the case in particular if the special auditor appointed does not have the knowledge required for dealing with the subject to be addressed by the special audit, if there is the fear of his being biased, or if there are concerns regarding his reliability. The petition is to be filed within two (2) weeks of the date of the general meeting.

(5) Besides hearing the parties involved, the court is to also hear the supervisory board and, in the case governed by subsection (4), the special auditor appointed by the general meeting. A complaint may permissibly be lodged against the decision taken. The regional court (*Landgericht*) in the judicial district of which the company has its seat shall hand down the decision regarding the petition pursuant to subsections (2) and (4).

(6) The special auditors appointed by the court are entitled to reimbursement for their reasonable cash expenditures and to remuneration for their activities. The court shall establish the expenditures and the remuneration. A complaint may permissibly be lodged

against the decision taken; filing a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement may be pursued in accordance with the Code of Civil Procedure (ZPO).

(7) Where the company has issued securities in the sense of section 2 (1) of the Securities Trading Act (WpHG) that are admitted to trading on a regulated market at a stock exchange within Germany, then the management board, in the case governed by subsection (1), first sentence, and in the case governed by subsection (2), first sentence, the court is to inform the Federal Financial Supervisory Authority (BAFin) of the appointment of the special auditor and of his audit report; additionally, the court is to inform BAFin of any petition for the appointment of a special auditor that it may receive.

(8) Unless stipulated otherwise by the present Act, the court proceedings pursuant to subsections (2) to (6) shall be governed by the regulations of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG).

Section 143

Selection of special auditors

(1) Solely the following should be appointed as special auditors where the subject to be addressed by the special audit does not require any other knowledge:

1. Persons having sufficient prior training and experience in accounting;
2. Auditing firms, provided that at least one of their legal representatives has sufficient prior training and experience in accounting.

(2) No-one may be a special auditor who is prohibited from being an auditor of annual accounts pursuant to section 319 subsections (2) and (3), section 319a (1), section 319b of the Commercial Code (HGB), or who should have been prohibited from being an auditor of annual accounts during the time in which the actions were taken and events occurred that are to be audited. An auditing firm may not serve as special auditor that is prohibited from being an auditor of annual accounts pursuant to section 319 subsections (2) and (4), section 319a (1), section 319b of the Commercial Code (HGB), or that should have been prohibited from being an auditor of annual accounts during the time in which the actions were taken and events occurred that are to be audited.

(3) (repealed)

Section 144

Liability and responsibilities of the special auditor

Section 323 of the Commercial Code (HGB) regarding the liability and responsibilities of the auditor of the annual accounts shall apply *mutatis mutandis*.

Section 145

Rights of the special auditors. Audit report

(1) The management board is to allow the special auditors to audit the books and records of the company as well as its assets, particularly the company's cash and the inventory of securities and goods.

(2) The special auditors may demand that the members of the management board and of the supervisory board provide them with all clarification statements and proof as may be required in order for the actions and events to be audited with due diligence.

(3) The special auditors have the rights pursuant to subsection (2) also vis-à-vis a group member company as well as vis-à-vis a controlled or controlling enterprise.

(4) Upon a corresponding petition being filed by the management board, the court is to allow certain facts to not be addressed in the report where this is mandated by the company's overriding interests and where such facts are not indispensable for submitting to the court the dishonest conduct or gross violations pursuant to section 142 (2).

(5) The regional court (*Landgericht*) in the judicial district of which the company has its seat shall hand down the decision regarding the petition pursuant to subsection (4). Section 142 (5), second sentence, and subsection (8) shall apply *mutatis mutandis*.

(6) The special auditors are to submit a written report on the results of their audit. The audit report must also address any facts that are suited, upon becoming known, to cause a greater than insignificant disadvantage to the company or an affiliated enterprise, if knowledge of same is necessary in order for the general meeting to adjudge the action or event to be audited. The special auditors are to sign the report and are to submit it, without undue delay, to the management board and the Commercial Register at the company's seat. Upon a corresponding demand being made, the management board is to provide each stockholder with a copy of the audit report. The management board is to submit the report to the supervisory board and is to publish it by notice in the invitation convening the next general meeting as an item of business set out in the agenda.

Section 146

Costs

Where the court appoints special auditors, the company shall bear the court costs and the costs of the audit. Where the petitioner has obtained such appointment of special auditors by intentionally or grossly negligently making inaccurate submissions to the court, the petitioner is to reimburse the company for the costs.

Section 147

Assertion of claims to compensation

(1) The company's claims to compensation arising from its formation against the persons obligated pursuant to sections 46 to 48 and section 53, or arising from the management of its affairs against the members of the management board and of the supervisory board, or arising from section 117, must be asserted if the general meeting so resolves by a simple majority of the votes cast. The claim to compensation should be asserted within six (6) months of the date of the general meeting.

(2) The general meeting may appoint special representatives for the purpose of asserting the claim to compensation. Upon the corresponding petition being filed by stockholders whose shares of stock, in the aggregate, are at least equivalent to one tenth of the share capital, or to a stake in same of one million euros, the court (section 14) is to appoint persons as representatives of the company for the purpose of asserting the claim to compensation other than the persons appointed as representatives of the company pursuant to sections 78 and 112 or pursuant to the first sentence of this provision, where the court holds that this is suitable for the proper assertion of such claims. Where the court finds for the petitioner, the company shall bear the court costs. A complaint may permissibly be lodged against the decision taken. The court-appointed representatives may demand reimbursement from the company for their reasonable cash expenditures and remuneration for their activities. The court shall establish the expenditures and the remuneration. A complaint may permissibly be lodged against the decision taken; filing a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement may be pursued in accordance with the Code of Civil Procedure (ZPO).

(3) (repealed)

(4) (repealed)

Section 148

Proceedings for leave to bring an action

(1) Stockholders, whose shares of stock, in the aggregate, are at least equivalent to one hundredth of the share capital, or to a stake in same of 100 000 euros, at the point in time at which the petition is filed, may file a petition for leave to assert, in their own name, the company's claims to compensation set out in section 147 (1), first sentence. The court shall permit such an action to be brought if:

1. The stockholders provide proof that they have purchased the shares of stock prior to the point in time at which they or, in the case of universal succession, their

predecessors in title had reason to become aware, due to a publication, of the alleged derelictions of duty or the alleged damage;

2. The stockholders provide proof that they have called on the company to itself bring an action, setting a reasonable period, but that this was to no avail;

3. Facts are given that justify the suspicion that the company may have suffered damage by dishonest conduct or gross violations of the law or the by-laws; and

4. No overriding grounds in terms of the company's best interests contravene the assertion of the claim to compensation.

(2) That regional court (*Landgericht*) in the judicial district of which the company has its seat shall decide on the petition for leave to bring an action by handing down a court order. Where a division for commercial matters has been formed at the regional court, this shall take the decision instead of the civil division. Where this serves to ensure uniform adjudication, the *Land* government may transfer the decision, by an ordinance having the force of law for the judicial districts of several regional courts, to one of the regional courts. The *Land* government may transfer the authorisation to the *Land* department of justice. The filing of the petition shall suspend the period of prescription applying to the claim that is the subject of the dispute until the petition has been dismissed and this dismissal has become final and conclusive, or until the period set for bringing the action has expired. Prior to its decision, the court is to give the respondent the opportunity to state its position. An immediate complaint may be lodged against the decision. Filing a complaint on points of law is precluded. The company is to be summoned to attend the proceedings concerning leave to bring an action, and the proceedings concerning the action itself, as an interested third party whose rights may be affected.

(3) The company shall be entitled, at any point in time, to itself assert the claim to compensation before the courts; upon the company bringing the action, any pending proceedings concerning leave to bring an action, or any pending proceedings concerning the action itself, that are pursued by stockholders regarding this claim to compensation shall become inadmissible. The company shall be entitled, at its election, to accede to pending proceedings of the action concerning its claim to compensation in the status which the proceedings have reached at the time the company accedes to them. In the cases governed by the first and second sentences, the current petitioners or plaintiffs shall be summoned to attend the proceedings as an interested third party whose rights may be affected.

(4) Where the court has found for the petitioner, the action may only be brought before the court having jurisdiction pursuant to subsection (2) within three (3) months of the decision having become final and conclusive and provided the stockholders have once again called on the company to itself bring an action, setting a reasonable period, but to no avail. The action is to be brought against the persons named in section 147 (1), first sentence, demanding that performance be provided to the company. An intervention by the stockholders as joint parties shall no longer be possible once leave has been granted to bring the action. Several actions are to be consolidated such that their hearings for oral argument and the decisions taken by the court coincide.

(5) The judgment shall take effect, even in those cases in which it dismisses the complaint, for and against the company and the remaining stockholders. This shall apply *mutatis mutandis* to any compromise to be published by notice pursuant to section 149; however, it shall take effect for and against the company only after leave has been granted to bring an action.

(6) Insofar as the petition brought by the petitioner is dismissed, he is to bear the costs of the proceedings for leave to bring an action. Where the dismissal is based on grounds contravening the action that concern the company's best interests and that the company could have provided prior to the petition being filed, but failed to so provide, then the company is to reimburse the petitioner for the costs. In all other cases, the final judgment is to allocate the costs. Where the company itself brings an action, or where it accedes to

pending proceedings of an action brought by stockholders, then it shall bear any costs the petitioner may have incurred up until the point in time at which the company brought the action or acceded to the proceedings; the company may withdraw the action only subject to the pre-requisites set out in section 93 (4), third and fourth sentences, to the exception of the blocking period. Where the action is dismissed, as a whole or in part, the company is to reimburse the plaintiffs for the costs they are to bear, unless the plaintiffs have obtained leave to bring an action by intentionally or grossly negligently making inaccurate submissions to the court. Stockholders acting jointly as petitioners or as joined parties shall be reimbursed overall only for the costs of one (1) authorised representative, unless involving a further authorised representative was indispensable for bringing the action.

Section 149

Notices published regarding a liability action

(1) Once leave has been granted to bring an action pursuant to section 148 and this leave has become final and conclusive, the company listed on the stock exchange is to give notice, without undue delay, of the petition requesting leave and of the termination of the proceedings in the company's publications of record.

(2) The notice as to the proceedings having been terminated is to set out the nature of the proceedings, all agreements connected to it, including any collateral agreements made, citing their full wording as well as the names of the parties involved. Any performance by the company and any performance by third parties to be attributed to the company are to be separately described and set out prominently. In order for the performance obligations to enter into effect, the notice must be full and complete. The validity of procedural measures serving to bring the proceedings to an end shall remain unaffected. Claims may be made for the recovery of any performance provided in spite of the invalidity.

(3) The above provisions shall apply *mutatis mutandis* to agreements concluded in order to avoid court proceedings.

Part 5

Accounting. Appropriation of profits

Chapter 1

Annual accounts and management report

Section 150

Statutory reserves. Capital reserves

(1) Statutory reserves are to be formed on the balance sheet of the annual accounts to be drawn up pursuant to sections 242 and 264 of the Commercial Code (HGB).

(2) One twentieth of the surplus for the year, reduced by any loss carried forward from the preceding year, is to be allocated to the statutory reserves, until the statutory reserves and the capital reserves pursuant to section 272 (2) nos. 1 to 3 of the Commercial Code (HGB), in the aggregate, are at least equivalent to one tenth of the share capital, or whichever greater part of the share capital is specified in the by-laws.

(3) Where the statutory reserves and the capital reserves pursuant to section 272 (2) nos. 1 to 3 of the Commercial Code (HGB) do not exceed, in the aggregate, one tenth of the share capital, or whichever greater part of the share capital is specified in the by-laws, they may be used exclusively for purposes of:

1. Offsetting a shortfall for the year insofar as this is not covered by profits carried forward from the preceding year and cannot be offset by reversing other revenue reserves;
2. Offsetting a loss carried forward from the preceding year insofar as this is not covered by any surplus for the year and cannot be offset by reversing other revenue reserves.

(4) Where the statutory reserves and the capital reserves pursuant to section 272 (2) nos. 1 to 3 of the Commercial Code (HGB) exceed, in the aggregate, one tenth of the share capital, or whichever greater part of the share capital is specified in the by-laws, the excess amount may be used for purposes of:

1. Offsetting a shortfall for the year insofar as this is not covered by profits carried forward from the preceding year;
2. Offsetting a loss carried forward from the preceding year insofar as this is not covered by any surplus for the year;
3. A capital increase using company funds pursuant to sections 207 to 220.

The appropriation pursuant to numbers 1 and 2 shall not be permissible if, concurrently, retained income is reversed for purposes of distributing the profits.

**Section 150a
(repealed)**

**Section 151
(repealed)**

Section 152

Regulations governing the balance sheet

(1) The share capital is to be recognised on the balance sheet as subscribed capital. In this context, the amount of the share capital allocated to each class of stock is to be stated separately. Contingent capital is to be noted at its nominal amount. Where multiple voting stock exists, the aggregate number of votes of the multiple voting stock and that of the other shares of stock is to be noted for the subscribed capital.

(2) Regarding the item "capital reserves," the following are to be stated separately on the balance sheet or in the notes:

1. The amount allocated to same in the course of the financial year;
2. The amount withdrawn from same for the financial year.

(3) Regarding the individual items of the retained income, the following are each to be stated separately on the balance sheet or in the notes:

1. The amounts that the general meeting has allocated to same out of the net income for the preceding year;
2. The amounts allocated to same out of the surplus for the financial year;
3. The amounts withdrawn from same for the financial year.

(4) Subsections (1) to (3) shall have no application to stock corporations that are micro share capital companies in the sense of section 267a of the Commercial Code (HGB) where they avail themselves of the eased requirements pursuant to section 266 subsection (1), fourth sentence, of the Commercial Code (HGB). Small stock corporations in the sense of section 267 (1) of the Commercial Code (HGB) are to apply subsections (2) and (3) subject to the proviso that the information is to be stated on the balance sheet.

**Sections 153 to 157
(repealed)**

Section 158

Regulations governing the income statement

(1) The following items are to be additionally reported in the income statement following the item "surplus for the year/shortfall for the year," with the numbering being continued:

1. Profits carried forward/loss carried forward from the preceding year
2. Withdrawals from the capital reserves
3. Withdrawals from retained income
 - a) From the statutory reserves
 - b) From the reserves for the ownership interest held in a controlling enterprise or in an enterprise holding a majority of the ownership interest
 - c) From the reserves set out in the by-laws
 - d) From other revenue reserves
4. Allocations to retained income
 - a) To the statutory reserves
 - b) To the reserves for the ownership interest held in a controlling enterprise or in an enterprise holding a majority of the ownership interest
 - c) To the reserves set out in the by-laws
 - d) To other revenue reserves
5. Net income/net loss.

The information set out in the first sentence may also be provided in the notes.

(2) Any compensation amount that is to be paid to external shareholders pursuant to a profit and loss absorption agreement, or an agreement on the partial absorption of profit and loss, shall be reported separately from the revenue obtained under such an agreement; where this compensation amount is in excess of the revenue, the excess amount is to be recognised on the balance sheet among the expenses for losses absorbed. No other amounts may be deducted.

(3) Subsections (1) and (2) shall have no application to stock corporations that are micro share capital companies in the sense of section 267a of the Commercial Code (HGB) where they avail themselves of the eased requirements pursuant to section 275 subsection (5) of the Commercial Code (HGB).

Section 159 (repealed)

Section 160

Regulations governing the notes

(1) All notes are to include information on

1. The inventory of shares of stock, and the receipt of additional shares of stock that a stockholder has acquired for the account of the company or of a controlled enterprise or of an enterprise in which the company holds a majority ownership interest, or that a controlled enterprise or enterprise in which the company holds a majority ownership interest has acquired as a founder or subscriber or by way of exercising a right of exchange, or pre-emptive right for newly issued shares of stock, conferred in the context of a conditional capital increase; where such shares of stock were realised in the financial year, the realisation is to likewise be reported, citing the proceeds and the appropriation of the proceeds;
2. The inventory of treasury shares of stock in the company that the company or a controlled enterprise or an enterprise in which the company holds a majority ownership interest or any other party has purchased or accepted in pledge for the account of the company or of a controlled enterprise or an enterprise in which the company holds a

majority ownership interest; in this context, the number of these shares of stock and the amount of the share capital allocated to same are to be stated as well as the portion of the share capital they represent, in the case of purchased shares of stock, the point in time at which they were so purchased and the reasons for such purchase are likewise to be stated. Where such shares of stock were purchased or disposed of in the financial year, then such purchase or disposal is to be reported, citing the number of such shares of stock, the amount of the share capital allocated to same, the portion of the share capital they represent, the purchase price or sales price, as well the appropriation of the proceeds;

3. The number of the shares of each class of stock, in which context the nominal amount is to be cited for par-value shares and the computational value is to be cited for each no-par value share individually, unless this information is apparent from the balance sheet; of these, any shares of stock subscribed in the context of a conditional capital increase or of a follow-on offering of authorised capital in the course of the financial year are to be separately stated in each case;

4. The authorised capital;

5. The number of the pre-emptive rights for newly issued shares of stock pursuant to section 192 (2) no. 3;

6. (Repealed)

7. The existence of any cross-shareholding, citing the enterprise;

8. The existence of an ownership interest of which notice has been given pursuant to section 20 subsection (1) or (4) of the present Act or pursuant to section 33 subsection (1) or (2) of the Securities Trading Act (WpHG); in this context, the content of the notification published pursuant to section 20 (6) of the present Act or pursuant to section 40 (1) of the Securities Trading Act is to be stated.

(2) No report shall be provided inasmuch as this is required for the well-being of the Federal Republic of Germany or of one of its *Länder*.

(3) Subsection (1) nos. 1 and 3 to 8 shall have no application to stock corporations that are small share capital companies in the sense of section 267 (1) of the Commercial Code (HGB). Subsection (1) no. 2 is to be applied to these stock corporations subject to the proviso that the corporation need provide information solely regarding treasury shares of stock that it has itself acquired and that it holds itself, or that have been so acquired and are being held by another person for the corporation's account; the company need not report the appropriation of the proceeds from the sale of treasury shares of stock.

Section 161

Declaration pursuant to the Corporate Governance Code

(1) The management board and the supervisory board of a company listed on the stock exchange shall declare annually that the recommendations of the Government Commission on the German Corporate Governance Code published by the Federal Ministry of Justice and Consumer Protection (BMJV) in the official section of the Federal Gazette (*Bundesanzeiger*) have been and are being complied with, or which of the Code's recommendations have not been applied or are not being applied and the reasons therefor. The same shall apply to the management board and the supervisory board of a company which has exclusively issued other securities than shares of stock for trading on an organised market in the sense of section 2 (11) of the Securities Trading Act (WpHG) and the issued shares of stock of which are traded, on the company's own initiative, only via a multilateral trading facility in the sense of section 2 (8), first sentence, no. 8 of the Securities Trading Act.

(2) The declaration shall be permanently made accessible to the public on the company's website.

Chapter 2

Audit of the annual accounts

Subchapter 1

Audit by auditors of the annual accounts

Sections 162 to 169

(repealed)

Subchapter 2

Audit by the supervisory board

Section 170

Submission to the supervisory board

(1) The management board is to submit the annual accounts and the management report to the supervisory board without undue delay after they have been drawn up. The first sentence shall apply *mutatis mutandis* to individual accounts pursuant to section 325 (2a) of the Commercial Code (HGB) as well as, in the case of parent companies (section 290 subsections (1) and (2) of the Commercial Code (HGB)), to the consolidated financial statements and the consolidated management report. If a separate non-financial report (section 289b of the Commercial Code (HGB)) or a separate consolidated non-financial report (section 315b of the Commercial Code (HGB)) has been prepared, it is to be submitted pursuant to the first sentence as well.

(2) Concurrently, the management board is to submit the proposal to the supervisory board that the management board intends to submit to the general meeting regarding the appropriation of the net income. Unless, in light of its substance, the proposal needs to be organised differently, it is to be structured as follows:

- | | | |
|----|-------------------------------|-----|
| 1. | Distribution to stockholders | ... |
| 2. | Allocation to retained income | ... |
| 3. | Profits carried forward | ... |
| 4. | Net income | ... |

(3) Each member of the supervisory board is entitled to obtain knowledge of the submissions made and of the audit reports. The submissions and audit reports are to be forwarded to each member of the supervisory board or, insofar as the supervisory board has adopted a corresponding resolution, to the members of a committee.

Section 171

Audit by the supervisory board

(1) The supervisory board is to audit the annual accounts, the management report, and the proposal regarding the appropriation of the net income; in the case of parent companies (section 290 subsections (1) and (2) of the Commercial Code (HGB)), it is to also audit the consolidated financial statements and the consolidated management report. Where the annual accounts or the consolidated financial statements are to be audited by an auditor of annual accounts, said auditor is to participate in the deliberations of the supervisory board or of the audit committee regarding the documents submitted and is to report on the substantial results of his audit, in particular on any findings he has made regarding significant weaknesses of the internal control system and of the risk management system as concerns the accounting process. The auditor shall inform on any circumstances giving rise to the concern that he might be biased and regarding any performance he has provided in addition to auditing the accounts. If a separate non-financial report (section 289b of the Commercial Code (HGB)) or a separate consolidated non-financial report (section 315b of the

Commercial Code (HGB)) has been prepared, the supervisory board is to audit such report as well.

(2) The supervisory board is to report in writing to the general meeting on the result of the audit. In the report, the supervisory board is to also inform on the manner and scope in which it has audited the management of the company's affairs in the course of the financial year; in the case of companies listed on the stock exchange, the supervisory board is to state in particular which committees have been formed, while informing on the number of its meetings and those of the committees. Where the annual accounts are to be audited by an auditor of annual accounts, the supervisory board is to furthermore state its position regarding the result of the audit of the annual accounts performed by the auditor of the annual accounts. At the conclusion of the report, the supervisory board is to declare whether, as a consequence of the conclusive result of its audit, exception is to be taken and whether it endorses the annual accounts drawn up by the management board. In the case of parent companies (section 290 subsections (1) and (2) of the Commercial Code (HGB)), the third and fourth sentences shall apply *mutatis mutandis* to the consolidated financial statements.

(3) The supervisory board is to forward its report within one (1) month of having received the documents submitted to it to the management board. Where the report is not forwarded to the management board within the period set, the management board is to set a period for the supervisory board, and shall do so without undue delay, such period amounting to no more than one (1) month. Where the report is not forwarded to the management board prior to expiry of this further period, the annual accounts shall be deemed to not have been endorsed by the supervisory board; in the case of parent companies (section 290 subsections (1) and (2) of the Commercial Code (HGB)), the same shall apply regarding the consolidated financial statements.

(4) Subsections (1) to (3) shall apply also as regards individual accounts pursuant to section 325 (2a) of the Commercial Code (HGB). The management board may disclose the accounts set out in the first sentence only after they have been endorsed by the supervisory board.

Chapter 3

Approval and establishment of the annual accounts. Appropriation of profits

Subchapter 1

Approval and establishment of the annual accounts

Section 172

Approval and establishment by the management board and the supervisory board

Where the supervisory board endorses the annual accounts, this is tantamount to their approval and establishment unless the management board and the supervisory board decide to leave the approval and establishment of the annual accounts to the general meeting. The resolutions adopted by the management board and the supervisory board are to be included in the report submitted by the supervisory board to the general meeting.

Section 173

Approval and establishment by the general meeting

(1) Where the management board and the supervisory board have resolved to leave the approval and establishment of the annual accounts to the general meeting, or where the supervisory board has not endorsed the annual accounts, the general meeting shall approve and establish the annual accounts. Where the supervisory board of a parent company (section 290 subsections (1) and (2) of the Commercial Code (HGB)) has not endorsed the consolidated financial statements, the general meeting shall decide on the endorsement.

(2) The regulations applicable to the manner in which annual accounts are drawn up shall apply to their approval and establishment. In approving and establishing the annual accounts, the general meeting may only allocate those amounts to retained income that are to be so allocated pursuant to the law or the by-laws.

(3) Where the general meeting modifies annual accounts that have been audited by reason of the corresponding statutory duty by an auditor of annual accounts, any resolutions regarding the approval and establishment of the annual accounts and the appropriation of profits that are adopted by the general meeting prior to the new audit being performed pursuant to section 316 (3) of the Commercial Code (HGB) shall enter into force only once an unqualified audit opinion has been issued by reason of the new audit regarding the modifications. The modifications shall become null and void if no unqualified audit opinion is issued regarding such modifications within two (2) weeks of the resolution having been adopted.

Subchapter 2

Appropriation of profits

Section 174

(1) The general meeting shall adopt a resolution as regards the appropriation of the net income. In so doing, it shall be bound to the annual accounts as approved and established.

(2) The resolution is to set out the details of the appropriation of the net income, and particularly is to state

1. The net income;
2. The amount or non-cash asset to be distributed to the stockholders;
3. The amounts to be allocated to retained income;
4. Any profits carried forward;
5. The additional expenses resulting from the resolution adopted.

(3) The resolution shall not result in a modification of the annual accounts as approved and established.

Subchapter 3

Ordinary annual general meeting

Section 175

Convening the annual general meeting

(1) Without undue delay following receipt of the report of the supervisory board, the management board is to convene the general meeting for purposes of accepting the annual accounts as approved and established along with the management report and individual accounts pursuant to section 325 (2a) of the Commercial Code (HGB) endorsed by the supervisory board, and for purposes of resolving on the appropriation of any net income that may have been earned; in the case of a parent company (section 290 subsections (1) and (2) of the Commercial Code (HGB)), the general meeting is to be convened also for purposes of accepting the consolidated financial statements endorsed by the supervisory board, and the consolidated management report. The general meeting is to take place in the course of the first eight (8) months of the financial year.

(2) The annual accounts, individual accounts pursuant to section 325 (2a) of the Commercial Code (HGB) endorsed by the supervisory board, the management report, the report of the supervisory board, and the proposal by the management board regarding the appropriation of the net income are to be kept available, from the time onwards at which the general meeting is convened, at the company's business premises for inspection by the stockholders. Upon a corresponding demand being made, each stockholder is to be provided with a copy of the documents submitted without undue delay. In the case of a parent company (section 290 subsections (1) and (2) of the Commercial Code (HGB)), the first and second sentences shall also apply to the consolidated financial statements, the consolidated management report, and the report of the supervisory board concerning said statement and report. The obligations pursuant to the first and third sentences shall not be

applicable if the documents designated therein are kept accessible on the company website for the same period of time.

(3) Where the general meeting is to approve and establish the annual accounts or where it is to decide on the endorsement of the consolidated financial statements, subsections (1) and (2) shall apply *mutatis mutandis* to the invitation convening the general meeting for the approval and establishment of the annual accounts, or for the endorsement of the consolidated financial statements, and shall likewise apply *mutatis mutandis* to how the documents submitted are made accessible and the copies are issued. The deliberations as to the approval and establishment of the annual accounts should be tied to those regarding the appropriation of the net income.

(4) Upon the general meeting having been convened that is to accept the annual accounts as approved and established or, if the general meeting is to approve and establish the annual accounts, upon the general meeting that is to approve and establish the annual accounts having been convened, the management board and the supervisory board shall be bound to the declarations regarding the annual accounts made in the report of the supervisory board (sections 172, 173 (1)). In the case of a parent company (section 290 subsections (1) and (2) of the Commercial Code (HGB)), the first sentence shall apply *mutatis mutandis* to the declaration by the supervisory board regarding the endorsement of the consolidated financial statements.

Section 176

Documents submitted. Presence of the auditor of the annual accounts

(1) The management board is to make accessible to the general meeting the documents submitted that have been set out in section 175 (2) as well as, in the case of companies listed on the stock exchange, an explanatory report on the information provided pursuant to section 289a (1) and section 315a (1) of the Commercial Code (HGB). At the outset of the meeting, the management board should explain the documents it has submitted, while the chairman of the supervisory board should explain the report of the supervisory board. In this context, the management board should also state its position regarding any shortfall for the year or any loss that has impaired the annual earnings to a significant degree. The third sentence shall not be applied to credit institutions.

(2) Where the annual accounts are to be audited by an auditor of annual accounts, such auditor is to participate in the deliberations regarding the approval and establishment of the annual accounts. The first sentence shall apply *mutatis mutandis* to the deliberations regarding the endorsement of consolidated financial statements. The auditor of the annual accounts is not under obligation to provide any information to a stockholder.

Chapter 4

Publication by notice of the annual accounts

Section 177 (repealed)

Section 178 (repealed)

Part 6

Amendment of the by-laws. Measures serving the procurement of capital and the reduction of capital

Chapter 1

Amendment of the by-laws

Section 179

Resolution adopted by the general meeting

- (1) Any amendment of the by-laws shall require a resolution to be adopted by the general meeting. The general meeting may transfer to the supervisory board the authority to make amendments that concern solely the changeable content of the by-laws.
- (2) The resolution adopted by the general meeting shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a different majority ratio of capital; however, this may only be a greater majority ratio of capital should the matter involve a modification of the enterprise's purpose. The by-laws may impose further requirements.
- (3) Where the ratio of several classes of stock is to be modified to the detriment of a particular class of stock, the resolution adopted by the general meeting shall require, in order to be effective, the consent of those stockholders who will be placed at a disadvantage. The stockholders placed at a disadvantage are to adopt a separate resolution as to the consent. Subsection (2) shall apply to such separate resolution.

Section 179a

Duty to transfer the entire assets of the company

- (1) A contract by which a stock corporation enters into obligation to transfer the entirety of the company's assets, without this transfer being governed by the regulations of the Transformation Act (UmwG), shall require a resolution to be adopted by the general meeting pursuant to section 179 also in those cases in which the transfer is not connected to a modification of the enterprise's purpose. If the by-laws make stipulations as to the majority ratio, they may only stipulate that the majority ratio of capital be greater.
- (2) From the time onwards at which the general meeting is convened that is to adopt a resolution as to the consent, the contract is to be kept available at the company's business premises for inspection by the stockholders. Upon a corresponding demand being made, each stockholder is to be provided with a copy without undue delay. The duties pursuant to the first and second sentences shall not be applicable if the contract is accessible via the company's website for the same period of time. The contract is to be made accessible at the general meeting. At the outset of the meeting, the management board is to give a presentation of the contract. It is to be attached to the minutes as an annex.
- (3) Where, on the occasion of the company's assets being transferred, the company is dissolved, an execution of the contract or a publicly certified copy of same is to be attached to the application for entry in the register of the company's dissolution.

Section 180

Consent of the stockholders affected

- (1) Any resolution imposing incidental duties on stockholders shall require the consent of all stockholders affected in order to be valid.
- (2) The same shall apply to a resolution by which the transfer of registered shares of stock or temporary share certificates is bound to the consent of the company.

Section 181

Entry in the register of the amendment of the by-laws

- (1) The management board is to file an application for entry in the Commercial Register of the amendment of the by-laws. The full wording of the by-laws is to be attached to the application for entry in the register; it must bear a certificate from a notary that the amended provisions of the by-laws correspond to the resolution adopted as to the amendment of the by-laws and that the unchanged provisions correspond to the full wording of the by-laws last filed with the Commercial Register.
- (2) Unless the amendment concerns particulars pursuant to section 39, it shall suffice, in entering the amendment, to refer to the records and documents filed with the court.
- (3) The amendment shall enter into force only once it has been entered in the Commercial Register kept at the seat of the company.

Chapter 2

Measures serving the procurement of capital

Subchapter 1

Capital increase in return for contributions

Section 182

Pre-requisites

(1) An increase of the share capital in return for contributions may only be resolved upon by a majority amounting to at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a different majority ratio of capital, however, this may only be a greater majority ratio of capital should the matter involve the issuance of preferential stock without voting rights. The by-laws may impose further requirements. The capital increase may be performed only by issuing new shares of stock. In the case of companies with no-par-value shares, the number of the shares must increase in the same ratio as the share capital increases.

(2) Where several classes of stock exist of shares with voting rights, the resolution adopted by the general meeting shall require the consent of the stockholders of each class of stock in order to be valid. The stockholders of each class of stock are to adopt a separate resolution regarding such consent. Subsection (1) shall apply to such separate resolution.

(3) Where the new shares of stock are to be issued at a price higher than the minimum issue price, then the resolution regarding the increase of the share capital is to specify the minimum price below which the shares should not be issued.

(4) The share capital should not be increased for as long as outstanding contributions to the current share capital can still be obtained. In the case of insurance companies, the by-laws may stipulate otherwise. Where the scope in which contributions are outstanding is relatively insignificant, this shall not impede the increase of the share capital.

Section 183

Capital increase based on contributions in kind; repayment of contributions

(1) Where a contribution in kind (section 27 subsections (1) and (2)) is made, the resolution adopted as to the increase of the share capital is to specify its object, the person from whom the company is purchasing the object, and the nominal amount, and in the case of no-par-value shares the number of shares to be allotted in the context of the contribution in kind. The resolution may be adopted only if the fact that contributions in kind are being made have been expressly published by due and proper notice along with the specifications pursuant to the first sentence.

(2) Section 27 subsections (3) and (4) shall apply *mutatis mutandis*.

(3) Where the capital is increased based on contributions in kind, an audit is to be performed by one or several auditors. Section 33 subsections (3) to (5), sections 34, 35 shall apply *mutatis mutandis*.

Section 183a

Capital increase based on contributions in kind not subjected to an audit

(1) Subject to the pre-requisites set out in section 33a, the audit of a contribution in kind (section 183 (3)) may be refrained from. The following subsections shall apply of an audit is so refrained from.

(2) The management board is to give notice in the company's publications of record of the date of the resolution adopted as to the capital increase while also citing the particulars pursuant to section 37a subsections (1) and (2). The implementation of the share capital increase may not be entered in the Commercial Register prior to expiry of four (4) weeks since the notice.

(3) Where the pre-requisites set out in section 33a (2) are given, the local court (*Amtsgericht*) is to appoint one or several auditors, upon a corresponding petition being filed by stockholders who, on the date on which the resolution as to the capital increase was

adopted, jointly held five (5) percent of the share capital and continue to hold this ownership interest on the date of filing their petition. The petition may be filed up until the date on which the implementation of the increase of the share capital (section 189) is entered in the Commercial Register. Prior to its decision regarding the petition, the court is to hear the management board. A complaint may be lodged against the decision.

(4) For the further procedure, Section 33 subsections (4) and (5), sections 34 and 35 shall apply *mutatis mutandis*.

Section 184

Application for entry in the register of the resolution

(1) The management board and the chairman of the supervisory board are to file an application for entry of the resolution as to the increase of the share capital in the Commercial Register. The application for entry in the register is to state which contributions to the current share capital have not yet been made and why they cannot be obtained. If an audit of the contribution in kind is to be refrained from and the date of the resolution adopted as to the capital increase has been published by notice in advance (section 183a (2)), the parties filing the application for entry in the register need only give an assurance in same that since publication of the notice, they have not become aware of any circumstances in the sense of section 37a (2).

(2) The report on the audit of the contributions in kind (section 183 (3)) or the annexes specified in section 37a (3) are to be attached to the application for entry in the register.

(3) The court may refuse to make the entry applied for if the value of the contribution in kind is lower, to a greater than negligible degree, than the minimum issue price of the shares of stock to be allotted therefor. Section 38 (3) shall apply *mutatis mutandis* if an audit of the contribution in kind is refrained from pursuant to section 183a (1).

Section 185

Subscription of the new shares of stock

(1) The new shares of stock shall be subscribed by way of a written declaration (certificate of subscription) that must identify the ownership interest by the number of shares of stock, and in the case of par-value shares by their nominal amount and, where several classes of stock are issued, by the class of stock of said shares. The certificate of subscription should be issued in duplicate. It is to set out:

1. The date on which the resolution was adopted to increase the share capital;
2. The issue price of the shares of stock, the amount of the specified payments, as well as the scope of incidental duties;
3. The specifications intended to be made in the case of a capital increase based on contributions in kind and, if several classes of stock are issued, the amount of the share capital allocated to each class of stock,
4. The point in time at which the subscription will become non-binding, unless the implementation of the share capital increase has been entered in the Commercial Register by that time.

(2) Certificates of subscription that do not include all of the above information, or that provide for restrictions on the duty of the subscriber besides the reservation made in subsection (1) no. 4, are null and void.

(3) Where the implementation of the share capital increase has been entered in the register, the subscriber cannot take recourse to the certificate of subscription being null and void or non-binding if he has exercised rights or fulfilled duties as a stockholder by reason of the certificate of subscription.

(4) Any restriction not set out in the certificate of subscription shall have no validity vis-à-vis the company.

Section 186

Pre-emptive right for newly issued shares of stock

(1) Each stockholder must be allotted, upon his making the corresponding demand, a portion of the new shares of stock corresponding to his portion of the current share capital. A period of at least two (2) weeks is to be determined for exercising the pre-emptive right for newly issued shares of stock.

(2) The management board is to give notice, in the company's publications of record, of the issue price or the basis on which it has established same and, concurrently, a subscription period pursuant to subsection (1). Where only the basis on which the issue price has been established is published, the management board is to give notice of the issue price in the company's publications of record and via an electronic information medium, doing so at the latest three (3) days prior to expiry of the subscription period.

(3) The pre-emptive right for newly issued shares of stock may be precluded, as a whole or in part, only in the resolution adopted as to the increase of the share capital. In this case, besides needing to meet the requirements set out in the law or in the by-laws for the capital increase, the resolution shall require a majority comprising, at a minimum, three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. Precluding the pre-emptive right for newly issued shares of stock shall be permissible in particular in those cases in which the capital increase in return for contributions in cash does not exceed ten (10) percent of the share capital and the issue price is not significantly lower than the stock exchange price.

(4) A resolution by which the pre-emptive right for newly issued shares of stock is precluded as a whole or in part may be adopted only if the preclusion is expressly published by due and proper notice. The management board is to make accessible to the general meeting a written report on the reason for the partial or complete preclusion of the pre-emptive right for newly issued shares of stock; the report is to cite the reasons for the proposed issue price.

(5) It is not to be regarded as a preclusion of the pre-emptive right for newly issued shares of stock if, following the adoption of the resolution, the new shares of stock are to be acquired, along with the duty to offer them to the stockholders for subscription, from a credit institution or from an enterprise pursuing activities pursuant to section 53 (1), first sentence, or section 53b (1), first sentence, or subsection (7) of the Banking Act (KWG). The management board is to publish by notice this offer for subscription together with the particulars stated in subsection (2), first sentence, along with a final issue price pursuant to subsection (2), second sentence; the same shall apply if the new shares of stock are to be acquired, along with the duty to offer them to the stockholders for subscription, by a different party than a credit institution or enterprise in the sense of the first sentence.

Section 187

Commitment to grant rights to subscribe to new shares of stock

(1) A commitment to grant rights to subscribe to new shares of stock may be given solely subject to the reservation of the pre-emptive right of the stockholders for newly issued shares of stock.

(2) Any commitments given prior to the resolution being adopted as to the increase of the share capital shall have no validity vis-à-vis the company.

Section 188

Application for entry in the register and entry of the implementation

(1) The management board and the chairman of the supervisory board are to file an application for entry in the Commercial Register of the increase of the share capital having been implemented.

(2) Section 36 (2), section 36a, and section 37 (1) shall apply *mutatis mutandis* to the application for entry in the register. The payment towards such increase cannot be made by crediting the amount to an account of the management board.

(3) The following documents are to be attached to the application for entry in the register:

1. The duplicates of the certificates of subscription and a list of the subscribers signed by the management board specifying the shares of stock allotted to each of them and the payments made towards such shares of stock;
 2. In the case of a capital increase based on contributions in kind, the contracts on which the determinations set out in section 183 are based, or that were concluded in order to implement such determinations;
 3. A calculation of the costs that will arise for the company by the issuance of the new shares of stock.
 4. (repealed)
- (4) The application for entry in the register, and entry in same, of the increase of the share capital having been implemented may be tied to the application for entry in the register, and entry in same, of the resolution adopted as to the increase.
- (5) (repealed)

Section 189

Entry into force of the capital increase

Upon the implementation of the increase of the share capital having been entered in the Commercial Register, the share capital shall be increased.

Section 190

(repealed)

Section 191

Prohibited issuance of shares of stock and temporary share certificates

Prior to the implementation of the increase of the share capital being entered in the register, the new rights to a share cannot be transferred, nor can new shares of stock or temporary share certificates be issued. The new shares of stock and temporary share certificates issued previously are null and void. The issuers shall be liable as joint and several debtors to the holders for any damages resulting from the issuance.

Subchapter 2

Conditional capital increase

Section 192

Pre-requisites

- (1) The general meeting may adopt a resolution to increase the share capital that is to be implemented only insofar as a right of exchange or pre-emptive right for newly issued shares of stock is utilised (conditional capital increase) to which the company is itself entitled or which it grants with regard to the new shares of stock (shares of a new issue).
- (2) The conditional capital increase should be resolved upon only for the following purposes:
 1. In order to grant rights of exchange or pre-emptive rights to newly issued shares of stock based on convertible bonds;
 2. In order to prepare for the merger of several enterprises;
 3. In order to grant to the company's employees and members of its management, or to those of an affiliated enterprise, pre-emptive rights to newly issued shares of stock by way of adopting a resolution granting consent or authorisation.
- (3) The nominal amount of the contingent capital may not exceed half, and the nominal amount of the capital resolved upon pursuant to subsection (2) no. 3 may not exceed one tenth, of the share capital that is available at the time the resolution regarding the conditional capital increase is adopted. Section 182 (1), fifth sentence, shall apply *mutatis mutandis*. The first sentence shall not apply to a conditional capital increase pursuant to subsection (2) no. 1 that is resolved upon solely for the purpose of allowing the company to perform an

exchange to which it is entitled in the event of its impending inability to pay its debts as they fall due, or for the purpose of averting an over-indebtedness. Where the company is an institution in the sense of section 1 (1b) of the Banking Act (KWG), the first sentence furthermore shall not apply to a conditional capital increase pursuant to subsection (2) no. 1 that is resolved upon for the purpose of allowing the company to perform an exchange in order to fulfil requirements of bank supervision regulations or requirements imposed on it for restructuring or liquidation purposes. Conditional capital to which the third sentence or the fourth sentence has application shall not be set off from other conditional capital.

(4) A resolution adopted by the general meeting contravening the resolution adopted as to the conditional capital increase is null and void.

(5) The following regulations governing the pre-emptive right for newly issued shares of stock shall apply *mutatis mutandis* to the right of exchange.

Section 193

Requirements to be met by the resolution

(1) The resolution as to the conditional capital increase shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. Section 182 (2) and section 187 (2) shall apply.

(2) The resolution must also establish the following:

1. The purpose pursued by the conditional capital increase;
2. The group of persons having subscription rights to the shares of a new issue;
3. The issue price or the basis on which this amount is calculated; in the case of a conditional capital increase performed for the purposes set out in section 192 (2) no. 1, it shall suffice if the resolution, or the resolution pursuant to section 221 that is tied thereto, specifies the minimum issue price or the basis for determining the issue price or the minimum issue price; as well as
4. In the case of resolutions pursuant to section 192 (2) no. 3, also the allocation of the pre-emptive right for newly issued shares of stock to members of the management bodies and employees, the performance targets, purchase and exercise periods, and the waiting period until the subscription right first may be exercised (at a minimum four (4) years).

Section 194

Conditional capital increase based on contributions in kind; repayment of contributions

(1) Where a contribution is rendered in kind, its object, the person from whom the company is acquiring such object, and the nominal amount – in the case of no-par-value shares: the number – of the shares of stock to be allotted in the context of the contribution in kind must be specified in the resolution adopted as to the conditional capital increase. The exchange of bonds for shares of a new issue shall not be deemed a contribution in kind. The resolution may be adopted only if the fact that contributions in kind are being made has been expressly published by due and proper notice.

(2) Section 27 subsections (3) and (4) shall apply *mutatis mutandis*; in each case, the time at which the shares of a new issue are so issued shall take the stead of the time at which the application for entry in the register is filed pursuant to section 27 (3), third sentence, and the time of the entry pursuant to section 27 (3), fourth sentence.

(3) Subsections (1) and (2) shall not apply to the contribution of monetary claims to which employees of the company are entitled based on a share in the profits granted to them by the company.

(4) In the case of a capital increase based on contributions in kind, an audit is to be performed by one or several auditors. Section 33 subsections (3) to (5), sections 34 and 35 shall apply *mutatis mutandis*.

(5) Section 183a shall apply *mutatis mutandis*.

Section 195

Application for entry in the register of the resolution

(1) The management board and the chairman of the supervisory board are to file an application for entry in the Commercial Register of the resolution adopted as to the conditional capital increase. Section 184 (1), third sentence, shall apply *mutatis mutandis*.

(2) The following documents are to be attached to the application for entry in the register:

1. In the case of a conditional capital increase based on contributions in kind, the contracts on which the specifications pursuant to section 194 are based, or that were concluded in order to implement them, and the report on the audit of the contributions in kind (section 194 (4)), or the documents designated in section 37a (3) as enclosures;

2. A calculation of the costs that will arise for the company by the issuance of the shares of a new issue.

3. (repealed)

(3) The court may refuse to make the entry applied for if the value of the contribution in kind is lower, to a greater than negligible degree, than the minimum issue price of the shares of stock to be allotted therefor. Section 38 (3) shall apply *mutatis mutandis* if an audit of the contribution in kind is refrained from pursuant to section 183a (1).

Section 196

(repealed)

Section 197

Prohibited issuance of shares of stock

The shares of a new issue may not be so issued prior to the resolution adopted as to the conditional capital increase having been entered in the Commercial Register. Prior to this time, no claim shall arise for the person having subscription rights to the shares of a new issue. Any shares of a new issue issued prior to this time shall be null and void. The issuers shall be liable as joint and several debtors to the holders for any damages resulting from the issuance.

Section 198

Declaration as to the exercise of the subscription right

(1) The pre-emptive right for newly issued shares of stock shall be exercised by a written declaration. The declaration (declaration as to the exercise of the subscription right) should be issued in duplicate. It is to state the ownership interest according to the number of the shares of stock – and, in the case of par-value shares, according to their nominal amount – and, if several classes of stock are issued, the class of stock of the shares, the specifications pursuant to section 193 (2), the specifications intended to be made pursuant to section 194 in the context of having the contributions in kind made, as well as the date on which the resolution as to the conditional capital increase was adopted.

(2) The declaration as to the exercise of the subscription right shall have the same effect as a declaration of subscription. Any declarations as to the exercise of the subscription rights shall be null and void where their content does not correspond to what has been set out in subsection (1) or where they provide for any restrictions on the duties of the party making the declaration.

(3) Where shares of a new issue are issued notwithstanding the fact that a declaration as to the exercise of the subscription right is null and void, the party making such declaration may not rely on its being null and void if he has exercised the rights of a stockholder, or has

fulfilled duties incumbent on a stockholder, based on the declaration as to the exercise of the subscription right.

(4) Any restriction not set out in the declaration as to the exercise of the subscription right shall have no validity vis-à-vis the company.

Section 199

Issuance of the shares of a new issue

(1) The management board may issue the shares of a new issue only by way of fulfilling the purpose specified in the resolution adopted as to the conditional capital increase, and may not do so prior to the full performance of the equivalent value as set out in the resolution.

(2) The management board may issue shares of a new issue in return for convertible bonds only if the difference between the issue price of the bonds submitted to be exchanged and the higher minimum issue price of the shares of a new issue to be allotted in return for them is covered by other revenue reserves, insofar as they may be used for this purpose, or by an additional payment to be made by the person entitled to exchange the bonds. This shall not apply if the total price at which the bonds have been issued is at least equivalent to the minimum issue price of the shares of a new issue overall, or is higher.

Section 200

Entry into force of the conditional capital increase

Upon the shares of a new issue being issued, the share capital shall have been increased.

Section 201

Application for entry in the register of the issuance of shares of a new issue

(1) The management board shall apply to have the issuance of shares of a new issue entered in the Commercial Register at least once per year, doing so no later than by the end of the calendar month following the end of the financial year.

(2) The duplicates of the declarations as to the exercise of the subscription rights and a list of the persons who have exercised the pre-emptive right for newly issued shares of stock, such list having been signed by the management board, are to be attached to the application for entry in the register. The list is to state the shares of stock allocated to each stockholder and the contributions made in their regard.

(3) In its application for entry in the register, the management board is to declare that the shares of a new issue have been issued solely by way of fulfilling the purpose specified in the resolution adopted as to the conditional capital increase and that they were not issued prior to the equivalent value set out in the resolution having been fully paid or rendered.

(4) (repealed)

Subchapter 3 Authorised capital

Section 202

Pre-requisites

(1) The by-laws may grant authority to the management board, for a maximum period of five (5) years following entry in the register of the company, to increase the share capital up to a specified nominal amount (authorised capital) by issuing new shares of stock in return for contributions.

(2) The authorisation may also be granted by an amendment of the by-laws; it shall continue in force for a maximum period of five (5) years following entry in the register of the amendment of the by-laws. The resolution adopted by the general meeting shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. Section 182 (2) shall apply.

(3) The nominal amount of the authorised capital may not exceed one half of the share capital given at the time of the authorisation. The new shares of stock should be issued

solely with the consent of the supervisory board. Section 182 (1), fifth sentence, shall apply *mutatis mutandis*.

(4) The by-laws may also provide for the new shares of stock to be issued to employees of the company.

Section 203

Issuance of the new shares of stock

(1) Sections 185 to 191 governing the capital increase on the basis of contributions shall apply *mutatis mutandis* to the issuance of the new shares of stock unless otherwise provided for by the regulations set out below. The authorisation to issue new shares of stock set out in the by-laws shall take the stead of the resolution adopted as to the increase of the share capital.

(2) The authorisation may provide that the management board is to decide on the preclusion of the pre-emptive right for newly issued shares of stock. Where an authorisation making this provision is granted by an amendment of the by-laws, then section 186 (4) shall apply *mutatis mutandis*.

(3) The new shares of stock should not be issued for as long as outstanding contributions to the current share capital can still be obtained. In the case of insurance companies, the by-laws may stipulate otherwise. Where the scope in which contributions are outstanding is relatively insignificant, this shall not impede the issuance of the new shares of stock. The first application for entry in the register of the fact that the increase of the share capital has been implemented is to state which contributions have not yet been made to the current share capital and why they cannot be obtained.

(4) Subsection (3), first and fourth sentences, shall not apply if the shares of stock are issued to employees of the company.

Section 204

Terms governing the issuance of the shares of stock

(1) The management board shall decide on the substance of the rights to a share of stock and the terms governing the issuance of the shares of stock unless the authorisation has made provisions in this regard. The decision of the management board shall require the consent of the supervisory board; the same applies to the decision of the management board pursuant to section 203 (2) as to the preclusion of the pre-emptive right for newly issued shares of stock.

(2) Where preferential stock without voting rights exists, the preferential stock that is to take precedence before such stock, or that is to have equivalent rank, in the distribution of the profits or of the company's assets may be issued only if this has been provided for in the authorisation.

(3) Where annual accounts certified by an unqualified audit opinion recognise a surplus for the year, shares of stock may also be issued to the employees of the company such that the contribution to be made for them is covered by that part of the surplus for the year that the management board and the supervisory board could allocate to other revenue reserves pursuant to section 58 (2). The regulations governing a capital increase in return for contributions in cash shall apply to the issuance of the new shares of stock, to the exception of section 188 (2). The annual accounts as approved and established are to be attached, along with the audit opinion, to the application for entry in the register of the fact that the increase of the share capital has been implemented. Furthermore, the parties filing the application for entry in the register are to also make the declaration pursuant to section 210 (1), second sentence.

Section 205

Issuance in return for contributions in kind; repayment of contributions

(1) Shares of stock may only be issued in return for contributions in kind if this has been provided for by the authorisation.

(2) Unless they have been specified in the authorisation, the management board is to specify and include in the certificate of subscription the object of the contribution in kind, the person from whom the company is purchasing the object, and the nominal amount – in the case of no-par-value shares the number – of shares of stock to be allotted in the context of the contribution in kind. The management board should take the decision solely upon having obtained the consent of the supervisory board.

(3) Section 27 subsections (3) and (4) shall apply *mutatis mutandis*.

(4) Subsections (2) and (3) shall not apply to the contribution of monetary claims to which employees of the company are entitled based on a share in the profits the company has granted them.

(5) Where the shares of stock are issued in return for contributions in kind, an audit is to be performed by one or several auditors; section 33 subsections (3) to (5), sections 34 and 35 shall apply *mutatis mutandis*. Section 183a is to be correspondingly applied. Instead of giving notice, in the company's publications of record, of the date on which the resolution as to the capital increase was adopted, the management board is to publish in same its decision regarding the issuance of new shares of stock in return for contributions in kind as well as the particulars set out in section 37a subsections (1) and (2).

(6) Inasmuch as no audit is performed of the contribution in kind, section 184 (1), third sentence, and subsection (2) also shall apply *mutatis mutandis* to the application for entry in the register of the fact that the capital increase has been implemented (section 203 (1), first sentence, section 188).

(7) The court may refuse to make the entry applied for if the value of the contribution in kind is lower, to a greater than negligible degree, than the minimum issue price of the shares of stock to be allotted therefor. Section 38 (3) shall apply *mutatis mutandis* if an audit of the contribution in kind is refrained from pursuant to section 183a (1).

Section 206

Contracts as to contributions in kind prior to the company being entered in the Commercial Register

Where contracts have been concluded, prior to the company being entered in the Commercial Register, pursuant to which a contribution in kind is to be made to the authorised capital, the by-laws must include the specifications that are prescribed for an issuance in return for contributions in kind. In this context, section 27 (3) and 5, sections 32 to 35, 37 (4) nos. 2, 4, and 5, section 37a and section 38 subsections (2) and (3) as well as section 49 regarding the formation of the company shall apply *mutatis mutandis*. The management board shall take the stead of the founders and the application for entry in the register, and entry in same, of the fact that the increase of the share capital has been implemented shall take the stead of the application for entry in the register, and entry in same, of the company.

Subchapter 4

Capital increase using company funds

Section 207

Pre-requisites

(1) The general meeting may resolve to increase the share capital by converting the capital reserves and retained income to share capital.

(2) Section 182 (1) and section 184 (1) shall apply *mutatis mutandis* to the resolution and to the application for entry in the register of same. Companies with no-par-value shares may increase their share capital also without issuing new shares of stock; the resolution adopted on the capital increase must state the nature of the increase.

(3) The resolution is to be based on a balance sheet.

Section 208

Convertibility of capital reserves and retained income

(1) The capital reserves and the retained income that are to be converted to share capital must have been recognised as “capital reserves” or “retained income” in the last annual financial statement and, where the resolution is based on a different balance sheet, also in that balance sheet, or they must have been recognised as an allocation to said reserves in the last resolution adopted as to the appropriation of the surplus for the year or of the net income. Subject to the stipulations made in subsection (2), other revenue reserves and the allocations made to same may be converted to share capital in their full amount; the capital reserves and the statutory reserves as well as the allocations to same may be converted to share capital only insofar as they are higher, in the aggregate, than one tenth of the share capital thus far, or whichever higher portion of same is specified in the by-laws.

(2) The capital reserves and the retained income as well as the allocations made to same may not be converted insofar as the balance sheet serving as the basis recognises a loss including a loss carried forward. Retained income and the allocations made to same that are determined for a specific purpose may be converted only insofar as this is compatible with their intended purpose.

Section 209

Balance sheet serving as the basis

(1) The resolution may be based on the last annual balance sheet if the annual balance sheet has been audited and the approved annual balance sheet is certified by the unqualified audit opinion of the auditor of the annual accounts and if its cut-off date does not precede by more than eight (8) months the date on which the application is filed for entry in the register of the resolution.

(2) Where the resolution is not based on the last annual balance sheet, the balance sheet must comply with sections 150, 152 of the present Act and with sections 242 to 256a and sections 264 to 274a of the Commercial Code (HGB). At a maximum, the balance sheet cut-off date may precede by eight (8) months the date on which the application is filed for entry in the register of the resolution.

(3) The balance sheet must be audited by an auditor of annual accounts to establish whether it complies with sections 150, 152 of the present Act and with sections 242 to 256a and sections 264 to 274a of the Commercial Code (HGB). It must be certified by an unqualified audit opinion.

(4) Unless the general meeting elects a different auditor, that auditor shall be deemed as having been elected who was elected by the general meeting to audit the last annual accounts or appointed by the court. Unless the special aspects of the auditor's engagement require otherwise, section 318 (1), third and fourth sentences, section 319 subsections (1) to (4), section 319a (1), section 319b (1), section 320 subsections (1) and (2), section 321, section 322 (7) and section 323 of the Commercial Code (HGB) shall correspondingly apply to the audit.

(5) In the case of insurance companies, the auditor shall be determined by the supervisory board; subsection (4), first sentence, shall apply *mutatis mutandis*. Unless the special aspects of the auditor's engagement require otherwise, section 341k of the Commercial Code (HGB) shall apply to the audit.

(6) In the case governed by subsections (2) to (5), section 175 (2) shall apply *mutatis mutandis* to making accessible the balance sheet and to the provision of copies.

Section 210

Application for entry in the register, and entry in same, of the resolution

(1) The balance sheet on which the capital increase is based along with the audit opinion, and in the case governed by section 209 subsections (2) to (6) also the last annual balance sheet unless it has already been filed pursuant to section 325 (1) of the Commercial Code (HGB), are to be attached to the application for entry in the Commercial Register of the resolution. The parties filing the application for entry in the register are to declare to the court that, as far as they are aware, no reduction of assets has occurred, since the balance sheet cut-off date serving as the basis of the capital increase until the date of the application for

entry in the register, that would contravene the capital increase had this been resolved upon on the date on which the application for entry in the register was filed.

(2) The court may enter the resolution in the register only if the balance sheet on which the capital increase is based was prepared as per a cut-off date that does not precede by more than eight (8) months the date on which the application is filed for entry in the register of the resolution and if a declaration pursuant to subsection (1), second sentence, has been made.

(3) The court need not review whether the balance sheets comply with statutory regulations.

(4) The entry of the resolution is to state that the capital increase is one using company funds.

(5) (repealed)

Section 211

Entry into force of the capital increase

(1) Upon the resolution as to the capital increase having been entered in the register, the share capital shall have been increased.

(2) (repealed)

Section 212

Beneficiaries of the capital increase

The stockholders shall be entitled to the new shares of stock in the ratio of their shareholding to the current share capital. Any resolution adopted by the general meeting to the contrary shall be null and void.

Section 213

Fractional shares of stock

(1) Where the capital increase results in a portion of the current share capital only being allotted a part of a new share of stock, this fractional share may be disposed of independently and is transferable by inheritance.

(2) The rights attaching to a new share of stock, including the claim to having a share 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.

Section 214

Calls made on the stockholders

(1) Following the entry in the register of the resolution as to the increase of the share capital by issuance of new shares of stock, the management board is to call on the stockholders to collect the new share certificates without undue delay. Notice of the call is to be given in the company's publications of record. The notice is to state:

1. The amount by which the share capital has been increased,

2. The ratio in which new shares of stock are allocated to the old shares of stock.

Furthermore, the notice is to indicate that the company is entitled to sell, for the account of the parties involved, any shares of stock the certificates of which are not collected within one (1) year of the call having been published by notice despite three (3) reminders having been issued previously that warn of the consequences.

(2) After one (1) year has lapsed since the publication by notice of the call, the company is to issue a reminder, warning that it will sell any shares of stock the certificates of which have not been collected. Notice of this reminder and warning of the consequences is to be given in the company's publications of record three (3) times at intervals of at least one (1) month. The last such publication must be made before eighteen (18) months have lapsed since the call was published by notice.

(3) After one (1) year has lapsed since the last publication by notice of the reminder and warning of the consequences, the company is to sell the shares of stock the certificates of

which have not been collected, doing so for the account of the parties involved, at the stock exchange price and, should no stock exchange price exist, the company is to sell the shares of stock at public auction. Section 226 (3), second to sixth sentences, shall apply *mutatis mutandis*.

(4) Subsections (1) to (3) shall apply *mutatis mutandis* to companies that have not issued any share certificates. The companies are to call on the stockholders to have allotted to themselves the new shares of stock.

Section 215

Treasury shares of stock. Partly paid shares of stock

(1) Treasury shares of stock shall participate in the increase of the share capital.

(2) Shares of stock that have been paid in only in part shall participate in the increase of the share capital in accordance with their proportion in the share capital. In their case, the capital increase cannot be implemented by issuing new shares; in the case of par-value shares, their nominal amount is increased. If fully paid shares of stock exist besides the partly paid shares of stock, then, in the case of fully paid par-value shares, the capital increase may be performed by increasing the nominal amount of the shares of stock and by issuing new shares of stock; the resolution adopted as to the increase of the share capital must set out the nature of the increase. Inasmuch as the capital increase is implemented by increasing the nominal amount of the shares of stock, it is to be calculated such that no amounts are allocated to shares of stock, as a result of the increase of the share capital, which cannot be covered by an increase of the nominal amount of the shares of stock.

Section 216

Protection of the rights of the stockholders and of third parties

(1) The relationship *inter se* of the rights appurtenant to the shares of stock will not be affected by the capital increase.

(2) Insofar as individual rights of partly paid shares of stock, in particular the participation in the profits or the voting right, are governed by the contribution made for the share of stock, the stockholders shall be entitled to these rights, until they have made the contributions as yet outstanding, only in accordance with the amount of the contribution they have made thus far, increased by the percentage by which the share capital was increased as calculated on the basis of the nominal amount of the share capital. Where further payments are made, these rights shall expand in proportion with such payments. In the case governed by section 271 (3), the amounts of the increase shall be deemed as fully paid.

(3) The economic substance of contractual relations which the company maintains with third parties who depend on the distribution of profits by the company, on the nominal amount or value of their shares of stock or on the value of their share capital, or on the current circumstances in terms of the capital or profits, will not be affected by the capital increase. The same applies to incidental duties of the stockholders.

Section 217

Commencement of the participation in the profits

(1) Unless otherwise determined, new shares of stock shall participate in the profits of the entire financial year in which the increase of the share capital was resolved upon.

(2) It may be stipulated in the resolution adopted as to the increase of the share capital that the new shares of stock shall participate in the profits of the last financial year expired already prior to the resolution as to the capital increase being adopted. In such event, the increase of the share capital is to be resolved upon prior to a resolution being adopted regarding the appropriation of the net income of the last financial year expired. The resolution adopted as to the appropriation of the net income of the financial year last expired before said resolution as to the capital increase was adopted shall enter into force only once the share capital has been increased. If the resolution adopted as to the capital increase has not been entered in the Commercial Register within three (3) months of the resolution having been adopted, the resolution adopted as to the increase of the share capital and the

resolution adopted as to the appropriation of the net income of the financial year last expired before said resolution as to the capital increase was adopted shall be null and void. The period shall be tolled for as long as an action for avoidance or an action for annulment is pending.

Section 218 **Contingent capital**

The contingent capital shall increase in the same ratio as the share capital. Where the contingent capital has been resolved upon in order to grant rights of exchange to creditors of convertible bonds, then, unless it has been agreed that the parties entitled to the exchange are to make additional payments, special reserves are to be formed in order to cover the difference between the issue price of the bonds and the higher minimum issue price of the shares of a new issue to be allotted for them.

Section 219 **Prohibited issuance of shares of stock and temporary share certificates**

Prior to the resolution as to the increase of the share capital having been entered in the Commercial Register, no new shares of stock and no temporary share certificates may be issued.

Section 220 **Carrying values**

Those amounts shall be deemed to be acquisition costs of the shares of stock purchased prior to the increase of the share capital and the new shares of stock allotted to them that result for the individual shares of stock once the acquisition costs of the shares of stock purchased prior to the increase of the share capital are distributed to these shares of stock, and to the new shares of stock allotted to them, in the ratio that the shares of stock have to the share capital. The accrual of shares of stock is not to be recognised on the balance sheet as an addition.

Subchapter 5 **Convertible bonds. Income bonds**

Section 221

- (1) Bonds entailing a right of exchange or pre-emptive right for newly issued shares of stock that is conferred on creditors or on the company (convertible bonds), and bonds entailing a connection of the rights of creditors with the stockholders' participation in the profits (income bonds) may only be issued based on a resolution adopted by the general meeting. The resolution shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a different majority ratio of capital and may impose further requirements. Section 182 (2) shall apply.
- (2) An authorisation of the management board to issue convertible bonds may be granted for a maximum period of five (5) years. The management board and the chairman of the supervisory board are to deposit the resolution adopted as to the issuance of the convertible bonds as well as a declaration regarding their issuance with the Commercial Register. Notice of the resolution and the declaration is to be given in the company's publications of record.
- (3) Subsection (1) shall apply *mutatis mutandis* where participatory rights are conferred.
- (4) The stockholders have a pre-emptive right to convertible bonds, income bonds, and participatory rights. Sections 186 and 193 (2) no. 4 shall apply *mutatis mutandis*.

Chapter 3 **Measures serving the reduction of capital**

Subchapter 1 **Ordinary capital reduction**

Section 222

Pre-requisites

- (1) A reduction of the share capital may be resolved upon only by a majority amounting to at least three quarters of the share capital represented at the time such 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 of shares with voting rights, the resolution adopted by the general meeting shall require the consent of the stockholders of each class of stock in order to be valid. The stockholders of each class of stock are to adopt a separate resolution regarding such consent. Subsection (1) shall apply to such separate resolution.
- (3) The resolution is to specify the purpose for which the reduction is being performed, namely whether parts of the share capital are to be repaid.
- (4) In the case of companies with par-value shares, the reduction of the share capital shall require the nominal amount of the shares of stock to be reduced. Inasmuch as the portion of the reduced share capital allocated to the individual share of stock would fall below the minimum amount pursuant to section 8 (2), first sentence, or subsection (3), third sentence, the reduction shall be implemented by way of a merger of the shares of stock. The resolution adopted must state the nature of the reduction.

Section 223

Application for entry in the register of the resolution

The management board and the chairman of the supervisory board are to file an application for entry of the resolution as to the reduction of the share capital in the Commercial Register.

Section 224

Entry into force of the capital reduction

Upon the resolution as to the reduction of the share capital having been entered in the register, the share capital shall have been reduced.

Section 225

Protection of creditors

- (1) Security is to be provided to those of the creditors whose claims have arisen prior to publication of the notice as to the resolution having been entered in the register, provided they come forward for this purpose within six (6) months of the notice, unless they are able to demand satisfaction of their claims. This right is to be indicated to the creditors in the publication by notice of the respective entry. Those creditors shall not be entitled to demand provision of security who are entitled to preferred satisfaction of their claims, in the event of insolvency, out of covering funds that were created for their protection pursuant to the stipulations of the law and that are monitored by the state.
- (2) Payments may be made to the stockholders on the basis of the reduction of the share capital only once six (6) months have lapsed since notice of the entry in the register was published and after those creditors who have come forward in due time have been granted satisfaction or provided security. A release of the stockholders from the duty to make contributions shall not enter into force prior to the point in time specified, nor shall it enter into force prior to those creditors having been granted satisfaction or provided security who have come forward in due time.
- (3) The right of creditors to demand provision of security is independent of whether payments are made to the stockholders on the basis of the reduction of the share capital.

Section 226

Invalidation of shares of stock

- (1) Where shares of stock are to be merged by way of being exchanged, by stamping the share certificates, or by some other procedure, in order to implement the reduction of the share capital, the company may declare invalid those shares of stock, the certificates of which were not produced to it in spite of a corresponding call having been made. The same

shall apply to share certificates that have been so produced, the number of which is not at least equivalent to the number required for the replacement by new share certificates and that are not available to the company to be realised for the account of the parties involved.

(2) The call to produce the share certificates shall include a warning that they may otherwise be invalidated. The invalidation is subject to the pre-requisite of the call having been published by notice in the manner stipulated in section 64 (2) for the period of grace. The invalidation shall be effected by notice in the company's publications of record. The notice shall designate the invalidated shares of stock such that it is readily apparent from the notice whether or not a share of stock has been invalidated.

(3) The company is to sell the new shares to be issued by way of replacing the invalidated shares without undue delay for the account of the parties involved at the stock exchange price and, should no stock exchange price exist, the company is to sell the shares of stock at public auction. If a public auction at the company's seat does not hold out reasonable prospects of success, the shares of stock are to be sold at a suitable location. The time and location of the sale at public auction as well as the items to be sold at same are to be published by notice. The parties involved are to be notified separately; the notification may be refrained from if it is not expedient. The publication by notice and the notification must be issued at least two (2) weeks prior to the sale at public auction. The proceeds are to be paid out to the parties involved or, should a right to deposit exist, to be so deposited.

Section 227

Application for entry in the register of the implementation

(1) The management board is to file an application for entry in the Commercial Register of the fact that the reduction of the share capital has been implemented.

(2) The application for entry in the register, and entry in same, of the reduction of the share capital having been implemented may be tied to the application for entry in the register, and entry in same, of the resolution adopted as to the reduction.

Section 228

Reduction below the minimum nominal amount

(1) The share capital may be reduced to an amount below the minimum nominal amount stipulated by section 7 if this amount is once again reached by a capital increase that is resolved upon concurrently with the capital reduction and in the context of which no contributions in kind have been specified.

(2) The resolutions shall be null and void if they, and the implementation of the increase, have not been entered in the Commercial Register within six (6) months following the resolution having been adopted. The period shall be tolled for as long as an action for avoidance or an action for annulment is pending. The resolutions and the implementation of the increase of the share capital should be entered in the Commercial Register only jointly.

Subchapter 2

Simplified capital reduction

Section 229

Pre-requisites

(1) A reduction of the share capital intended to offset impairments in value, to cover other losses, or to allocate amounts to the capital reserves may be performed in simplified form. The resolution is to specify that the reduction is being made for these purposes.

(2) The simplified capital reduction shall be permissible only after that part of the statutory reserves and the capital reserves has been reversed in advance, along with the retained income, by which these reserves, taken together, exceed ten (10) percent of the share capital that remains after the reduction. The simplified capital reduction shall not be permissible for as long as profits carried forward exist.

(3) Section 222 subsections (1), (2), and (4), sections 223 and 224 as well as sections 226 to 228 regarding the ordinary capital reduction shall apply *mutatis mutandis*.

Section 230

Prohibition of payments to the stockholders

The amounts obtained from the reversal of the capital reserves or the retained income and from the capital reduction may not be used to make payments to the stockholders, nor may they be used for purposes of releasing the stockholders from the duty to make contributions. They may be used solely for purposes of offsetting impairments in value, covering other losses, and allocating amounts to the capital reserves or the statutory reserves. Using them for any one of the above purposes shall be permissible only insofar as they have been specified in the resolution as the purpose for which the share capital is being reduced.

Section 231

Limited allocation to the capital reserves and to the statutory reserves

The allocation of the amounts obtained from the reversal of other revenue reserves to the statutory reserves, and of the amounts obtained from the capital reduction to the capital reserves, shall be permissible only insofar as the capital reserves and the statutory reserves, taken together, do not exceed ten (10) percent of the share capital. The share capital shall be deemed to be the nominal amount resulting from the reduction, at a minimum, however, the minimum nominal amount stipulated in section 7. In calculating the amount permissibly allocable, those amounts that are to be allocated to the capital reserves in the period following the adoption of the resolution as to the capital reduction shall not be taken into account, also not in those cases in which their payment is based on a resolution that was adopted concurrently with the resolution as to the capital reduction.

Section 232

Allocation of amounts to the capital reserves in the case of losses having been overestimated

Should it become apparent in the course of drawing up the annual balance sheet for the financial year in which the resolution as to the capital reduction was adopted, or for one of the two (2) subsequent financial years, that impairments in value and other losses in fact have not occurred in the amount estimated at the time the resolution was adopted, or were offset, the difference is to be allocated to the capital reserves.

Section 233

Distribution of profits. Protection of creditors

- (1) Profits may not be distributed before the statutory reserves and the capital reserves, taken together, have reached ten (10) percent of the share capital. The share capital shall be deemed to be the nominal amount resulting from the reduction, at a minimum, however, the minimum nominal amount stipulated in section 7.
- (2) The payment of a participation in the profits amounting to more than four (4) percent shall be permissible only for a financial year commencing no earlier than two (2) years after the resolution as to the capital reduction was adopted. This shall not apply if the creditors whose claims have arisen prior to publication of the notice as to the entry of the resolution in the register have been granted satisfaction or provided security, insofar as they have come forward for this purpose within six (6) months following the date on which those annual accounts have been published by reason of which the distribution of profits has been resolved. Those creditors need not be provided security who are entitled to preferred satisfaction of their claims, in the event of insolvency, out of covering funds that were created for their protection pursuant to the stipulations of the law and that are monitored by the state. The satisfaction or security is to be indicated to the creditors in the publication by notice pursuant to section 325 (2) of the Commercial Code (HGB).
- (3) The amounts obtained from the reversal of the capital reserves and the retained income, as well as from the capital reduction, may not be distributed as profits, also not pursuant to these regulations.

Section 234

Retroactive effect of the capital reduction

- (1) The subscribed capital as well as the capital reserves and the retained income may be recognised in that amount, in the annual accounts drawn up for the financial year last expired prior to the resolution as to the capital reduction being adopted, that they are to have after the capital reduction.
- (2) In such event, the general meeting shall resolve as to the approval and establishment of the annual accounts. The resolution should be adopted concurrently with the resolution as to the capital reduction.
- (3) The resolutions shall be null and void unless the resolution as to the capital reduction has been entered in the Commercial Register within three (3) months of its having been adopted. The period shall be tolled for as long as an action for avoidance or an action for annulment is pending.

Section 235

Retroactive effect of a concurrent capital increase

- (1) If, in the case governed by section 234, an increase of the share capital is resolved upon concurrently with the capital reduction, then the capital increase as well may be itemised in the annual accounts as having been completed. The resolution may only be permissibly adopted if the shares of a new issue have been subscribed, if no contributions in kind have been specified, and if that payment has been made towards each share that, pursuant to section 188 (2), must have been made at the time at which an application is filed to have the fact entered in the register that the capital increase has been implemented. Proof of the subscription and of the payment is to be submitted to the notary recording the resolution adopted as to the increase of the share capital.
- (2) The resolutions shall be null and void in their entirety unless the resolutions as to the capital reduction and the capital increase, as well as the implementation of the increase, have been entered in the Commercial Register within three (3) months of their having been adopted. The period shall be tolled for as long as an action for avoidance or an action for annulment is pending. The resolutions and the increase of the share capital should be entered in the Commercial Register only jointly.

Section 236

Disclosure

The annual accounts may be disclosed pursuant to section 325 of the Commercial Code (HGB), in the case governed by section 234 only after the resolution as to the capital reduction has been entered in the register, in the case governed by section 235 only after the resolutions as to the capital reduction and the capital increase, and the implementation of the increase, have been entered in the Commercial Register.

Subchapter 3

Capital reduction by redeeming shares of stock. Exception for no-par-value shares

Section 237

Pre-requisites

- (1) Shares of stock may be redeemed mandatorily or following a purchase by the company. A mandatory redemption shall be permissible only if it was stipulated or permitted in the original by-laws, or by an amendment of the by-laws, prior to the shares being acquired or subscribed.
- (2) In redeeming the shares of stock, the regulations governing the ordinary capital reduction are to be observed. The by-laws or the resolution adopted by the general meeting are to specify the pre-requisites for a mandatory redemption and the details of its implementation. Section 225 (2) shall apply *mutatis mutandis* to the payment of the fee granted to stockholders in the case of a mandatory redemption or in the case of a purchase of shares of

stock for redemption purposes, and to the release of these stockholders from the duty to make contributions.

(3) The regulations governing the ordinary capital reduction need not be complied with if the shares of stock for which the issue price has been fully paid:

1. Are made available to the company without monetary consideration, or
2. Are redeemed out of the net income or out of freely disposable reserves, insofar as they may be used for such purpose, or
3. Are no-par-value shares and the resolution adopted by the general meeting stipulates that the redemption will have the effect of increasing the stake that the remaining shares have in the share capital pursuant to section 8 (3); where the management board is granted authority to perform the redemption, it may also be granted authority to amend the number stated in the by-laws.

(4) In the cases governed by subsection (3) as well, the capital reduction by way of redemption may be resolved upon only by the general meeting. A simple majority of the votes cast shall suffice for the resolution to be adopted. The by-laws may stipulate a greater majority ratio and may impose further requirements. The resolution is to specify the purpose of the capital reduction. The management board and the chairman of the supervisory board are to file an application for entry of the resolution in the Commercial Register.

(5) In the cases governed by subsection (3) nos. 1 and 2, an amount is to be allocated to the capital reserves that is equal to the amount of the share capital allocated to the redeemed shares of stock.

(6) Inasmuch as the redemption is a mandatory redemption stipulated in the by-laws, no resolution need be adopted by the general meeting. In such event, the decision of the management board as to the redemption shall take the stead of the resolution adopted by the general meeting in applying the regulations as to the ordinary capital reduction.

Section 238

Entry into force of the capital reduction

Upon the resolution or, if the redemption is subsequent to same, upon the redemption having been entered in the register, the share capital shall have been reduced by the amount allocated to the redeemed shares of stock. Where the redemption is a mandatory redemption stipulated in the by-laws, the share capital shall have been reduced upon the mandatory redemption having been performed unless the general meeting adopts a resolution as to the capital reduction. The redemption shall require an action to be taken by the company targeted at the permanent cancellation of the rights attaching to certain shares of stock.

Section 239

Application for entry in the register of the implementation

(1) The management board is to file an application for entry in the Commercial Register of the fact that the reduction of the share capital has been implemented. This shall apply also in the case of a mandatory redemption stipulated in the by-laws.

(2) The application for entry in the register, and entry in same, of the fact that the reduction has been implemented may be joined to the application for entry in the register, and entry in same, of the resolution as to the reduction.

Subchapter 4

Reporting the capital reduction

Section 240

The amount obtained from the capital reduction is to be separately recognised in the income statement as “revenue from capital reduction,” following the item “withdrawals from retained income.” An allocation to the capital reserves pursuant to section 229 (1) and section 232 is

to be separately recognised as an “allocation to the capital reserves according to the regulations governing the simplified capital reduction.” An explanation is to be provided in the notes whether and, if so, in which amount the amounts obtained from the capital reduction and from reversing the retained income will be used:

1. To offset impairments in value,
2. To cover other losses, or
3. As allocations to the capital reserves.

Where the company is a small share capital company (section 267 (1) of the Commercial Code (HGB)), it need not apply the third sentence.

Part 7

Nullity of resolutions adopted by the general meeting and of the annual accounts as approved and established. Special audit for impermissible understatement

Chapter 1

Nullity of resolutions adopted by the general meeting

Subchapter 1

General provisions

Section 241

Grounds for nullity

Except in the cases governed by section 192 (4), section 212, section 217 (2), section 228 (2), section 234 (3), and section 235 (2), a resolution adopted by the general meeting shall be null and void only if

1. It was adopted by a general meeting that was convened such that section 121 subsections (2) and (3), first sentence, or subsection (4) were violated,
2. It has not been recorded by a notary pursuant to section 130 subsections (1) and (2), first sentence, and subsection (4),
3. It is not to be reconciled with the nature of the stock corporation or violates, by its content, regulations that exclusively or primarily were instituted for the protection of the company's creditors or that otherwise serve the public interest,
4. Its content is contrary to public policy,
5. It has been declared null and void by a final and conclusive judgment handed down on an action for avoidance,
6. It has been cancelled due to its nullity pursuant to section 398 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG) on the basis of a final and conclusive court decision.

Section 242

Remedy of nullity

(1) The nullity of a resolution adopted by a general meeting that, contrary to section 130 subsections (1) and (2), first sentence, and subsection (4), has not been recorded by a notary, or not properly, no longer may be asserted once the resolution has been entered in the Commercial Register.

(2) Where a resolution adopted by the general meeting is null and void pursuant to section 241 nos. 1, 3, or 4, its nullity may no longer be asserted once the resolution has been entered in the Commercial Register and three (3) years have lapsed since its entry. Where, at the time the period expires, an action for a declaratory judgment as to the nullity of the resolution adopted by the general meeting is pending, the period shall be extended until that

point in time at which the final and conclusive decision has been taken regarding that action, or at which it has been conclusively dealt with and terminated in some other way. The lapse of time does not preclude the cancellation *ex officio* of the resolution pursuant to section 398 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG). Where a resolution adopted by the general meeting is null and void pursuant to section 241 no. 1 due to a violation of section 121 (4), second sentence, the nullity may no longer be asserted also in those cases in which the stockholder who was not invited approved the resolution. Where a resolution adopted by the general meeting is null and void pursuant to section 241 no. 5 or section 249, the judgment pursuant to section 248 (1), third sentence, no longer may be entered in the register if it has been finally and conclusively determined by a court's declaratory judgment pursuant to section 246a (1) that any deficiencies of the resolution adopted by the general meeting will not impair the effects of the entry in the register; section 398 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction shall have no application.

(3) Subsection (2) shall apply *mutatis mutandis* if, in the cases governed by section 217 (2), section 228 (2), section 234 (3), and section 235 (2), the required entries were not made in due time.

Section 243 **Grounds for avoidance**

(1) A resolution adopted by the general meeting may be challenged on grounds of its violating the law or the by-laws by bringing an action for avoidance.

(2) The action for avoidance may also be based on the fact that a stockholder, by exercising the voting right, sought to obtain special benefits for himself or for a third party to the detriment of the company or of the other stockholders and that the resolution is suited to serve this purpose. This shall not apply if the resolution grants adequate compensation to the other stockholders for their damage.

(3) The action for avoidance may not be based on:

1. The violation caused by a technical disruption of rights that have been exercised using electronic means pursuant to section 118 (1), second sentence, subsection (2) and section 134 (3), unless the company is to be charged with having acted grossly negligently or intentionally; the by-laws may stipulate a stricter measure of culpability,

2. A violation as set out in section 121 (4a), section 124a, or section 128,

3. Grounds justifying proceedings pursuant to section 318 (3) of the Commercial Code (HGB).

(4) An action for avoidance may be brought where inaccurate or incomplete information has been provided, or a request for information has been refused, only if a stockholder assessing the situation objectively would have regarded the provision of the information as a significant pre-requisite for the appropriate exercise of his participatory rights and rights as a member. An action for avoidance may not be based on inaccurate, incomplete, or insufficient information having been provided at the general meeting concerning the identification, amount, or appropriateness of compensation, settlement payments, additional payments, or other forms of recompense if the law stipulates that objections concerning assessments must be pursued in valuation proceedings.

Section 244 **Confirmation of voidable resolutions adopted by the general meeting**

No action for avoidance may be brought if the general meeting has confirmed the voidable resolution by a new resolution and no action has been brought to set aside the resolution within the period for avoidance, or the action for avoidance has been dismissed in a final and conclusive manner. Where the plaintiff has a legitimate interest in the voidable resolution being declared null and void for the period until the adoption of the resolution confirming it,

then he may continue to pursue the action for avoidance with the objective of having the voidable resolution declared null and void for that period of time.

Section 245

Authority to bring an action for avoidance

The following shall have authority to bring an action for avoidance:

1. Any stockholder attending the general meeting, provided he has purchased the shares of stock already prior to the agenda having been published by notice and provided he raised an objection concerning the resolution and had it recorded in the minutes;
2. Any stockholder not attending the general meeting if he was not admitted to said general meeting without the refusal to admit him being justified, or if the general meeting has not been duly and properly convened, or if no proper notice has been published of the subject matter of the resolution to be adopted;
3. In the case governed by section 243 (2), any stockholder who has purchased the shares of stock already prior to the agenda having been published by notice;
4. The management board;
5. Each member of the management board and of the supervisory board, if, by implementing the resolution, the members of the management board or of the supervisory board were to commit an act punishable under law or an administrative offence, or if said implementation would obligate them to provide compensation.

Section 246

Action for avoidance

- (1) The action must be brought within one (1) month of the resolution having been adopted.
- (2) The action is to be brought against the company. The company shall be represented by the management board and the supervisory board. Where the management board or a member of the management board is bringing the action, the company shall be represented by the supervisory board, where a member of the supervisory board is bringing the action, the company shall be represented by the management board.
- (3) Exclusively that regional court (*Landgericht*) shall have jurisdiction for the action in the judicial district of which the company has its seat. Where a division for commercial matters has been formed at the regional court, this shall take the decision instead of the civil division. Section 148 (2), third and fourth sentences, shall apply *mutatis mutandis*. The hearing for oral argument shall not take place prior to expiry of the period of one (1) month stipulated in subsection (1). The company may inspect a complaint filed, immediately upon the period of one (1) month stipulated in subsection (1) having expired, already prior to its being served, and may have the court registry provide it with excerpts and copies. Several avoidance proceedings are to be consolidated such that their hearings for oral argument and the decisions taken by the court coincide.
- (4) The management board is to give notice, without undue delay, in the company's publications of record of the fact that the action has been brought. A stockholder may become involved in the action as a joint party only within one (1) month of the notice having been published.

Section 246a

Proceedings for the release for entry in the register

- (1) Where an action is brought against a resolution adopted by the general meeting as to a measure serving the procurement of capital, the reduction of capital (sections 182 to 240), or an inter-company agreement (sections 291 to 307), the court may establish by order, upon a petition having been filed by the company, that the fact of the action having been brought does not contravene the entry of the resolution in the register and that deficiencies of the resolution adopted by the general meeting will not impact the effects of the entry. Unless

otherwise determined, section 247, section 82, section 83 (1), and section 84 of the Code of Civil Procedure (ZPO) shall correspondingly apply to the proceedings, as shall the regulations of the Code of Civil Procedure applying in the first level of jurisdiction to the proceedings before the regional courts (*Landgerichte*). A senate of the higher regional court (*Oberlandesgericht*) in the judicial district of which the company has its seat shall decide regarding the petition.

(2) A court order pursuant to subsection (1) shall be delivered if:

1. The action is inadmissible or manifestly unfounded,
2. The plaintiff has failed to provide evidence by submitting the corresponding records and documents, within one (1) week of having served the petition, that he has been holding a stake of at least 1,000 euros since the notice convening the assembly was published, or
3. The prompt entering into force of the resolution adopted by the general meeting appears to take precedence because the court holds, at its discretion and conviction, that the significant disadvantages for the company and its stockholders 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.

(3) Transferring the matter to a judge sitting alone is precluded; no conciliation hearing is required. In urgent cases, a hearing for oral argument may be forgone. The facts and circumstances brought before the court, by reason of which the court order may be delivered, are to be demonstrated to the satisfaction of the court. There shall be no right of appeal against the court order. It shall be binding upon the court of registration; the establishment by the court that the entry is final and non-appealable shall take effect for and against any entity or individual. The court order should 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 against which there shall be no right of appeal.

(4) Should good cause have been shown for the action, then the company 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 resolution adopted by the general meeting having been entered in the register based on the court order. Once it has been entered in the register, any deficiencies of the resolution shall not affect its implementation; no demand may be made to cancel the effects of entering the resolution in the register, also not by way of compensation of damages.

Section 247 **Value of the matter in dispute**

(1) The court hearing the case shall determine the value of the matter in dispute at its equitably exercised discretion, taking account of all circumstances of the individual case, in particular the significance of the matter for the parties. However, the value may not exceed one tenth of the share capital or, if this tenth amounts to more than 500 000 euros, the value may exceed 500 000 euros only insofar as the significance of the matter for the petitioner is to be assessed as higher.

(2) Where a party demonstrates to the satisfaction of the court that, were it to be charged with the costs of the proceedings based on the value of the matter in dispute determined in accordance with subsection (1), this would gravely jeopardise its economic situation, then the court hearing the case may order, upon that party filing a corresponding petition, that the party's duty to pay court fees shall be assessed based on a part of the value of the matter in dispute defined in keeping with its economic situation. This order will have as its consequence that the beneficiary of same will need to pay the fees charged by its lawyers also only based on that part of the value of the matter in dispute. Inasmuch as costs of the legal dispute are imposed on the party or inasmuch as it accepts to bear such costs, it is to reimburse the court fees paid by its opponent and the fees of the opponent's attorneys only

based on the part of the value of the matter in dispute. Inasmuch as the costs incurred out of court are imposed on the opposing party, or inasmuch as the opposing party accepts to bear such costs, the lawyer of the beneficiary will be able to recover his fees from the opponent in accordance with the value of the matter in dispute as it applies for the opponent.

(3) The petition pursuant to subsection (2) may be filed by having it recorded by the registry of the court hearing the case. It is to be recorded prior to the hearing for oral argument being held at which the merits of the case are to be heard. Filing the petition later shall be admissible only if the value of the matter in dispute assumed or established is increased by the court hearing the case. Prior to a decision being taken regarding the petition, the opponent is to be heard.

Section 248 **Effects of the judgment**

(1) Inasmuch as the resolution adopted is declared null and void by a final and conclusive judgment, the judgment shall take effect for and against all stockholders as well as the members of the management board and of the supervisory board, even if they are not parties to the proceedings. The management board is to file the judgment with the Commercial Register without undue delay. If the resolution was entered in the Commercial Register, then the judgment as well is to be entered. The entry in the register of the judgment is to be published by notice in the same manner as the entry in the register of the resolution.

(2) Where the resolution had as its subject matter an amendment of the by-laws, the full wording of the by-laws as it stands after considering the judgment and all previous amendments of the by-laws is to be filed with the Commercial Register along with a certificate from a notary confirming this fact.

Section 248a **Notices by publication regarding the action for avoidance**

Where the avoidance proceedings are terminated, the company listed on the stock exchange is to give notice without undue delay in the company's publications of record of the termination of the proceedings. Section 149 subsections (2) and (3) shall be correspondingly applied.

Section 249 **Action for annulment**

(1) Where a stockholder, the management board, or a member of the management board or of the supervisory board brings an action against the company to have a resolution adopted by a general meeting declared null and void, section 246 subsection (2), subsection (3), first to fifth sentences, subsection (4), sections 246a, 247, 248, and 248a shall have corresponding application. The assertion of nullity by some other manner than bringing an action is not precluded. Where the resolution adopted by the general meeting creates the pre-requisites for a transformation pursuant to section 1 of the Transformation Act (UmwG) and the resolution as to the transformation has been entered in the register, section 20 (2) of the Transformation Act shall apply *mutatis mutandis* to the resolution adopted by the general meeting.

(2) Several annulment proceedings are to be consolidated such that their hearings for oral argument and the decisions taken by the court coincide. Annulment proceedings and avoidance proceedings may be consolidated.

Subchapter 2 **Nullity of certain resolutions adopted by the general meeting**

Section 250 **Nullity of the election of members of the supervisory board**

(1) The election of a member of the supervisory board by the general meeting shall be set aside as null and void, except in the case governed by section 241 nos. 1, 2, and 5, only if:

1. The supervisory board is constituted such that section 96 (4), section 97 (2), first sentence, or section 98 (4) is violated;
 2. The general meeting elects a person not nominated in spite of being bound to nominations (sections 6 and 8 of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG));
 3. The election results in the statutory maximum number of members of the supervisory board being exceeded (section 95);
 4. At the commencement of his term of office, the person elected is prohibited, pursuant to section 100 subsections (1) and (2), from being a member of the supervisory board.
 5. The election violates the stipulations of section 96 (2).
- (2) The following are eligible to act as parties to an action brought to obtain a declaratory judgment from the court setting aside the election of a member of the supervisory board as null and void:
1. The central works council of the company or, where only a single works council exists for the company, the works council, as well as the group works council if the company is the controlling enterprise of a group of companies,
 2. The central committee, or corporate council, representing the executive staff of the company or, where only a single council representing the executive staff exists for the company, the council representing the executive staff as well as the group council representing the executive staff if the company is the controlling enterprise of a group of companies,
 3. The central works council of some other enterprise, the employees of which themselves vote, or vote through delegates, to elect members of the company's supervisory board, or, where only a single works council exists in the other enterprise, the works council,
 4. The central committee representing the executive staff, or the corporate council representing the executive staff, of some other enterprise, the employees of which themselves vote, or vote through delegates, to elect members of the company's supervisory board, or, where only a council representing the executive staff exists in the other enterprise, the council representing the executive staff,
 5. Any union, as well as its umbrella organisation, represented in the company or in an enterprise, the employees of which themselves vote, or vote through delegates, to elect members of the company's supervisory board.
- (3) Where a stockholder, the management board, a member of the management board or of the supervisory board, or any organisation or employee representative body designated in subsection (2) brings an action against the company for a declaratory judgment by a court setting aside the election of a member of the supervisory board as null and void, section 246 subsection (2), subsection (3), first to fourth sentences, subsection (4), section 247, section 248 (1), second sentence, as well as sections 248a and 249 (2) shall apply *mutatis mutandis*. Asserting nullity by some other manner than bringing an action is not precluded.

Section 251

Action to set aside the election of members of the supervisory board

- (1) An action may be brought to set aside as null and void the election of a member of the supervisory board by the general meeting, on grounds of the law or the by-laws having been violated. Where the general meeting is bound to nominations, the action to set aside the

election may also be based on the nomination having come about unlawfully. Section 243 (4) and section 244 shall apply.

(2) Section 245 nos. 1, 2, and 4 shall apply to the authority to bring an action to set aside the election. Any works council of an operation of the company, any union represented in the operations of the company, or the union's umbrella organisation may bring an action to set aside the election of a member of the supervisory board who has been elected pursuant to the stipulations of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG) upon having been nominated by the works councils. Any member of the supervisory board may also bring an action to set aside as null and void the election of a further member who has been elected pursuant to the stipulations of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry or the Amending Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestGErgG) upon having been nominated by the remaining members of the supervisory board.

(3) Sections 246, 247, 248 (1), second sentence, and section 248a shall apply to the proceedings concerning the action to set aside the election.

Section 252 **Effects of the judgment**

(1) Where a stockholder, the management board, a member of the management board or of the supervisory board or of any organisation or employee representative body designated in section 250 (2) brings an action against the company for a declaratory judgment by a court that the election of a member of the supervisory board by the general meeting be set aside as null and void, a judgment finally and conclusively setting aside the election as null and void shall take effect for and against all stockholders and employees of the company, all employees of other enterprises the employees of which themselves vote, or vote through delegates, to elect members of the company's supervisory board, the members of the management board and of the supervisory board, as well as the organisations and employee representative bodies designated in section 250 (2), even if they are not party to the proceedings.

(2) Where the election of a member of the supervisory board by the general meeting is set aside as null and void by a final and conclusive judgment, the judgment shall take effect for and against all stockholders as well as the members of the management board and the supervisory board, even if they are not party to the proceedings. In the case governed by section 251 (2), second sentence, the judgment also shall take effect for and against the works councils, unions, and umbrella organisations having authority pursuant to the present regulation to bring an action for avoidance, even if they are not party to the proceedings.

Section 253 **Nullity of the resolution as to the appropriation of the net income**

(1) The resolution adopted as to the appropriation of the net income shall be null and void, except in the cases governed by section 173 (3), section 217 (2), and section 241, only if the approval and establishment of the annual accounts on which it is based is null and void. Asserting the nullity of the resolution based on these grounds no longer shall be possible once the nullity of the approval and establishment of the annual accounts can no longer be asserted.

(2) Section 249 applies to the action brought against the company for a declaratory judgment as to nullity.

Section 254 **Action for avoidance of the resolution as to the appropriation of the net income**

(1) An action for avoidance may be brought against a resolution adopted as to the appropriation of the net income also on the grounds, besides those set out in section 243, of the general meeting allocating amounts from the net income to retained income or carrying amounts forward as profits that are not, according to the law or the by-laws, precluded from

being distributed among the stockholders, in spite of the fact that so allocating the amounts or carrying them forward is not necessary, when the matter is assessed while applying prudent business judgment, to secure the viability and resilience of the company for a foreseeable period of time in terms of economic and financial requirements, meaning that no profits can be distributed among the stockholders in the amount of at least four (4) percent of the share capital reduced by the contributions not yet called in.

(2) Sections 244 to 246 and sections 247 to 248a shall apply to the action for avoidance. The period for avoidance shall commence running on the date on which the resolution is adopted also in those cases in which the annual accounts are to be audited anew pursuant to section 316 (3) of the Commercial Code (HGB). Stockholders shall have authority to bring an action for avoidance pursuant to subsection (1) only if their shares, taken together, are at least equivalent to one twentieth of the share capital, or to a stake of 500 000 euros.

Section 255

Action for avoidance of the capital increase in return for contributions

(1) An action for avoidance may be brought against the resolution as to a capital increase in return for contributions pursuant to section 243.

(2) The action for avoidance may be based, if the pre-emptive right of the stockholders for newly issued shares of stock has been precluded as a whole or in part, also on the fact that the issue price resulting from the resolution adopted as to the increase, or the minimum price below which the new shares of stock should not be issued, is unreasonably low. This shall not apply if the new shares of stock are to be acquired by a third party along with the duty to offer them to the stockholders for subscription.

(3) Sections 244 to 248a shall apply to the action for avoidance.

Chapter 2

Nullity of the annual accounts as approved and established

Section 256

Nullity

(1) In addition to being null and void in the cases governed by section 173 (3), section 234 (3), and section 235 (2), annual accounts as approved and established are null and void if:

1. They violate, by their content, regulations that exclusively or primarily were instituted for the protection of the company's creditors,

2. In the case of a statutory obligation to have an audit performed, they have not been audited pursuant to section 316 subsections (1) and (3) of the Commercial Code (HGB);

3. In the case of a statutory obligation to have an audit performed, they have been audited by persons who, pursuant to section 319 (1) of the Commercial Code (HGB) or pursuant to Article 25 of the Introductory Act of the Commercial Code (EGHGB), are not auditors of annual accounts or who have not been appointed as auditors of the annual accounts for other reasons than the following:

a) Violation of section 319 subsection (2), (3), or (4) of the Commercial Code (HGB),

b) Violation of section 319a subsection (1) or (3) of the Commercial Code (HGB),

c) Violation of section 319b (1) of the Commercial Code (HGB),

d) Violation of Regulation (EU) No. 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (OJ L 158 of 27 May 2014, p. 77, L 170 of 11 June 2014, p. 66),

4. At their approval, the provisions of the law or of the by-laws regarding the allocation of amounts to capital reserves or retained income or regarding the withdrawal of amounts from the capital reserves or the retained income have been violated.

(2) In addition to being null and void in the cases set out in subsection (1), annual accounts approved and established by the management board and the supervisory board shall be null and void only if the management board or the supervisory board did not duly and properly cooperate in and assist with their approval and establishment.

(3) In addition to being null and void in the cases set out in subsection (1), annual accounts approved and established by the general meeting shall be null and void only if the approval

1. Was resolved upon at a general meeting that was convened such that section 121 subsections (2) and (3), first sentence, or subsection (4) was violated,

2. Was not recorded by a notary pursuant to section 130 subsections (1) and (2), first sentence, and subsection (4),

3. Has been finally and conclusively declared null and void by a judgment handed down upon an action for avoidance having been brought.

(4) The annual accounts shall be null and void for a violation of the regulations governing the layout of the annual accounts as well as for the non-compliance with forms according to which the annual accounts are to be laid out only if this has significantly impaired their clarity and structure.

(5) The annual accounts shall be null and void for a violation of the valuation rules only if

1. Items have been overstated or

2. Items have been understated so that the assets and the revenue situation of the company have been intentionally depicted inaccurately or have been concealed.

Assets items are overstated if they have been stated at a higher value than that permissible pursuant to sections 253 to 256a of the Commercial Code (HGB), while liabilities items are overstated if they have been stated at a lower amount than that permissible pursuant to said provisions. Assets items are understated if they have been stated at a lower value than that permissible pursuant to sections 253 to 256a of the Commercial Code (HGB), while liabilities items are understated if they have been recognised at a higher amount than that permissible pursuant to said provisions. In the case of credit institutions or financial services providers as well as in the case of capital management companies in the sense of section 17 of the Investment Code (KAGB), no violation of the valuation rules shall be given insofar as the deviation is permissible pursuant to the regulations applying to them, in particular pursuant to sections 340e to 340g of the Commercial Code (HGB); this shall apply *mutatis mutandis* to insurance companies subject to the regulations applying to them, particularly sections 341b to 341h of the Commercial Code (HGB).

(6) The nullity pursuant to subsection (1) nos. 1, 3, and 4, subsection (2), subsection (3) nos. 1 and 2, subsections (4) and (5) no longer can be asserted if, since publication of the notice pursuant to section 325 (2) of the Commercial Code (HGB) in the cases governed by subsection (1) nos. 3 and 4, by subsection (2), and by subsection (3) nos. 1 and 2, six (6) months have lapsed, in the other cases three (3) years. Where, at the time the period expires, an action for a declaratory judgment as to the nullity of the annual accounts is pending, the period shall be extended until that point in time at which the final and conclusive decision has been taken regarding that action or it has been conclusively dealt with and terminated in some other way.

(7) Section 249 shall apply *mutatis mutandis* to the action brought against the company for a declaratory judgment as to nullity. Where the company has issued securities in the sense of section 2 (1) of the Securities Trading Act (WpHG) that are admitted to trading on a regulated market at a stock exchange within Germany, then the court is to inform the Federal Financial Supervisory Authority (BAFin) of any action brought with it seeking a declaratory

judgment as to nullity; the court is to likewise inform BAFin of any final and conclusive decision it may hand down with regard to such action.

Section 257

Action for avoidance of the approval of the annual accounts by the general meeting

- (1) The approval of the annual accounts by the general meeting may be challenged pursuant to section 243. However, the action for avoidance cannot be based on the fact that, by their content, the annual accounts violate the law or the by-laws.
- (2) Sections 244 to 246, 247 to 248a apply to the action for avoidance. The period for avoidance shall commence running on the date on which the resolution is adopted also in those cases in which the annual accounts are to be audited anew pursuant to section 316 (3) of the Commercial Code (HGB).

Chapter 3

Special audit for impermissible understatement

Section 258

Appointment of special auditors

- (1) Where there is cause to assume that

1. Certain items have been understated to a greater than negligible degree in annual accounts that have been approved and established (section 256 (5), third sentence), or
2. The notes do not provide the required information, or not completely, and the management board has failed to provide the missing information at the general meeting in spite of inquiries having been made in its regard, and a demand has been made to include the question in the minutes,

the court is to appoint special auditors upon a corresponding petition having been filed. The special auditors are to audit the items regarding which an objection has been raised with a view to ascertaining whether they have been understated to a greater than negligible degree. They are to audit the notes with a view to ascertaining whether the required information has not been provided, or not completely, and the management board has failed to provide the missing information at the general meeting in spite of inquiries having been made in its regard, and a demand has been made to include the question in the minutes.

(1a) In the case of credit institutions or financial services providers as well as in the case of capital management companies in the sense of section 17 of the Investment Code (KAGB), no special auditor may be appointed pursuant to subsection (1) insofar as the understatement or the lack of information in the notes is the result of section 340f of the Commercial Code (HGB) having been applied.

(2) The petition must be filed within one (1) month following the general meeting as to the annual accounts. This shall apply also if the annual accounts are to be audited anew pursuant to section 316 (3) of the Commercial Code (HGB). The petition may be filed solely by stockholders whose shares of stock, taken together, are at least equivalent to the threshold value set out in section 142 (2). The petitioners shall deposit the shares of stock until a decision is taken on their petition, or shall submit an assurance from the depositary institute that until such decision the shares of stock shall not be disposed of, and moreover shall demonstrate to the satisfaction of the court that they have been the holders of the shares of stock for at least three (3) months prior to the date of the general meeting. A statutory declaration in lieu of an oath made to a notary shall suffice as satisfactory demonstration.

(3) Prior to the appointment, the court is to hear the management board, the supervisory board, and the auditor of the annual accounts. A complaint may permissibly be lodged against the decision taken. That regional court (*Landgericht*) shall take the decision on the petition pursuant to subsection (1) in the judicial district of which the company has its seat.

(4) Solely auditors and audit firms may be special auditors pursuant to subsection (1). Section 319 subsections (2) to (4), section 319a (1), and section 319b (1) of the Commercial Code (HGB) shall apply *mutatis mutandis* to their selection. The auditor of the company's annual accounts and persons who served as the auditor of the company's annual accounts in the past three (3) years prior to the appointment may not be special auditors pursuant to subsection (1).

(5) Section 142 (6) governing the reimbursement for reasonable cash expenditures and the remuneration of court-appointed special auditors, section 145 subsections (1) to (3) governing the rights of the special auditors, section 146 governing the costs of special audits, and section 323 of the Commercial Code (HGB) governing the liability and responsibilities of the auditor of the annual accounts shall apply *mutatis mutandis*. The special auditors pursuant to subsection (1) shall have the rights pursuant to section 145 (2) also vis-à-vis the auditor of the company's annual accounts.

Section 259

Audit report. Conclusive determinations

(1) The special auditors are to submit a written report on their audit. Should the special auditors become aware, in the performance of their duties, that items have been overstated (section 256 (5), second sentence), or that the regulations governing the organisational structure of the annual accounts have been violated or forms have not been complied with, they are to report on this fact as well. Section 145 subsections (4) to (6) shall apply *mutatis mutandis*.

(2) Where according to the result of the audit the items regarding which an objection has been raised have been understated to a greater than negligible degree (section 256 (5), third sentence), the special auditors are to declare, in a conclusive determination at the end of their report:

1. The minimum value at which the individual assets items were to be stated, and the maximum amount at which the individual liabilities items were to be stated;
2. The amount by which the surplus for the year would have increased, or by which the shortfall for the year would have been reduced, had these values or amounts been stated.

The special auditors are to base their judgment on the circumstances given at the cut-off date of the annual accounts. They are to base the statement of the values and amounts pursuant to no. 1 on that valuation and amortisation method that the company has used most recently in order to value the objects to be valued, or comparable objects, in a permissible manner.

(3) Where, according to the results of the audit, the items regarding which an objection has been raised have not been understated, or only to a negligible degree (section 256 (5), third sentence), the special auditors are to declare, in a conclusive determination at the end of their report, that according to their audit and judgment, performed in keeping with their professional duties, the items regarding which an objection has been raised have not been impermissibly understated.

(4) Where, according to the result of the audit, the notes do not provide the required information, or not completely, and the management board has failed to provide the missing information at the general meeting in spite of inquiries having been made in its regard, and a demand has been made to include the question in the minutes, the special auditors are to provide the missing information in a conclusive determination at the end of their report. In the case of a failure to state deviations from valuation or amortisation methods, the conclusive determination is to also state the amount by which the surplus for the year or the shortfall for the year would have been higher or lower had the deviation not occurred that it was failed to state. Where, according to the result of the audit, there was no failure to provide information pursuant the first sentence, the special auditors are to declare, in a conclusive determination at the end of their report, that according to their audit and judgment, performed in keeping

with their professional duties, there was no failure to provide the required information in the notes.

(5) The management board is to give notice without undue delay in the company's publications of record of the conclusive determinations of the special auditors pursuant to subsections (2) to (4).

Section 260

Court decision as to the conclusive determinations by the special auditors

(1) The company or stockholders whose shares of stock, in the aggregate, are at least equivalent to one twentieth of the share capital, or to a stake of 500 000 euros, may file a petition for a decision to be handed down by the court having jurisdiction pursuant to section 132 (1) against the conclusive determinations by the special auditors pursuant to section 259 subsections (2) and (3), provided they do so within one (1) month of such determinations having been published in the Federal Gazette (*Bundesanzeiger*). Section 258 (2), fourth and fifth sentences, shall apply *mutatis mutandis*. The petition must be directed at obtaining a declaratory judgment regarding the minimum amount at which the assets items designated in the petition should have been stated, or the maximum amount at which the liabilities items designated in the petition should have been stated. The petition of the company may also be directed at obtaining a declaratory judgment that the annual accounts did not set out the understatements established in the special auditors' conclusive determinations.

(2) The court shall take the final decision on the petition at its equitably exercised discretion, taking account of all circumstances. Section 259 (2), second and third sentence, shall apply. Inasmuch as completely clearing up all relevant circumstances would entail significant difficulties, the court is to estimate the values or amounts to be stated.

(3) Section 99 subsection (1), subsection (2), first sentence, subsections (3) and (5) shall apply *mutatis mutandis*. The court is to serve its decision to the company and, if stockholders have filed the petition pursuant to subsection (1), also to the stockholders. Further, it is to give notice of same, without providing the reasoning, in the company's publications of record. The company and the stockholders whose shares of stock, in the aggregate, are at least equivalent to one twentieth of the share capital, or to a stake of 500 000 euros, shall be entitled to lodge a complaint. Section 258 (2), fourth and fifth sentences, shall apply *mutatis mutandis*. The period within which a complaint must be lodged shall commence running upon notice of the decision being given in the Federal Gazette (*Bundesanzeiger*); however, it shall not commence running for the company prior to the decision having been served to it, nor shall it commence running, if stockholders have filed the petition pursuant to subsection (1), for the stockholders prior to the decision having been served to them, either.

(4) Where the court complies with the petition, the costs are to be imposed on the company, in all other cases on the petitioner. Section 247 shall apply *mutatis mutandis*.

Section 261

Decision as to the revenue by reason of a higher valuation

(1) Where the special auditors have declared in their conclusive determination that items have been understated, and where no petition for a court decision has been filed against this determination within the period specified in section 260 (1), the items are to be stated in the first annual accounts drawn up following expiry of said period at the values or amounts established by the special auditors. This shall not apply insofar as, due to changed circumstances, and namely in the case of objects that are subject to wear and tear, a lower value is to be stated for assets items or a higher amount for liabilities items as a result of such wear and tear pursuant to sections 253 to 256a of the Commercial Code (HGB) or in accordance with generally accepted accounting principles. In such event, the reasons are to be stated in the notes, and the manner in which the special auditors have developed the values or amounts established to become the value or amount stated pursuant to the second sentence is to be presented in a separate statement. Where the objects no longer exist, this is to be reported in the notes, as well as the appropriation of the revenue from the disposal of such objects. For the individual items of the annual balance sheet, the differences in amount

are to be noted by which the assets items were stated at a higher value or the liabilities items were stated at a lower value due to the first and second sentences. The sum total of the differences in amount is to be recognised separately on the “Liabilities” side of the balance sheet, and in the income statement as “revenue from a higher valuation pursuant to the result of the special audit.” Where the company is a small share capital company (section 267 (1) of the Commercial Code (HGB)), it is to apply the third and fourth sentences only if the pre-requisites of section 264 subsection (2), second sentence, of the Commercial Code (HGB) are met, taking account of the special audit performed pursuant to this Chapter.

(2) Where the court seised with the matter pursuant to section 260 has established that items have been understated, subsection (1) shall apply *mutatis mutandis* to the statement of the items in the first annual accounts drawn up after the decision by the court has become final and conclusive. The differences in amount are to be recognised on the balance sheet as “revenue from a higher valuation pursuant to the decision by the court.”

(3) The revenue resulting from a higher valuation pursuant to subsections (1) and (2) shall not be counted, in applying section 58, as part of the surplus for the year. The general meeting shall decide on the appropriation of the revenue reduced by the taxes to be remitted therefor, unless a net loss is recognised in the annual accounts that is not covered by capital reserves or retained income.

Section 261a

Notifications to be made to the Federal Financial Supervisory Authority (BAFin)

If the company has issued securities in the sense of section 2 (1) of the Securities Trading Act (WpHG) that are admitted to trading on the regulated market at a German stock exchange, the court is to notify the Federal Financial Supervisory Authority (BAFin) of the receipt of an application for appointment of a special auditor, each decision as to the appointment of special auditors that has become final and conclusive, the audit report, as well as a final and conclusive decision by the court as to the conclusive determinations by the special auditors pursuant to section 260.

Part 8

Dissolution and declaration of the company's nullity

Chapter 1

Dissolution

Subchapter 1

Reasons for dissolving the company and application for entry in the register

Section 262

Reasons for dissolving the company

(1) The stock corporation shall be dissolved

1. By expiry of the time determined in the by-laws;
2. By resolution adopted by the general meeting; this shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted; the by-laws may stipulate a greater majority ratio of capital and may impose further requirements;
3. By the opening of insolvency proceedings for the assets of the company;
4. Upon the court order becoming final and conclusive by which the opening of insolvency proceedings is refused for insufficiency of assets;
5. Upon the direction issued by the court of registration becoming final and conclusive by which a deficiency of the by-laws has been established pursuant to section 399 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG);

6. By cancellation of the company for lack of assets pursuant to section 394 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG).

(2) This chapter shall apply also if the stock corporation is dissolved on other grounds.

Section 263

Application for entry in the register, and entry in same, of the dissolution

The management board is to file an application for entry of the dissolution of the company in the Commercial Register. This shall not apply in the cases in which insolvency proceedings are opened or the opening of insolvency proceedings is refused (section 262 (1) nos. 3 and 4), as well as in the case of the court establishing a deficiency of the by-laws (section 262 (1) no. 5). In these cases, the court is to enter in the register *ex officio* the dissolution and the reason therefor. In the case of the cancellation of the company (section 262 (1) no. 6) the entry of the dissolution may be dispensed with.

Subchapter 2 **Winding up**

Section 264 **Need to wind up**

- (1) After the company has been dissolved, it shall be wound up unless insolvency proceedings have been opened for the assets of the company.
- (2) Where the company has been dissolved by cancellation for lack of assets, it shall be wound up only if it becomes apparent after the cancellation that assets exist that are subject to distribution. Upon a corresponding petition having been filed by a party involved, the court is to appoint the liquidators.
- (3) Unless otherwise provided for by the present subchapter or unless something else results from the purpose pursued in winding up the company, the regulations shall continue to be applied to the company, until the completion of the winding-up, that apply to companies that are not dissolved.

Section 265 **Liquidators**

- (1) The members of the management board shall wind up the company as liquidators.
- (2) The by-laws or a resolution adopted by the general meeting may appoint other persons as liquidators. Section 76 (3), second and third sentence, shall apply *mutatis mutandis* to the selection of the liquidators. A legal entity may also be a liquidator.
- (3) Upon a corresponding petition having been filed by the supervisory board or a minority of stockholders whose shares of stock, in the aggregate, are at least equivalent to one twentieth of the share capital, or to a stake of 500 000 euros, and where grave cause is given, the court is to appoint the liquidators and remove them from office. The stockholders are to demonstrate to the satisfaction of the court that they have been holders of the shares of stock for a minimum of three (3) months. A statutory declaration in lieu of an oath made to a court or a notary shall suffice as satisfactory demonstration. A complaint may permissibly be lodged against the decision taken.
- (4) The court-appointed liquidators are entitled to reimbursement for their reasonable cash expenditures and to remuneration for their activities. Should the court-appointed liquidator and the company not come to an agreement, the court shall establish the expenditures and the remuneration. A complaint may permissibly be lodged against the decision taken; filing a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement may be pursued in accordance with the Code of Civil Procedure (ZPO).
- (5) The general meeting may at any point in time remove liquidators from office who have not been appointed by the court. The general regulations shall apply to claims arising from the employment agreement.

(6) Subsections (2) to (5) do not apply to the member of the board responsible for human resources and social welfare matters (*Arbeitsdirektor*) insofar as his appointment and removal from office are governed by the regulations of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry (MontanMitbestG).

Section 266

Application for entry in the register of liquidators

- (1) The management board is to file an application for entry in the Commercial Register of the first liquidators as well as their power of representation, while the liquidators are to file such application for any change of liquidators and any modification of their power of representation.
- (2) The records and documents as to the appointment or removal from office are to be attached, as the original or as publicly certified copies, to the application for entry in the register, as are the records and documents concerning the power of representation.
- (3) In the application for entry in the register, the liquidators are to give an assurance that no circumstances exist that would disqualify them from being appointed pursuant to section 265 (2), second sentence, and that they have been instructed concerning their unrestricted obligation to provide information to the court. Section 37 (2), second sentence, shall apply.
- (4) The appointment or removal from office of liquidators by the court shall be entered in the register *ex officio*.
- (5) (repealed)

Section 267

Notice to the company's creditors

The liquidators are to call on the creditors of the company, indicating that the company is being dissolved, to file their claims for entry in the schedule of creditors' claims. Notice of the call is to be given in the company's publications of record.

Section 268

Duties of the liquidators

- (1) The liquidators are to terminate the ongoing business, collect receivables, convert the remaining assets to cash, and satisfy the creditors. Insofar as the winding up requires this to be done, they may also enter into new business transactions.
- (2) In all other cases the liquidators shall have the rights and duties of the management board within their sphere of business. Like the management board, they are subject to monitoring by the supervisory board.
- (3) The prohibition of competition set out in section 88 does not apply to them.
- (4) All business letters addressed to a specific recipient must set out the following particulars: the legal structure and the seat of the company, the fact that the company is in the process of being wound up, the court of registration at the seat of the company, and the number under which the company has been entered in the Commercial Register, as well as all liquidators and the chairman of the supervisory board, providing their family names and at least one fully spelled-out first name. Where information is provided regarding the company's capital, its share capital must be set out in any case, as must be the aggregate amount of the contributions still outstanding if the issue price has not been fully paid for the shares of stock. The particulars pursuant to the first sentence need not be provided in the case of notifications or reports issued in the context of an existing business relationship and for which pre-printed forms are customarily used that simply are to be completed by the particulars respectively required for the individual case. Order forms shall be deemed to be business letters in the sense of the first sentence; the third sentence shall not be applicable to them.

Section 269

Representation by the liquidators

- (1) The liquidators shall represent the company in court and outside of court.

(2) Where several liquidators have been appointed, then, unless the by-laws or the authority otherwise competent have determined otherwise, any and all liquidators shall have authority to represent the company solely jointly. Where a declaration of intent is to be made to the company, it shall suffice for it to be made to one (1) liquidator.

(3) The by-laws or the authority otherwise competent may also determine that individual liquidators shall have authority to represent the company alone or jointly with an officer of the company vested with full commercial power of attorney (*Prokurist*). The same may be determined by the supervisory board, provided it has been granted the corresponding authority in the by-laws or by a resolution adopted by the general meeting. Subsection (2), second sentence, shall apply *mutatis mutandis* to these cases.

(4) Liquidators having the authority to represent the company jointly may grant authority to individual liquidators from among their midst to enter into certain business transactions or certain types of business transactions. This shall apply *mutatis mutandis* where an individual liquidator has authority to represent the company jointly with an officer of the company vested with full commercial power of attorney (*Prokurist*).

(5) The power of representation of the liquidators may not be restricted.

(6) Liquidators shall sign for the company by setting an addendum to the business name indicating the fact that the company is being wound up, and with their signature.

Section 270

Opening balance sheet. Annual accounts and management report

(1) The liquidators are to prepare, for the commencement of the process of winding up the company, a balance sheet (opening balance sheet) and a report explaining the opening balance sheet and, as per the end of each year, annual accounts and a management report.

(2) The general meeting shall resolve on the approval of the opening balance sheet and of the annual accounts as well as on the approval of the actions taken by the liquidators and the members of the supervisory board and the discharge granted to same. The regulations governing the annual accounts shall be correspondingly applied to the opening balance sheet and the explanatory report. However, items of property making up the fixed assets are to be valued as if they were current assets insofar as it is intended to dispose of them within a foreseeable period of time, or insofar as these assets no longer serve the company's business operations; this shall also apply to the annual accounts.

(3) The court may grant a release from the obligation to have the annual accounts and the management report audited by an auditor of annual accounts if the circumstances of the company are so easily surveyed that, in the interests of the creditors and stockholders, an audit seems not to be required. A complaint may permissibly be lodged against the decision taken.

Section 271

Distribution of the assets

(1) The assets of the company that remain following the discharge of the liabilities shall be distributed among the stockholders.

(2) The assets are to be distributed in accordance with the shares held in the share capital unless shares of stock exist that grant different rights in the distribution of the company's assets.

(3) Where the contributions towards the share capital have not been made for all shares of stock in the same ratio, the contributions made shall be reimbursed and any surplus shall be distributed in accordance with the shares held in the share capital. Where the assets do not suffice to reimburse the contributions, the stockholders are to bear the loss in accordance with their shares in the share capital; insofar as this is necessary, the contributions as yet outstanding are to be collected.

Section 272

Protection of creditors

- (1) The assets may only be distributed if one (1) year has lapsed since the date on which the notice to the creditors has been published.
- (2) Where a creditor who is known fails to come forward, the amount owed is to be deposited on his behalf where a right to deposit exists.
- (3) Where a liability cannot be settled for the time being, or where it is in dispute, the assets may only be distributed if security has been provided to the creditor.

Section 273

Completion of the winding up

- (1) Where the winding up has been terminated and the final accounts have been rendered, the liquidators are to file an application for entry of the completion of the winding up in the Commercial Register. The company is to be cancelled.
- (2) The books and records of the company are to be deposited at a secure site determined by the court and are to be kept safe for ten (10) years.
- (3) The court may allow the stockholders and the creditors to inspect the books and records.
- (4) Should it become apparent subsequently that further measures serving to wind up the company are necessary, the court is to re-appoint the liquidators involved thus far, or is to appoint other liquidators, upon a corresponding petition having been filed by a party involved. Section 265 (4) shall apply.
- (5) A complaint may permissibly be lodged against the decisions set out in subsections (2), (3), and (4), first sentence.

Section 274

Continuation of a dissolved company

- (1) Where a stock corporation has been dissolved by lapse of time or by a resolution adopted by the general meeting, then for as long as the distribution of the assets among the stockholders has not commenced, the general meeting may resolve to continue the company. The resolution shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements.
- (2) The same shall apply where the company:
 1. Has been dissolved as a result of insolvency proceedings having been opened, but the proceedings have been discontinued in accordance with the petition filed by the creditor, or have been terminated following the approval of an insolvency plan providing for the continued existence of the company;
 2. Has been dissolved as a result of the court establishing a deficiency of the by-laws pursuant to section 262 (1) no. 5, but an amendment of the by-laws remedying such deficiency is resolved upon at the latest concurrently with the resolution adopted to continue the company.
- (3) The liquidators are to file an application for entry of the continuation of the company in the Commercial Register. In filing such application for entry in the register, they are to submit proof that the distribution of the company's assets among the stockholders has not yet commenced.
- (4) The resolution adopted as to continuing the company shall enter into force only once it has been entered in the Commercial Register kept at the seat of the company. In the case governed by subsection (2) no. 2, the resolution as to the continuation of the company shall have no effect for as long as neither it nor the resolution adopted as to the amendment of the by-laws has been entered in the Commercial Register kept at the seat of the company; both resolutions should be entered in the Commercial Register only jointly.

Chapter 2

Declaration of nullity of the company

Section 275

Action for declaration of nullity

(1) Where the by-laws do not make any provisions governing the amount of the share capital or the purpose of the enterprise, or where the provisions made in the by-laws regarding the purpose of the enterprise are null and void, each stockholder and each member of the management board and of the supervisory board may file an action to have the nullity of the company declared. The action may not be based on other grounds.

(2) Where it is possible to remedy the deficiency pursuant to section 276, the action may be filed only once a person entitled to bring an action has called on the company to remedy the deficiency and the company has failed to comply with this call within a period of three (3) months.

(3) The action must be brought within three (3) years following entry in the register of the company. A cancellation *ex officio* of the company pursuant to section 397 (1) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG) is not precluded by the lapse of time.

(4) Section 246 subsections (2) to (4), sections 247 and 248 (1), first sentence, sections 248a and 249 (2) shall apply *mutatis mutandis* to the action for avoidance. The management board is to file with the Commercial Register a certified copy of the writ of complaint as well as the final and conclusive judgment. An entry is to be made of the company's nullity by reason of a final and conclusive judgment.

Section 276

Remediation of deficiencies

A deficiency concerning the provisions governing the purpose of the enterprise may be remedied, observing the stipulations of the law and of the by-laws concerning amendments of the by-laws.

Section 277

Effect of the entry in the register of nullity

(1) Where the company's nullity by reason of a final and conclusive judgment or of a decision taken by the court of registration has been entered in the Commercial Register, the company shall be wound up according to the regulations governing the winding up in the case of dissolution.

(2) The nullity shall not affect the validity of the legal transactions entered into on the company's behalf.

(3) The shareholders are to make the contributions insofar as this is necessary to settle the liabilities that have been entered into.

Book 2

Public partly limited partnership

Section 278

Nature of the public partly limited partnership

(1) The public partly limited partnership is a company having a legal personality of its own in which at least one shareholder is liable to the creditors of the company without limitation (general partner) and the remaining shareholders, without being personally liable for the obligations of the company, have an ownership interest in the share capital divided up into shares of stock (limited liability shareholders of a public partly limited partnership).

(2) The legal relationship of the general partners *inter se* and vis-à-vis the entirety of the limited liability shareholders of a public partly limited partnership as well as vis-à-vis third parties, namely the authority of the general partners to manage the affairs of the company and to represent it, is governed by the regulations of the Commercial Code (HGB) relating to the limited partnership.

(3) In all other cases, the regulation of Book 1 relating to the stock corporation shall apply *mutatis mutandis* to the public partly limited partnership unless anything to the contrary is stipulated in the regulations set out below or results from the lack of a management board.

Section 279 **Business name**

- (1) The business name of the public partly limited partnership must bear the designation “*Kommanditgesellschaft auf Aktien*” (public partly limited partnership), or a generally understandable abbreviation of this designation, regardless of whether or not the business name continues to be used pursuant to section 22 of the Commercial Code (HGB) or other statutory regulations.
- (2) If no natural person within the company is personally liable, the business name must bear a designation identifying the limitation of liability, regardless of whether or not the business name continues to be used pursuant to section 22 of the Commercial Code (HGB) or other statutory regulations.

Section 280 **Establishment of the by-laws. Founders**

- (1) The by-laws must be established by way of being recorded by a notary. The deed is to set out the nominal amount of the shares of stock, in the case of par-value shares, and in the case of no-par-value shares the number, as well as the issue price and, where several classes of stock exist, the class of stock of the shares, that each of the parties holding an ownership interest is acquiring. Authorised representatives may act only if they have a power of attorney certified by a notary.
- (2) All general partners must contribute to the establishment of the by-laws. Besides them, those persons must cooperate and assist in their establishment who, as the limited liability shareholders of a public partly limited partnership, are acquiring shares of stock in return for contributions.
- (3) The shareholders who have established the by-laws are the founders of the company.

Section 281 **Content of the by-laws**

- (1) Besides the determinations set out in section 23 subsections (3) and (4), the by-laws must set out the family name, first name, and place of residence of each general partner.
- (2) The assets contributed by the general partners must be specified in the by-laws by their amount and nature if they are not paid towards the share capital.
- (3) (repealed)

Section 282 **Entry in the register of the general partners**

In entering the company in the Commercial Register, the general partners are to be identified instead of the members of the management board. Furthermore, it is to be entered in the register which kind of power of representation is conferred upon the general partners.

Section 283 **General partners**

The regulations governing the management board of the stock corporation shall apply *mutatis mutandis* to the general partners regarding

1. The applications for entry, filings, declarations, and proof submitted to the Commercial Register, as well as regarding publications by notice;
2. The formation audit;
3. The duty to exercise skill and care as well as the liability and responsibilities;
4. The obligations vis-à-vis the supervisory board;

5. The permissibility of granting a loan;
6. Convening the general meeting;
7. The special audit;
8. The assertion of claims to compensation regarding the management of the company's affairs;
9. The drawing up, submission, and audit of the annual accounts and of the proposal for the appropriation of the net income;
10. The submission and audit of the management report, of a separate non-financial report as well as of consolidated financial statements, a consolidated management report, and a separate consolidated non-financial report;
11. The submission, audit, and disclosure of individual accounts pursuant to section 325 (2a) of the Commercial Code (HGB);
12. The issuance of shares of stock in the case of a conditional capital increase, in the case of authorised capital, and in the case of a capital increase using company funds;
13. The nullity and avoidance of resolutions adopted by the general meeting;
14. The application to open insolvency proceedings.

Section 284

Prohibition of competition

- (1) A general partner may not pursue any business in the company's line of business for his own account or that of others without having obtained the express consent of the remaining general partners and of the supervisory board, nor may a general partner be a member of the management board or a managing director or a general partner of some other, similar trading company. The consent may be granted only for specific types of transactions or for specific trading companies.
- (2) Where a general partner violates this prohibition, the company may demand compensation of its damages. It may instead demand of the general partner that he allow the transactions he has entered into for his own account to be considered transactions entered into for the account of the company, and that he surrender the remuneration obtained for the transactions entered into for the account of some other party, or that he assign his claim to the remuneration.
- (3) The company's claims shall become statute-barred following the expiry of three (3) months from the point in time at which the other general partners and the members of the supervisory board become aware of the measure resulting in the obligation to provide compensation for damages, or should become aware of same unless they are grossly negligent. Such claims shall become statute-barred, irrespective of this awareness, or grossly negligent lack of awareness, following the expiry of five (5) years from the date on which they have arisen.

Section 285

General meeting

- (1) At the general meeting, the general partners shall have voting rights only for their shares of stock. They may not exercise this voting right, neither for themselves nor on behalf of some other party, where resolutions are adopted on:
1. The election of the supervisory board and the removal of its members from office;
 2. The approval of the actions taken by general partners and the members of the supervisory board and discharge granted to same;

3. The appointment of special auditors;
4. The assertion of claims to compensation;
5. The waiver of claims to compensation;
6. The election of the auditors of the annual accounts.

Where these resolutions are adopted, their voting right also may not be exercised by some other party.

(2) The resolutions adopted by the general meeting require the consent of the general partners insofar as they concern matters requiring, in the case of a limited partnership, the agreement of the general partners and the limited partners. Exercising the authority to which the general meeting or a minority of limited liability shareholders of a public partly limited partnership are entitled in appointing auditors and asserting claims of the company arising from its formation or the management of its affairs shall not require the consent of the general partners.

(3) Resolutions adopted by the general meeting requiring the consent of the general partners are to be filed with the Commercial Register only once said consent has been obtained. In the case of resolutions that are to be entered in the Commercial Register, the consent is to be notarially recorded in the minutes of the deliberations or in an annex to said minutes.

Section 286

Annual accounts. Management report

(1) The general meeting shall adopt a resolution as to the approval of the annual accounts. The resolution shall require the consent of the general partners.

(2) In the annual balance sheet, the equity shares of the general partners are to be separately recognised under the item "Subscribed Capital." The loss allocated to the equity share of a general partner for the financial year is to be written down from the equity share. Inasmuch as the loss is higher than the equity share, it is to be recognised separately on the "Assets" side of the balance sheet under the designation "Call liabilities of general partners" among the receivables insofar as a payment obligation exists; where no such payment obligation exists, the amount is to be designated as "Loss share of general partners not covered by assets contributed" and is to be recognised pursuant to section 268 (3) of the Commercial Code (HGB). Loans governed by section 89 that the company has granted to general partners, their spouses, partners in a civil union or minor children, or to third parties acting for the account of these persons, are to be noted on the "Assets" side under the corresponding items with the designation "of which granted to general partners and their relatives."

(3) The profit or loss allocated to the equity shares of the general partners need not be separately recognised in the income statement.

(4) Section 285 no. 9 letters a and b of the Commercial Code (HGB) shall apply to general partners subject to the proviso that the profit allocated to the equity share of a general partner need not be stated.

Section 287

Supervisory board

(1) Unless stipulated otherwise in the by-laws, the supervisory board shall implement the resolutions adopted by the limited liability shareholders of a public partly limited partnership.

(2) In legal disputes pursued by the entirety of the limited liability shareholders of a public partly limited partnership against the general partners, or pursued by the latter against the entirety of the limited liability shareholders of a public partly limited partnership, the supervisory board shall represent the limited liability shareholders of a public partly limited partnership unless the general meeting has elected special representatives. The company shall be liable for the costs of the legal dispute that the limited liability shareholders of a public partly limited partnership are to bear, notwithstanding the recourse it may take against the limited liability shareholders of a public partly limited partnership.

(3) General partners cannot be members of the supervisory board.

Section 288

Withdrawals by general partners. Granting of loans

(1) Where a loss is allocated to a general partner and such loss is in excess of his equity share, he may not withdraw any profits allocated to his equity share. Furthermore, he may not withdraw any such participation in the profits and may not withdraw any money from his equity share for as long as the sum total of the net loss, call liabilities, shares in the loss of general partners, and receivables from loans granted to general partners and their relatives is in excess of the sum total of the profits carried forward, the capital reserves, and the retained income, as well as the equity shares of the general partners.

(2) As long as the pre-requisite set out in subsection (1), second sentence, is given, the company may not grant any loan governed by section 286 (2), fourth sentence. Any loan granted notwithstanding is to be repaid immediately, irrespective of any agreements to the contrary.

(3) Claims of general partners to remuneration for their activities, such remuneration not being dependent on the profits, shall not be affected by the present regulations. Section 87 (2), first and second sentences, shall apply *mutatis mutandis* for an abatement of such remunerations.

Section 289

Dissolution

(1) Unless otherwise determined in subsections (2) to (6), the grounds for which the public partly limited partnership is dissolved or for which one of several general partners leaves the company shall be governed by the regulations of the Commercial Code (HGB) regarding the limited partnership.

(2) The public partly limited partnership shall also be dissolved:

1. Upon the court order becoming final and conclusive by which the opening of insolvency proceedings is refused for insufficiency of assets;
2. Upon the direction issued by the court of registration becoming final and conclusive by which a deficiency of the by-laws has been established pursuant to section 399 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG);
3. By cancellation of the company for lack of assets pursuant to section 394 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (FamFG).

(3) The company is not dissolved by the opening of insolvency proceedings for the assets of a limited liability shareholder of a public partly limited partnership. The creditors of a limited liability shareholder of a public partly limited partnership are not entitled to terminate the company.

(4) In order for the limited liability shareholders of a public partly limited partnership to terminate the company and for them to grant their consent to the company being dissolved, a resolution adopted by the general meeting is required. The same shall apply to a petition filed for dissolution of the company by a decision by the court. The resolution shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements.

(5) General partners may leave the company, besides being expelled, only if the by-laws declare this to be permissible.

(6) All general partners are to file an application for entry in the Commercial Register if the company is dissolved or if a general partner leaves the company. Section 143 (3) of the Commercial Code (HGB) shall apply *mutatis mutandis*. In the cases governed by subsection (2), the court is to enter the dissolution in the register *ex officio* and the reason therefor. In

the case governed by subsection (2) no. 3, the entry of the dissolution may be dispensed with.

Section 290

Winding up

- (1) Unless stipulated otherwise in the by-laws, all general partners and one or several persons elected by the general meeting as liquidators shall wind up the company.
- (2) Any general partners may also file a petition for the appointment of liquidators or their removal from office by the court.
- (3) Where the company has been dissolved by way of cancellation for lack of assets, it shall be wound up only if it should become apparent following its cancellation that assets exist that are subject to distribution. The liquidators are to be appointed by the court upon a petition having been filed by a party involved.

Book 3

Affiliated enterprises

Part 1

Inter-company agreements

Chapter 1

Types of inter-company agreements

Section 291

Control agreement. Profit and loss absorption agreement

- (1) Inter-company agreements are contracts by which a stock corporation or public partly limited partnership allows the management of its company to be performed by some other enterprise (control agreement) or by which it enters into obligation to transfer its entire profits to some other enterprise (profit and loss absorption agreement). Likewise, a contract by which a stock corporation or a public partly limited partnership accepts to manage its enterprise for the account of some other enterprise shall be deemed to be an agreement regarding the transfer of the entire profits.
- (2) Where enterprises that are not controlled by one another agree by a contract to place themselves under common management, without this resulting in one of these enterprises being controlled by some other enterprise concluding the contract, then this contract is not a control agreement.
- (3) Performance by the company where a control agreement or a profit and loss absorption agreement exists shall not be deemed a violation of sections 57, 58, and 60.

Section 292

Other inter-company agreements

- (1) Inter-company agreements furthermore are contracts by which a stock corporation or public partly limited partnership:
 1. Enters into obligation to combine its profits, or the profits of individual of its operations, as a whole or in part with the profits of other enterprises, or with the profits of individual operations of other enterprises, for distribution of the pooled profits (profit pool),
 2. Enters into obligation to transfer part of its profits or the profits of individual of its operations, as a whole or in part, to some other party (agreement as to the partial absorption of profit and loss),
 3. Leases the operation of its enterprise to some other party or surrenders it in some other manner (company lease agreement, company surrender agreement).
- (2) A profit-sharing contract with members of the management board and of the supervisory board or with individual employees of the company, as well as a profit-sharing arrangement

in the context of contracts concluded as part of the ongoing pursuit of business or of license agreements, is not an agreement as to the partial absorption of profit and loss.

(3) A company lease agreement or company surrender agreement and the resolution by which the general meeting has consented to it shall not be null and void by reason of the agreement violating sections 57, 58, and 60. The first sentence does not preclude an action for avoidance of the resolution being brought for such violation.

Chapter 2

Conclusion, amendment, and termination of inter-company agreements

Section 293

Consent of the general meeting

(1) An inter-company agreement shall enter into force only with the consent of the general meeting. The resolution shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. The provisions of the law and those of the by-laws governing amendments of the by-laws are not to be applied.

(2) A control agreement or a profit and loss absorption agreement shall enter into force, in cases in which the other contracting party is a stock corporation or public partly limited partnership, only if the general meeting of that company likewise grants its consent.

Subsection (1), second to fourth sentences, shall apply *mutatis mutandis* to the resolution.

(3) The agreement must be made in writing.

(4) (repealed)

Section 293a

Report on the inter-company agreement

(1) The management board of each stock corporation or public partly limited partnership that is party to an inter-company agreement is to submit a detailed report in writing, insofar as the consent of the general meeting pursuant to section 293 is required, explaining and justifying in legal and economic terms the conclusion of the inter-company agreement, the details of the agreement, and in particular the nature and amount of the compensation pursuant to section 304 and the settlement payment pursuant to section 305; the management boards may also submit a common report. The report is to indicate any particular difficulties encountered in valuing the contracting enterprises as well as the consequences the agreement will have for the ownership interest held by the stockholders.

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

(3) The report shall not be required if all owners of shares in all legal entities involved waive its being submitted and this waiver is publicly certified.

Section 293b

Audit of the inter-company agreement

(1) Unless all shares of stock in the controlled company are held by the controlling enterprise, the inter-company agreement is to be audited for each contracting stock corporation or public partly limited partnership by one or several expert auditors (contract auditors).

(2) Section 293a (3) shall be correspondingly applied.

Section 293c

Appointment of the contract auditors

(1) The contract auditors shall be selected and appointed by the court, in each case upon the management boards of the contracting companies having filed a corresponding petition. They may be jointly appointed upon the management boards filing a common petition for all contracting companies. That regional court (*Landgericht*) shall have jurisdiction in the judicial

district of which the controlled company has its seat. Where a division for commercial matters has been formed at the regional court, the chairman of said division shall take the decision instead of the civil division. Section 318 (5) of the Commercial Code (HGB) shall apply to the reimbursement of the auditors appointed by the court and their remuneration. (2) Section 10 subsections (3) to (5) of the Transformation Act (UmwG) shall apply *mutatis mutandis*.

Section 293d

Selection, position, as well as liability and responsibilities of the contract auditors

(1) Section 319 subsections (1) to (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 contract auditors and their right to request information. The right to request information shall exist vis-à-vis the contracting enterprises and vis-à-vis a group member company 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 liability and responsibilities of the contract auditors, their agents, and the legal representatives of an auditing firm cooperating with and assisting in the audit. The liability and responsibilities shall be given vis-à-vis the contracting enterprises and their shareholders.

Section 293e

Audit report

(1) The contract auditors are to report in writing on the results of their audit. The audit report is to be concluded by a declaration as to whether or not the compensation proposed or the settlement payment proposed is a fair equivalent. In this context, the following information is to be provided:

1. The methods based on which the compensation and settlement payment have been established;
2. The reasons for which the application of these methods is appropriate;
3. In the event that several methods have been applied: which compensation or which settlement payment 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 compensation proposed or the settlement payment proposed and the values on which they are based, as well as any particular difficulties encountered in valuing the contracting enterprises.

(2) Section 293a subsections (2) and (3) shall be correspondingly applied.

Section 293f

Preparations for the general meeting

(1) From the time onwards at which the general meeting is convened that is to adopt a resolution consenting to the inter-company agreement, the following documents are to be kept available for inspection by the stockholders at the business premises of each of the stock corporations or public partly limited partnerships that are involved:

1. The inter-company agreement;
2. The annual accounts and the management reports of the contracting enterprises for the last three (3) financial years;
3. The reports submitted by the management boards pursuant to section 293a and the reports submitted by the contract auditors pursuant to section 293e.

(2) 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.

(3) The duties 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 293g

Conduct of the general meeting

- (1) The documents designated in section 293f (1) are to be made available at the general meeting.
- (2) At the outset of the meeting, the management board is to give an oral presentation of the inter-company agreement. The presentation is to be attached to the minutes as an annex.
- (3) Should any stockholder so request at the general meeting, he is to be provided also with information about any and all matters of the other contracting party that are relevant to the conclusion of the agreement.

Section 294

Entry in the register. Entry into force

- (1) The management board of the company is to file an application for entry in the Commercial Register of the existence and the nature of the inter-company agreement as well as the name of the other contracting party; should a plurality of agreements as to the partial absorption of profit and loss exist, some other designation may be entered in the register instead of the name of the other contracting party, provided it sets out in exact terms the respective agreement as to the partial absorption of profit and loss. The agreement as well as – where the agreement will enter into force only with the consent of the general meeting of the other contracting party – the minutes recording such resolution and their annexes are to be attached to the application for entry in the register in the original version, as an execution, or as a public certified copy.
- (2) The agreement shall enter into force only once its existence has been entered in the Commercial Register kept at the seat of the company.

Section 295

Amendment

- (1) An inter-company agreement may be amended only with the consent of the general meeting. Sections 293 to 294 shall apply *mutatis mutandis*.
- (2) In order for the consent of the general meeting of the company to enter into force by which the stipulations of the agreement are amended that create an obligation to provide compensation to the external stockholders of the company or to purchase their shares of stock, a separate resolution must be adopted by the external stockholders. Section 293 (1), second and third sentences, shall apply to the separate resolution. Should any external stockholder so request at the general meeting adopting a resolution as to the consent, he is to be provided also with information about any and all matters of the other contracting party that are relevant to the amendment.

Section 296

Rescission

- (1) An inter-company agreement may be rescinded only as per the end of the financial year or of any accounting period otherwise contractually determined. Any retroactive rescission shall be impermissible. The rescission must be made in writing.
- (2) An agreement creating an obligation to provide compensation to the external stockholders or to purchase their shares of stock may be rescinded only if the external stockholders consent by adopting a separate resolution. Section 293 (1), second and third sentences, section 295 (2), third sentence, shall apply *mutatis mutandis* to the separate resolution.

Section 297

Termination

(1) An inter-company agreement may be terminated for grave cause without complying with a notice period. Grave cause shall be given in particular if the respective other contracting party foreseeably will not be in a position to fulfil the duties incumbent on it as a result of the agreement.

(2) The management board of the company may terminate an agreement creating an obligation to provide compensation to the external stockholders of the company or to purchase their shares without grave cause being given only in those cases in which the external stockholders consent by adopting a separate resolution. Section 293 (1), second and third sentences, section 295 (2), third sentence, shall apply *mutatis mutandis* to the separate resolution.

(3) The termination must be made in writing.

Section 298

Application for entry in the register and entry

The management board of the company is to file an application for entry in the Commercial Register of the termination of an inter-company agreement, the reasons therefor, and the time at which it was so terminated, and shall do so without undue delay.

Section 299

Prohibition of instructions

It shall not be possible to instruct the company, based on an inter-company agreement, to amend, uphold, or terminate the agreement.

Chapter 3

Securitisation of the company and the creditors

Section 300

Statutory reserves

The following are to be allocated to the statutory reserves instead of the amount specified in section 150 (2):

1. If a profit and loss absorption agreement exists: that amount of the surplus for the year, arising without the transfer of the profits and reduced by any loss carried forward from the preceding year, that is necessary in order to uniformly replenish the statutory reserves, while adding capital reserves within the first five (5) financial years commencing during the existence of the agreement or after the implementation of a capital increase, such that they are at least equivalent to one tenth of the share capital or whichever greater part of the share capital is specified in the by-laws, at a minimum, however, the amount specified in no. 2;
2. If an agreement as to the partial absorption of profit and loss exists: that amount of the surplus for the year, arising without the transfer of the profits and reduced by any loss carried forward from the preceding year, that would have to be allocated to the statutory reserves pursuant to section 150 (2);
3. If a control agreement exists, without the company also being obligated to transfer its entire profits: that amount that is required to replenish the statutory reserves pursuant to no. 1, at a minimum, however, the amount specified in section 150 (2) or, if the company is obligated to transfer parts of its profits, the amount specified in no. 2.

Section 301

Maximum amount of the profit transfer

Irrespective of the agreements made regarding the calculation of the profits to be transferred, a company may remit as its profits, at a maximum, the surplus for the year accruing without the profits being remitted, reduced by a loss carried forward from the preceding year, by the amount to be allocated to the statutory reserves pursuant to section 300, and by the amount barred from distribution pursuant to section 268 (8) of the

Commercial Code (HGB). Where, during the term of the agreement, amounts have been allocated to other revenue reserves, these amounts may be withdrawn from the other revenue reserves and remitted as profits.

Section 302 **Absorption of losses**

- (1) Where a control agreement or a profit and loss absorption agreement exists, the other contracting party is to absorb any shortfall for the year that would otherwise accrue during the term of the agreement, unless the shortfall is offset by amounts withdrawn from the other revenue reserves that have been allocated to same during the agreement's term.
- (2) Where a controlled company has leased the operation of its enterprise to the controlling enterprise or has otherwise surrendered it, the controlling enterprise is to absorb any shortfall for the year that would otherwise accrue during the term of the agreement insofar as the agreed counter-performance is not at least equivalent to the appropriate remuneration.
- (3) The company may waive its claim to compensation, or conclude a compromise regarding this claim, only after three (3) years have lapsed after the day on which the entry of the agreement's termination in the Commercial Register pursuant to section 10 of the Commercial Code (HGB) has been published by notice. This shall not apply if the party obligated to provide compensation is unable to pay his debts as they become due and concludes a compromise with his creditors in order to avert insolvency proceedings or if the obligation to provide compensation is provided for by an insolvency plan. The waiver or compromise shall enter into force only if the external stockholders grant their consent by a separate resolution and no minority, the aggregate of whose shares is at least equivalent to one tenth of the share capital represented at the time such resolution is adopted, raises an objection and has it recorded in the minutes.
- (4) The claims under the present regulations shall become statute-barred ten (10) years following the day on which the entry of the agreement's termination in the Commercial Register pursuant to section 10 of the Commercial Code (HGB) has been published by notice.

Section 303 **Protection of creditors**

- (1) Where a control agreement or a profit and loss absorption agreement ends, the other contracting party is to provide security to those of the creditors of the company whose claims have arisen prior to publication by notice of the agreement's termination having been entered in the Commercial Register pursuant to section 10 of the Commercial Code (HGB), provided they come forward to him for this purpose within six (6) months of the publication by notice of the respective entry. This right is to be indicated to the creditors in the publication by notice of the respective entry.
- (2) Those creditors shall not be entitled to demand security who are entitled to preferred satisfaction of their claims, in the event of insolvency, out of covering funds that were created for their protection pursuant to the stipulations of the law and that are monitored by the state.
- (3) Instead of providing security, the other contracting party may guarantee the claim. Section 349 of the Commercial Code (HGB) regarding the exclusion of the defence of failure to pursue remedies shall have no application.

Chapter 4 **Securitisation of the external stockholders in the case of control agreements and profit and loss absorption agreements**

Section 304 **Appropriate compensation**

- (1) A profit and loss absorption agreement must provide appropriate compensation for the external stockholders by way of a recurring payment of money in proportion with the shares in the share capital (payment of compensation). A control agreement must guarantee to the

external stockholders, unless the company is also under obligation to remit its entire profits, a specified annual participation in the profits as appropriate compensation, in keeping with the amount determined for the payment of compensation. Determining an appropriate compensation may be refrained from only if the company has no external stockholder at the point in time at which its general meeting adopts a resolution as to the agreement.

(2) At a minimum, the annual payment of an amount is to be committed to as compensation that foreseeably could be distributed as an average participation in the profits for the individual share of stock, based on the company's current revenue situation and its future revenue prospects, taking account of appropriate depreciations and value adjustments, but without forming other revenue reserves. Where the other contracting party is a stock corporation or a public partly limited partnership, that amount may be committed to, as compensation payment, that accrues to the shares of stock in the other company in each case as a participation in the profits, based on an appropriate conversion ratio. The appropriateness of the conversion is determined based on the ratio in which shares of stock of the other company would have to be allotted to one share of stock of the company in the case of a merger.

(3) An agreement providing for no compensation at all, in contravention of subsection (1), shall be null and void. An action for avoidance of the resolution adopted by the general meeting of the company to consent to the agreement or to its amendment pursuant to section 295 (2) may not be based on section 243 (2) or on the fact that the compensation determined in the agreement is not a fair equivalent. Where the compensation determined in the agreement is not a fair equivalent, the court determined in section 2 of the Act on Valuation Proceedings under Corporate Law (SpruchG) is to determine, upon a corresponding petition having been filed, the compensation contractually owed; if, in this context, the agreement provides for the compensation to be calculated pursuant to subsection (2), second sentence, then the court is to determine the compensation pursuant to this regulation.

(4) Where the court determines the compensation, the other contracting party may terminate the agreement within two (2) months of the decision having become final and conclusive without observing any period of notice.

Section 305 **Settlement payment**

(1) Except for the duty to provide compensation pursuant to section 304, a control agreement or a profit and loss absorption agreement must include the duty of the other contracting party, upon a corresponding demand being made by an external stockholder, to purchase the latter's shares of stock in return for an appropriate settlement payment determined in the agreement.

(2) The agreement must provide for the following as settlement payment:

1. Where the other contracting party is a stock corporation or public partly limited partnership not controlled by another company and in which no majority ownership interest is held and has its seat in a Member State of the European Union or in some other contracting party of the Agreement creating the European Economic Area: the allotment of own shares in this company,

2. Where the other contracting party is a stock corporation or public partly limited partnership controlled by another company or in which a majority ownership interest is held, and the controlling enterprise is a stock corporation or public partly limited partnership having its seat in a Member State of the European Union or in some other contracting party of the Agreement creating the European Economic Area: either the allotment of shares of stock in the controlling company or in the company holding a majority of the ownership interest, or a cash settlement,

3. In all other cases, a cash settlement.

(3) If shares of stock in some other company are allotted by way of settlement payment, then the settlement payment is to be deemed appropriate if the shares of stock are allotted in the ratio in which shares of stock in the other company would have to be allotted to one share of stock in the company in the case of a merger; in this context, indivisible residual amounts may be compensated for by additional cash payments. The appropriate cash settlement must take account of the company's circumstances as given at the time its general meeting adopts the resolution regarding the agreement. It is to accrue interest from midnight of that day onwards on which the control agreement or the profit and loss absorption agreement entered into force at five (5) percentage points *per annum* above the respectively applicable basic rate of interest pursuant to section 247 of the Civil Code (BGB); the assertion of further-reaching damages is not precluded.

(4) The duty to purchase the shares of stock may be limited in time. At the earliest, the period shall end two (2) months following the date on which the entry of the agreement's existence in the Commercial Register pursuant to section 10 of the Commercial Code (HGB) was published by notice. Where a petition has been filed to have the court specified in section 2 of the Act on Valuation Proceedings under Corporate Law (SpruchG) determine the compensation or the settlement payment, the period shall end at the earliest two (2) months following the day on which the decision as to the last petition ruled on has been published by notice in the Federal Gazette (*Bundesanzeiger*).

(5) The action for avoidance of the resolution adopted by the general meeting of the company to consent to the agreement or to its amendment pursuant to section 295 (2) may not be based on the fact that the settlement payment provided for in the agreement is not appropriate. Should the agreement not provide for any settlement payment at all, or a settlement payment that does not comply with subsections (1) to (3), the court specified in section 2 of the Act on Valuation Proceedings under Corporate Law (SpruchG) shall determine, upon a corresponding petition having been filed, the settlement payment that is to be granted under the agreement. In the cases governed by subsection (2) no. 2, and where the agreement provides for the allotment of shares of stock in the controlling company or in the company holding a majority of the ownership interest, the court in this context is to determine the ratio in which such shares of stock are to be allotted, and if the agreement does not provide for the allotment of shares of stock in the controlling company or in the company holding a majority of the ownership interest, the court is to determine the appropriate cash settlement. Section 304 (4) shall apply *mutatis mutandis*.

Section 306 (repealed)

Section 307

Termination of the agreement in order to provide security to external stockholders

If, at the time the resolution is adopted by its general meeting regarding a control agreement or a profit and loss absorption agreement, the company does not have an external stockholder, the agreement shall end at the latest as per the end of the financial year in which an external stockholder holds an ownership interest.

Part 2

Power of direction as well as liability and responsibilities in the case of controlled enterprises

Chapter 1

Power of direction as well as liability and responsibilities in the case of a control agreement

Section 308

Power of direction

(1) Where a control agreement has been concluded, the controlling enterprise shall be entitled to issue directions to the management board of the company as regards the

management of the company. Where the agreement does not stipulate otherwise, directions may also be issued that are detrimental to the company if they serve the interests of the controlling enterprise or those of the enterprises forming a group of affiliated companies together with it and the company.

(2) The management board is under obligation to comply with the directions issued by the controlling enterprise. It is not entitled to refuse to comply with the directions issued on the grounds of their not serving, in its view, the interests of the controlling enterprise or those of the enterprises forming a group of affiliated companies together with it and the company, unless they manifestly do not serve these interests.

(3) Where the management board is directed to enter into a transaction that may be so entered into only with the consent of the supervisory board of the company, and where this consent is not granted within a reasonable period, the management board is to notify the controlling enterprise of this fact. Where, following such notification, the controlling enterprise repeats its directions, the consent of the supervisory board shall no longer be required; where the controlling enterprise has a supervisory board, the directions may be repeated only with the supervisory board's consent.

Section 309

Liability and responsibilities of the legal representatives of the controlling enterprise

(1) Where a control agreement has been concluded, the legal representatives (in the case of a sole trader: the business owner) of the controlling enterprise are to exercise, vis-à-vis the company, the due care of a prudent manager faithfully complying with his duties in issuing directions to same.

(2) Where they violate their duties, they shall be liable as joint and several debtors to compensate the company for the damage resulting therefrom. Where it is in dispute whether or not they have exercised the due care of a prudent manager faithfully complying with his duties, the onus of proof shall be upon them.

(3) The company may waive its claims to compensation, or conclude a compromise regarding these claims, only once three (3) years have lapsed since the arising of the claim, and only in those cases in which the external stockholders consent thereto by a separate resolution and no minority, the aggregate of whose shares is at least equivalent to one tenth of the share capital represented at the time such resolution is adopted, raises an objection and has it recorded in the minutes. The limitation in time shall not apply where the party obligated to provide compensation is unable to pay his debts as they become due and concludes a compromise with his creditors in order to avert insolvency proceedings or if the obligation to provide compensation is provided for in an insolvency plan.

(4) The company's claim to compensation may also be asserted by any stockholder. However, the stockholder may only demand that performance be made to the company. Furthermore, the company's claim to compensation may also be asserted by the creditors of the company insofar as they cannot obtain satisfaction from same. The obligation to provide compensation will not be cancelled vis-à-vis the creditors by a waiver by the company or by its concluding a compromise. Where insolvency proceedings have been opened for the company's assets, the insolvency administrator or the insolvency monitor shall exercise, for the duration of said proceedings, the right of the stockholders and creditors to assert the company's claim to compensation.

(5) The claims governed by the present regulations shall become statute-barred after five (5) years.

Section 310

Liability and responsibilities of the officers of the company

(1) If the members of the management board and of the supervisory board of the company have acted in dereliction of their duties, they shall be liable as joint and several debtors in addition to the party obligated to provide compensation pursuant to section 309. Where it is in dispute whether or not they have exercised the due care of a prudent manager faithfully complying with his duties, the onus of proof shall be upon them.

- (2) The fact that the supervisory board has endorsed the action does not preclude the obligation to provide compensation.
- (3) No obligation to provide compensation shall be given for the officers of the company if the action causing the damage is based on a direction that was to be complied with pursuant to section 308 (2).
- (4) Section 309 subsections (3) to (5) shall apply.

Chapter 2

Liability and responsibilities in the case of no control agreement existing

Section 311

Limitations restricting the exertion of influence

- (1) Where no control agreement exists, a controlling enterprise may not use its influence to instigate a controlled stock corporation or public partly limited partnership to enter into a legal transaction detrimental to it, or to take or refrain from measures resulting in a disadvantage, unless the disadvantages are compensated.
- (2) Where the compensation has not in fact been provided in the course of the financial year, then it must be determined at the latest at the end of the financial year in which the controlled company suffered the disadvantage when and by which advantages the disadvantage is to be compensated. The controlled company is to be granted a legal claim to the advantages determined to serve as compensation.

Section 312

Report by the management board on the relations with affiliated enterprises

- (1) Where no control agreement exists, the management board of a controlled company is to prepare, in the first three (3) months of the financial year, a report on the relations of the company with affiliated enterprises. The report is to set out all legal transactions that the company has entered into, in the course of the financial year expired, with the controlling enterprise or with an enterprise affiliated with the controlling enterprise, or at the instigation or in the interests of these enterprises, as well as all other measures it has taken or refrained from at the instigation or in the interests of these enterprises in the course of the financial year expired. Where legal transactions are concerned, the performance and counter-performance are to be stated, and where measures are concerned, the reasons for which the measure was taken and the benefits and disadvantages it entails for the company. Where disadvantages have been compensated, the report is to state in detail in which way the compensation was in fact provided in the course of the financial year, or to which advantages the legal claim granted to the company refers.
- (2) The report is to correspond to the principles of conscientious and faithful accounting.
- (3) At the end of the report, the management board is to declare whether, based on the circumstances of which the management board was aware at the point in time at which the legal transaction was entered into, or the measure was taken or refrained from, the company received appropriate counter-performance for each legal transaction and did not suffer a disadvantage by the measure being taken or refrained from. Where the company did suffer a disadvantage, the management board is to declare furthermore whether the disadvantages have been compensated. This declaration is to be also included in the management report.

Section 313

Audit by the auditor of the annual accounts

- (1) Where the annual accounts are to be audited by an auditor of annual accounts, then the report on the relations of the company with affiliated enterprises is to be submitted to the auditor of the annual accounts concurrently with the annual accounts and the management report. He is to audit whether:

1. The statements as to fact made in the report are accurate,

2. The performance of the company was excessive in the case of the legal transactions set out in the report, based on the circumstances known at the point in time at which the legal transactions were entered into; if it was excessive, whether the disadvantages have been compensated,

3. Any circumstances regarding the measures set out in the report give rise to an assessment significantly different from that of the management board.

Section 320 (1), second sentence, and subsection (2), first and second sentences, of the Commercial Code (HGB) shall apply *mutatis mutandis*. The auditor of the annual accounts shall have the rights governed by this regulation also vis-à-vis a group member company as well as vis-à-vis a controlled or controlling enterprise.

(2) The auditor of the annual accounts is to report in writing on the results of the audit. Should he establish, in auditing the annual accounts, the management report, and the report on the relations of the company with affiliated enterprises, that this report is incomplete, he is to report on this fact as well. The auditor of the annual accounts is to sign his report and submit it to the supervisory board; prior to so forwarding the report, the management board is to be given the opportunity to state its position.

(3) Where, according to the conclusive result of the audit, no exception is to be taken, the auditor of the annual accounts is to confirm this fact by adding the following audit opinion to the report on the relations of the company with affiliated enterprises:

Following my / our audit and judgment, performed in keeping with my / our professional duties, I / we hereby confirm that:

1. The statements as to fact made in the report are accurate,

2. The performance of the company for the legal transactions set out in the report was not excessive, or that the disadvantages have been compensated,

3. No circumstances regarding the measures set out in the report give rise to an assessment significantly different from that of the management board.

Where the report does not set out any legal transaction, then no. 2 is to be left out of the certificate; should the report not list any measure, then no. 3 is to be left out. Where the auditor of the annual accounts has not established for any of the legal transactions set out in the report that the performance of the company was excessive, then no. 2 of the certificate is to be limited to that confirmation.

(4) Where exception is to be taken, or where the auditor of the annual accounts has established that the report on the relations of the company with affiliated enterprises is incomplete, he is to limit the confirmation or is to refuse to grant it. Where the management board itself has declared that the company has suffered a disadvantage by certain legal transactions or measures, without these disadvantages having been compensated, then this is to be stated in the audit opinion and the audit opinion is to be limited to the remaining legal transactions or measures.

(5) The auditor of the annual accounts is to sign the audit opinion providing the place and date. The audit opinion is to also be included in the audit report.

Section 314

Audit by the supervisory board

(1) The management board is to submit the report on the relations of the company with affiliated enterprises to the supervisory board without undue delay after it has been drawn up. This report and, where the annual accounts are to be audited by an auditor of annual accounts, the audit report prepared by the auditor of the annual accounts are to be forwarded also to each member of the supervisory board or, if the supervisory board has so resolved, to the members of a committee.

(2) The supervisory board is to audit the report on the relations of the company with affiliated enterprises and is to report on the results of its audit to the general meeting (section 171 (2)).

Where the annual accounts are to be audited by an auditor of annual accounts, the supervisory board is to furthermore state its position in its report regarding the results obtained by the auditor of the annual accounts in auditing the report on the relations of the company with affiliated enterprises. An audit opinion issued by the auditor of the annual accounts is to be included in the report, and any refusal of such audit opinion is to be expressly stated therein.

(3) The supervisory board is to declare at the end of its report whether exception is to be taken, based on the conclusive result of its audit, against the declaration made by the management board at the end of the latter's report on the relations of the company with affiliated enterprises.

(4) Where annual accounts are to be audited by an auditor of annual accounts, said auditor is to participate in the deliberations of the supervisory board or of the committee on the report on the relations of the company with affiliated enterprises and is to report on the substantial results of his audit.

Section 315 Special audits

Upon a corresponding petition having been filed by a stockholder, the court is to appoint special auditors who are to audit the business relations of the company with the controlling enterprise or with a company affiliated with same if:

1. The auditor of the annual accounts has issued the audit opinion on the report on the relations of the company with affiliated enterprises only with restrictions, or has refused to issue it,
2. The supervisory board has declared that exception is to be taken regarding the declaration by the management board at the end of the report on the relations of the company with affiliated enterprises,
3. The management board itself has declared that the company has suffered a disadvantage as a result of certain legal transactions or measures without these disadvantages having been compensated.

Where other facts are given that justify the suspicion that disadvantages have been caused by way of dereliction of duties, the petition may also be filed by stockholders whose shares of stock in the aggregate are at least equivalent to the threshold value set out in section 142 (2), if they demonstrate to the satisfaction of the court that they have been the holders of the shares of stock for at least three (3) months prior to the date on which they have filed the petition. That regional court (*Landgericht*) in the judicial district of which the company has its seat shall decide on the petition. Section 142 (8) shall apply *mutatis mutandis*. A complaint may permissibly be lodged against the decision taken. Where the general meeting has appointed special auditors who are to perform an audit of the same actions and events, any stockholder may file the petition pursuant to section 142 (4).

Section 316

No report on relations with affiliated enterprises where a profit and loss absorption agreement has been concluded

Sections 312 to 315 shall not apply where a profit and loss absorption agreement is in place between the controlled company and the controlling enterprise.

Section 317

Liability and responsibilities of the controlling enterprise and its legal representatives

(1) Where a controlling enterprise instigates a controlled company, with which no control agreement is in place, to enter into a legal transaction causing a disadvantage to it, or to take or refrain from taking a measure and this causes a disadvantage to the controlled company, without the controlling enterprise in fact compensating it for this disadvantage by the end of the financial year or granting to the controlled company a legal claim to an

advantage intended to serve as compensation, then the controlling enterprise is under obligation to compensate the company for the damage resulting therefrom. The controlling enterprise shall also be under obligation to compensate the stockholders for the damage they have suffered as a result insofar as they have suffered damage above and beyond the damage that has been caused them by the damage caused to the company.

(2) The obligation to provide compensation shall not arise where even a conscientious manager faithfully complying with his duties of an independent company would have also entered into the legal transaction or would have taken, or refrained from taking, the measure.

(3) Besides the controlling enterprise, those of the legal representatives of the enterprise shall be liable as joint and several debtors that have instigated the company to enter into the legal transaction or to take the measure.

(4) Section 309 subsections (3) to (5) shall apply *mutatis mutandis*.

Section 318

Liability and responsibilities of the officers of the company

(1) If the members of the management board of the company have failed, in dereliction of their duties, to set out the disadvantageous legal transaction or the disadvantageous measure in the report on the relations of the company with affiliated enterprises, or have failed to state that the company suffered a disadvantage by the legal transaction or the measure and that the disadvantage was not compensated, they shall be liable as joint and several debtors besides the parties obligated to provide compensation pursuant to section 317. Where it is in dispute whether or not they have exercised the due care of a prudent manager faithfully complying with his duties, the onus of proof shall be upon them.

(2) If the members of the company's supervisory board have failed, in dereliction of their duties, to audit the report on the relations of the company with affiliated enterprises as regards the disadvantageous legal transaction or the disadvantageous measure and have failed to report on the results of their audit to the general meeting (section 314), they shall be liable as joint and several debtors besides the parties obligated to provide compensation pursuant to section 317; subsection (1), second sentence, shall apply *mutatis mutandis*.

(3) The obligation to provide compensation shall not arise vis-à-vis the company, nor shall it arise vis-à-vis the stockholders, where the action taken is based on a lawful resolution adopted by the general meeting.

(4) Section 309 subsections (3) to (5) shall apply *mutatis mutandis*.

Part 3

Integrated companies

Section 319

Integration

(1) The general meeting of a stock corporation may resolve to integrate the company into some other stock corporation having its seat in Germany (principal company) if all shares of stock in the company are held by the future principal company. The stipulations of the law and the by-laws regarding amendments of the by-laws shall have no application.

(2) The resolution adopted as to the integration shall enter into force only if the general meeting of the future principal company has consented thereto. The resolution adopted as to the consent shall require a majority of at least three quarters of the share capital represented at the time such resolution is adopted. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. Subsection (1), second sentence, shall apply.

(3) From the time onwards at which the general meeting of the future principal company is convened that is to adopt a resolution as to the consent to the integration, the following documents are to be kept available at that company's business premises for inspection by the stockholders:

1. The draft resolution as to the integration;

2. The annual accounts and the management reports of the companies involved for the last three (3) financial years;
3. A detailed written report by the management board of the future principal company explaining and justifying the integration in legal and economic terms (integration report).

Upon a corresponding demand being made, each stockholder of the future principal company is to be provided, without undue delay and at no charge, with a copy of the documents designated in the first sentence. The obligations pursuant to the first and second sentences shall not be applicable if the documents designated in the first sentence are accessible, for the same period of time, via the website of the future principal company. These documents are to be made accessible at the general meeting. Should any stockholder so request at the general meeting, he is to be provided also with information about any and all matters of the company to be integrated that are relevant in connection with the integration.

(4) The management board of the company to be integrated is to file an application for entry in the Commercial Register of the integration and the business name of the principal company. The minutes of the resolutions adopted by the general meeting and their annexes are to be attached, as execution copies or as publicly certified copies, to the application for entry in the register.

(5) In filing the application for entry in the register pursuant to subsection (4), the management board is to declare that no action has been brought against the entry into force of a resolution adopted by the general meeting, 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 management board is to notify the court of registration maintaining the register of these circumstances also after having filed the application for entry in the register. Where no such declaration is available, the integration may not be entered in the register unless the stockholders entitled to bring an action declare, by a notarized declaration of waiver, that they waive bringing an action against the entry into force of the resolution adopted by the general meeting.

(6) It shall be equivalent to the declaration pursuant to subsection (5), first sentence, if, once an action has been brought against the entry into force of a resolution adopted by a general meeting, the court has established by a court order, upon the petition having been filed by that company against whose resolution adopted by the general meeting the action is directed, that the fact of the action having been filed does not contravene the entry in the register. Unless stipulated otherwise, section 247 of the present Act, 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 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 inadmissible or manifestly unfounded,
2. The plaintiff has failed to provide proof by submitting the corresponding records and documents, within one (1) week of having served the petition, that he has been holding a stake of at least 1,000 euros since the notice convening the assembly was published, or
3. The prompt entering into force of the resolution adopted by the general meeting appears to take precedence because the court holds, at its discretion and conviction, that the significant disadvantages for the company and its stockholders 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 should 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 against which there shall be no right of appeal. 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 senate of the higher regional court (*Oberlandesgericht*) in the judicial district of which the company has its seat shall decide regarding the petition. Transferring the matter to a judge sitting alone is precluded; no conciliation hearing is required. There shall be no right of appeal against the court order. Should good cause have been shown for the action, then the company 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 integration having been entered in the register based on the court order. Once it has been entered in the register, any deficiencies of the court order shall not affect its implementation; no demand may be made for compensation of damages by way of cancelling the effects of entering the integration in the register.

(7) Upon entry of the integration in the Commercial Register kept at the seat of the company, the company shall have been integrated into the principal company.

Section 320

Integration by a resolution of the majority

(1) The general meeting of a stock corporation may resolve to integrate the company into some other stock corporation having its seat within Germany also in those cases in which the shares of stock in the company making up, in the aggregate, ninety-five (95) percent of the share capital, are held by the future principal company. Treasury shares of stock and shares of stock held by some other party for the account of the company are not to be included in determining the share capital. Besides section 319 subsection (1), second sentence, and subsections (2) to (7), the subsections (2) to (4) shall apply to the integration.

(2) The notice as to the integration shall have been duly and properly published as an item of business set out in the agenda only if:

1. It includes the business name and seat of the future principal company,
2. It is accompanied by a declaration by the future principal company in which this offers its own shares of stock to the leaving stockholders as settlement payment for the shares of stock they hold, and in which it furthermore offers, in the case governed by section 320b (1), third sentence, to pay a cash settlement.

No. 2 of the first sentence shall also apply to the notice published by the future principal company.

(3) The integration is to be audited by one or several expert auditors (integration auditor). The court shall select and appoint them upon a corresponding petition having been filed by the management board of the future principal company. Section 293a (3), sections 293c to 293e are to be applied *mutatis mutandis*.

(4) From the time onwards at which the general meeting is convened that is to adopt a resolution as to the consent to the integration, the documents designated in section 319 (3), first sentence, as well as the audit report pursuant to subsection (3) are each to be kept available at the business premises of the company to be integrated and of the principal company for inspection by the stockholders. The integration report is to also explain and justify, in legal and economic terms, the nature and amount of the settlement payment pursuant to section 320b; any particular difficulties encountered in valuing the companies involved as well as the consequences for the ownership interest held by the stockholders are to be indicated. Section 319 (3), second to fifth sentences, shall apply *mutatis mutandis* to the stockholders of both companies.

Subsections (5) to (7) (repealed)

Section 320a

Effects of the integration

Upon the integration having been entered in the Commercial Register, all shares of stock not held by the principal company shall devolve to same. Where share certificates have been issued regarding these shares of stock, they shall securitise, until they are physically handed over to the principal company, solely the claim to a settlement payment.

Section 320b

Settlement payment to former stockholders

(1) The former stockholders of the integrated company are entitled to an appropriate settlement payment. Shares of stock in the principal company are to be allotted to them as settlement payment. Where the principal company is a controlled company, then, at the election of the former stockholders, either treasury shares of stock in the principal company are to be allotted to them or an appropriate cash settlement is to be paid. Where shares of stock in the principal company are allotted by way of a settlement payment, the settlement payment is to be deemed appropriate if the shares of stock are allotted in the ratio in which shares of stock in the principal company would have to be allotted to one share of stock in the company in the case of a merger; in this context, indivisible residual amounts may be compensated by additional cash payments. The cash settlement must take account of the company's circumstances as given at the time its general meeting adopts the resolution regarding the integration. The cash settlement as well as the additional cash payments are to accrue interest from the time at which the entry is published by notice at five (5) percentage points *per annum* above the respectively applicable basic rate of interest pursuant to section 247 of the Civil Code (BGB); the assertion of further-reaching damages is not precluded.

(2) The action for avoidance of the resolution adopted by the general meeting of the integrated company by which it resolved on the integration may not be based on section 243 (2), or on the fact that the settlement payment offered by the principal company pursuant to section 320 (2) no. 2 is not appropriate. Where the settlement payment offered is not appropriate, the court specified in section 2 of the Act on Valuation Proceedings under Corporate Law (SpruchG) shall establish, upon a corresponding petition having been filed, the appropriate settlement payment. The same shall apply if the principal company has not offered any settlement payment, or has not offered it duly and properly, and no action for avoidance based on that fact has been brought within the period for avoidance, or the action for avoidance has been retracted or has been dismissed in a final and conclusive manner.

(3) (repealed)

Section 321

Protection of creditors

(1) Security is to be provided to those of the creditors of the integrated company whose claims have arisen prior to publication by notice of the integration's entry in the Commercial Register, provided they come forward for this purpose within six (6) months of the publication by notice, unless they are able to demand satisfaction of their claims. This right is to be indicated to the creditors in the publication by notice of the entry.

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

Section 322

Liability of the principal company

(1) From the integration onwards, the principal company shall be liable to the creditors of the company, as a joint and several debtor, for the liabilities of the integrated company that have arisen prior to the integration. It shall be liable in the same manner for all liabilities of the integrated company arising after the integration. Any agreement to the contrary shall have no validity vis-à-vis third parties.

(2) Where the principal company is laid claim to for a liability of the integrated company, it may assert objections that do not have their cause in its person only to the extent the integrated company is entitled to assert such objections.

(3) The principal company may refuse to satisfy the creditors for as long as the integrated company is entitled to seek avoidance of the legal transaction on which its liability is based. The principal company shall have the same authority for as long as the creditor is able to obtain satisfaction by offsetting his claims against an amount receivable due to the integrated company.

(4) No compulsory enforcement may be pursued against the principal company based on an enforceable deed directed against the integrated company.

Section 323

Power of direction of the principal company as well as liability and responsibilities of the members of the management board

(1) The principal company is entitled to issue directions to the management board of the integrated company as regards the management of the company. Section 308 subsection (2), first sentence, and subsection (3), sections 309, 310 shall apply *mutatis mutandis*. Sections 311 to 318 shall have no application.

(2) Performance by the integrated company to the principal company shall not be deemed a violation of sections 57, 58, and 60.

Section 324

Statutory reserves. Profit transfer. Loss absorption

(1) The statutory regulations regarding the formation of statutory reserves, regarding their appropriation, and regarding the allocation of amounts to the statutory reserves shall have no application to integrated companies.

(2) Sections 293 to 296 and sections 298 to 303 shall have no application to a profit and loss absorption agreement, a profit pool, or an agreement as to the partial absorption of profit and loss in place between the integrated company and the principal company. The agreement, its amendment, and its cancellation must be made in writing. At a maximum, the net income accruing without the transfer of profits may be transferred as profits. The agreement shall end at the latest as per the end of the financial year in which the integration ends.

(3) The principal company is under obligation to offset any net loss otherwise arising for the integrated company insofar as this exceeds the amount of the capital reserves and of the retained income.

Section 325

(repealed)

Section 326

Right of the stockholders of the principal company to request information

Information regarding matters of the integrated company is to be provided to any stockholder of the principal company in like manner as information regarding matters of the principal company is to be provided to him.

Section 327

End of the integration

(1) The integration shall end:

1. By a resolution adopted by the general meeting of the integrated company,
2. If the principal company no longer is a stock corporation having its seat in Germany,
3. If the principal company no longer holds all of the shares of stock in the integrated company,

4. By dissolution of the principal company.

(2) Where the principal company no longer holds all of the shares of stock in the integrated company, the principal company is to notify the integrated company of this fact without undue delay and in writing.

(3) The management board of the formerly integrated company is to file, without undue delay, an application for entry in the Commercial Register kept at the seat of the company of the end of the integration, its cause, and the time at which the integration ended.

(4) Where the integration comes to an end, the former principal company shall be liable for the obligations of the formerly integrated company that have arisen up to that time, if they are due prior to five (5) years lapsing following the end of the integration and if, on their basis, claims against the former principal company have been established in a manner as set out in section 197 (1) nos. 3 to 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 period shall commence running on the day on which the entry of the end of the integration in the Commercial Register has been published by notice pursuant to section 10 of the Commercial Code (HGB). Sections 204, 206, 210, 211, and 212 subsections (2) and (3) of the Civil Code (BGB) applying to prescriptions shall be correspondingly applied. The establishment of claims in a manner as set out in section 197 (1) nos. 3 to 5 of the Civil Code (BGB) shall not be required should the former principal company have acknowledged the claim in writing.

Part 4

Expulsion of minority stockholders

Section 327a

Transfer of shares of stock in return for cash settlement

(1) The general meeting of a stock corporation or of public partly limited partnership may adopt a resolution, upon a corresponding demand being made by a stockholder owning shares of stock in the company in the amount of ninety-five (95) percent of the share capital (principal stockholder), to transfer the shares of stock of the other stockholders (minority stockholders) to the principal stockholder against appropriate cash settlement being granted. Section 285 (2), first sentence, shall have no application.

(2) Section 16 subsections (2) and (4) shall apply to determining whether the principal stockholder owns ninety-five (95) percent of the shares of stock.

Section 327b

Cash settlement

(1) The principal stockholder is to determine the amount of the cash settlement; it must take account of the company's circumstances at the time the resolution is adopted by its general meeting. The management board is to make available to the principal stockholder all documents required for this purpose and is to provide information to same.

(2) From that day onwards on which the entry of the resolution as to the transfer in the Commercial Register has been published by notice, the cash settlement is to accrue interest at five (5) percentage points *per annum* above the respectively applicable basic rate of interest pursuant to section 247 of the Civil Code (BGB); the assertion of further-reaching damages is not precluded.

(3) Prior to the general meeting being convened, the principal stockholder is to forward to the management board the declaration by a credit institution authorised to do business in the area of application of the present Act by which the credit institution warrants that it will fulfil the obligation of the principal stockholder to pay to the minority stockholders, without undue delay once the resolution as to transfer has been entered in the register, the cash settlement determined for the shares of stock that have devolved to the principal stockholder.

Section 327c

Preparations for the general meeting

(1) The notice to be published on the transfer as an item of business set out in the agenda is to set out the following particulars:

1. The business name and seat of the principal stockholder, in the case of natural persons their name and address;
2. The cash settlement determined by the principal stockholder.

(2) The principal stockholder is to submit a written report to the general meeting presenting the pre-requisites for the transfer and explaining and justifying the appropriateness of the cash settlement. One or several expert auditors are to audit the appropriateness of the cash settlement. The court shall select and appoint them upon a corresponding petition having been filed by the principal stockholder. Section 293a subsections (2) and (3), section 293c subsection (1), third to fifth sentences, and subsection (2), as well as sections 293d and 293e shall be applied *mutatis mutandis*.

(3) From the time onwards at which the general meeting is convened, the following documents are to be kept available at the company's business premises for inspection by the stockholders:

1. The draft resolution as to the transfer;
2. The annual accounts and the management reports for the last three (3) financial years;
3. The report submitted by the principal stockholder pursuant to subsection (2), first sentence;
4. The audit report submitted pursuant to subsection (2), second to fourth sentences.

(4) Upon a corresponding demand being made, copies of the documents designated in subsection (3) are to be provided to each stockholder without undue delay and at no charge.

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

Section 327d

Conduct of the general meeting

At the general meeting, the documents designated in section 327c (3) are to be made accessible. The management board may give the principal stockholder the opportunity to give an oral presentation at the outset of the meeting of the draft of the resolution as to the transfer, and of the calculation of the amount of the cash settlement.

Section 327e

Entry in the register of the resolution as to the transfer

(1) The management board is to file an application for entry in the Commercial Register of the resolution as to the transfer. The minutes of the resolution as to the transfer and its annexes, as execution copies or publicly certified copies, are to be attached to the application for entry in the register.

(2) Section 319 subsections (5) and (6) shall apply *mutatis mutandis*.

(3) Upon the resolution as to the transfer having been entered in the Commercial Register, all shares of stock owned by the minority stockholders shall devolve to the principal stockholder. Where share certificates have been issued regarding these shares of stock, they shall securitise, until they are physically handed over to the principal stockholder, solely the claim to a cash settlement.

Section 327f

Court review of the settlement payment

The action for avoidance of the resolution adopted as to the transfer may not be based on section 243 (2), or on the fact that the settlement payment determined by the principal stockholder is not appropriate. Where the cash settlement is not appropriate, the court specified in section 2 of the Act on Valuation Proceedings under Corporate Law (SpruchG) shall establish, upon a corresponding petition having been filed, the appropriate cash settlement. The same shall apply if the principal stockholder has not offered any cash settlement, or has not offered it duly and properly, and no action for avoidance based on that fact has been brought within the period for avoidance, or the action for avoidance has been retracted or has been dismissed in a final and conclusive manner.

Part 5

Cross-shareholding enterprises

Section 328

Limitation of rights

- (1) Where a stock corporation or public partly limited partnership and some other enterprise are cross-shareholding enterprises, then as soon as one enterprise becomes aware of the existence of the cross-shareholding, or the other enterprise has notified it in accordance with section 20 (3) or section 21 (1), the rights attaching to the shares of stock that the one enterprise owns in the other enterprise may be exercised at a maximum only for one quarter of all shares of stock in the other enterprise. This shall not apply to the right to new shares of stock in the event of a capital increase using company funds. Section 16 (4) shall apply.
- (2) The limitation set out in subsection (1) shall not apply if that enterprise for its part had notified the other enterprise in accordance with section 20 (3) or section 21 (1), prior to receiving such notification from the other enterprise, and prior to its becoming aware of the existence of the cross-shareholding.
- (3) At the general meeting of a company listed on the stock exchange, an enterprise that is aware of the cross-shareholding pursuant to subsection (1) may not exercise its voting right for the election of members of the supervisory board.
- (4) Where a stock corporation or public partly limited partnership and some other enterprise are cross-shareholding enterprises, the enterprises are to notify each other without undue delay in writing of the amount of their respective ownership interest and of any changes thereto.

Part 6

Group accounting

Sections 329 to 336 (repealed)

Section 337 (repealed)

Section 338 (repealed)

Book 4

Specific provisions, penal provisions, and final provisions

Part 1

Specific provisions applying to cases in which local authorities hold an ownership interest

Section 394

Reports from members of the supervisory board

Members of the supervisory board who have been elected or delegated to same at the instigation of a local authority shall not be under any obligation of secrecy regarding the reports they are to submit to the local authority. This shall not apply to confidential information and secrets of the company, particularly trade secrets or business secrets, if the knowledge of same is not relevant to the purpose of the reports. The reporting obligation pursuant to the first sentence may be based on the law, the by-laws or a legal transaction of which the supervisory board is notified in text form.

Section 395 **Obligation of secrecy**

(1) Persons to whom the management of the ownership interest held by a local authority has been entrusted, or to whom the task has been entrusted by a local authority to audit the company, the conduct by the local authority in its role as a stockholder, or the activities of the members of the supervisory board who have been elected or delegated to same at the instigation of the local authority, shall respect the secrecy of any confidential information and secrets of the company, particularly trade secrets or business secrets of which they have become aware from reports pursuant to section 394; this shall not apply to notifications made in an official capacity.

(2) Where audit results are published, no confidential information and secrets of the company, particularly trade secrets or business secrets, may be published.

Part 2 **Dissolution by the court**

Section 396 **Pre-requisites**

(1) Where a stock corporation or public partly limited partnership jeopardises public welfare by the unlawful conduct of the parties responsible for managing its affairs, and where the supervisory board and the general meeting do not take measures to remove from office such parties managing the affairs of the company, the company may be dissolved by a court judgment upon a corresponding petition having been filed by the responsible supreme *Land* authority of the *Land* in which the company has its seat. Solely that regional court (*Landgericht*) shall have jurisdiction for the complaint in the judicial district of which the company has its seat.

(2) Following its dissolution, the company shall be wound up pursuant to sections 264 to 273. The authority specified in subsection (1), first sentence, may also file the petition for removal from office or appointment of the liquidators for grave cause.

Section 397 **Orders issued in the case of dissolution**

Where an action has been brought for dissolution, the court may issue the necessary orders, upon a corresponding petition having been filed by the authority specified in section 396 (1), first sentence, by preliminary injunctions.

Section 398 **Entry in the register**

The court maintaining the register is to be notified of the decisions taken by the court of registration. Insofar as these decisions concern legal relationships the entry in the register of which is obligatory, the court maintaining the register shall enter them in the Commercial Register.

Part 3 **Provisions regarding punitive fines and administrative fines. Final provisions**

Section 399 **False information**

(1) Anyone shall be liable to a term of imprisonment not exceeding three (3) years or to payment of a fine who provides false information or conceals significant circumstances in any of the cases set out below:

1. As a founder or as a member of the management board or of the supervisory board, for purposes of entering the company or an agreement pursuant to section 52 (1), first sentence, in the register, concerning the acquisition of the shares of stock, the contribution made for the shares of stock, the appropriation of the amounts paid in, the issue price of the shares of stock, regarding special benefits, formation expenses, contributions in kind and acquisitions of assets, or in the assurance to be given pursuant to section 37a (2), also in conjunction with section 52 (6), third sentence,
2. As a founder or as a member of the management board or of the supervisory board, in the formation report, the report on post-formation agreements, or in the audit report,
3. In the public announcement pursuant to section 47 no. 3,
4. As a member of the management board or of the supervisory board, for purposes of entering an increase of the share capital (sections 182 to 206) in the register, concerning the contribution of the current capital, the subscription or contribution of the new capital, the issue price of the shares of stock, the issuance of the shares of a new issue, regarding contributions in kind, in the notice published pursuant to section 183a (2), first sentence, in conjunction with section 37a (2), or in the assurance to be given pursuant to section 184 (1), third sentence,
5. As a liquidator, for purposes of entering in the register the continuation of the company, in the proof to be provided pursuant to section 274 (3), or
6. As a member of the management board of a stock corporation or of the executive body of a foreign legal entity, in the assurance to be given pursuant to section 37 (2), first sentence, or section 81 (3), first sentence, or as a liquidator in the assurance to be given pursuant to section 266 (3), first sentence.

(2) Likewise, anyone shall be liable to punishment who, as a member of the management board or of the supervisory board, provides untrue information in the declaration stipulated by section 210 (1), second sentence, for purposes of entering an increase of the share capital in the register.

Section 400 **False representation 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 management board or of the supervisory board or as a liquidator:

1. Incorrectly represents or conceals the circumstances of the company including its relations with affiliated enterprises in depictions or summaries of the company's net asset position, in presentations to the general meeting or in informational statements 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 false information, or incorrectly represents or conceals the circumstances of the company in any clarification statement or proof to be provided, according to the regulations of the present Act, to an auditor of the company or of an affiliated enterprise, unless the deed is liable to punishment under section 331 no. 4 of the Commercial Code (HGB).

(2) Likewise, anyone shall be liable to punishment who, as a founder or stockholder, provides false information or conceals significant circumstances in any clarification

statements or proof to be provided to a formation auditor or any other auditor pursuant to the regulations of the present Act.

Section 401

Dereliction of duties in the cases of loss, over-indebtedness, or inability to pay debts as they fall due

(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 management board, in contravention of section 92 (1), fails to convene the general meeting and to notify it in the event of a loss amounting to half of the share capital.

(2) Where the perpetrator has acted negligently, the punishment shall be a term of imprisonment not exceeding one (1) year or payment of a fine.

Section 402

False issuance of proof of entitlement

(1) Anyone shall be liable to a term of imprisonment not exceeding three (3) years or to payment of a fine who falsely issues, or falsifies, certificates intended to provide evidence of the voting right at a general meeting or at a separate meeting, unless other regulations governing criminal offences involving records and documents subject the deed to stricter punishment.

(2) Likewise, anyone shall be liable to punishment who uses a falsely issued or falsified certificate of the nature designated in subsection (1) in order to exercise the voting right.

(3) The attempt is liable to punishment.

Section 403

Violation of reporting obligations

(1) Anyone who, as the auditor or as the agent of an auditor, submits an incorrect report of the results obtained in an audit or who fails to disclose significant circumstances in the 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 404

Violation of the obligation to maintain confidentiality

(1) Anyone disclosing a secret of the company 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 management board or of the supervisory board or a liquidator,
2. An auditor or as the agent of an auditor

shall be liable to a term of imprisonment not exceeding one (1) year, in the case of companies listed on the stock exchange to a term of imprisonment not exceeding two (2) years, or to payment of a fine; in the case of no. 2, however, he shall be so liable only if the deed 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, in the case of companies listed on the stock exchange to a term of imprisonment not exceeding three (3) 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 the company. Where a member of the management board or a liquidator has committed the deed, the supervisory board shall be entitled to file the corresponding petition; where a member of the supervisory board has committed the deed, the members of the management board or the liquidators shall be entitled to file the corresponding petition.

Section 404a

Violation of the obligations entailed by the auditing of accounts

(1) Anyone shall be liable to a term of imprisonment not exceeding one (1) year or to payment of a fine who, as a member of the supervisory board or as a member of an audit committee of a company that is publicly traded in the sense of section 264d of the Commercial Code (HGB), that is a credit institution as defined by the Capital Requirements Regulation (CRR) in the sense of section 1 (3d), first sentence, of the Banking Act (KWG), to the exception of the institutions named in section 2 (1) nos. 1 and 2 of the Banking Act, or that is an insurance undertaking in the sense of Article 2 paragraph 1 of the Council Directive 91/674/EEC of 19 December 1991 on the annual account and consolidated accounts of insurance undertakings (OJ L 374 of 31 December 1991, p. 7), last amended by Directive 2006/46/EC (OJ L 224 of 16 August 2006, p. 1),

1. Commits an act designated in section 405 (3b), thus obtaining a material benefit or having such a material benefit promised to him, or who
2. Persistently commits an act designated in section 405 (3b).

(2) Likewise, anyone shall be liable to punishment who, as a member of the supervisory board or as a member of an audit committee of a company that is publicly traded in the sense of section 264d of the Commercial Code (HGB) or that is a credit institution as defined by the Capital Requirements Regulation (CRR) in the sense of section 1 (3d), first sentence, of the Banking Act (KWG), to the exception of the institutions named in section 2 (1) nos. 1 and 2 of the Banking Act,

1. Commits an act designated in section 405 subsection (3c) or subsection (3d), thus obtaining a material benefit or having such a material benefit promised to him, or who
2. Persistently commits an act designated in section 405 subsection (3c) or subsection (3d).

Section 405

Administrative offences

(1) Anyone shall be committing an administrative offence who, as a member of the management board or of the supervisory board or as a liquidator,

1. Issues registered shares of stock, the share certificates of which do not set out the amount of the partial payments made, or issues bearer shares prior to their issue price having been fully paid in.
2. Issues share certificates or temporary share certificates prior to the company having been entered in the register, or, in the case of a capital increase, prior to the implementation of such increase of the share capital having been entered, or, in the case of a conditional capital increase or of a capital increase using company funds, prior to the resolution adopted as to the conditional capital increase or the capital increase using company funds having been entered in the Commercial Register,
3. Issues share certificates or temporary share certificates in a lower amount than the minimum nominal amount permissible pursuant to section 8 (2), first sentence, or share certificates or temporary share certificates to which, in the case of a company with

no-par-value shares, a lower stake in the share capital is allocated than the minimum amount permissible pursuant to section 8 (3), third sentence, or

4.

- a) Purchases treasury shares of stock in the company in contravention of section 71 subsection (1) nos. 1 to 4 or subsection (2) or, in conjunction with section 71e (1), accepts them in pledge,
- b) Fails to offer treasury shares of stock that are to be disposed of (section 71c subsections (1) and (2)), or
- c) Fails to take the measures required to prepare for the adoption of the resolution as to the redemption of treasury shares of stock (section 71c (3)).

5. (repealed)

(2) Anyone shall be committing an administrative offence as well who, as a stockholder or as the representative of a stockholder, fails to provide the particulars to be included in the list pursuant to section 129 or does not provide accurate particulars.

(2a) Anyone shall be committing an administrative offence who, contrary to section 67 (4), second sentence, and also in conjunction with the third sentence, fails to submit a notification or does not submit a correct notification.

(3) Furthermore, anyone shall be committing an administrative offence who

- 1. Uses shares of stock belonging to some other party that he does not have authority to represent, and without that party's consent, in order to exercise rights at the general meeting or at a separate meeting,
- 2. Uses shares of stock belonging to some other party in order to exercise rights at the general meeting or at a separate meeting, having procured such shares of stock for this purpose by granting or promising special benefits,
- 3. Surrenders shares of stock to some other party for the purpose designated in no. 2 in return for special benefits being granted or promised to him,
- 4. Uses shares of stock belonging to some other party, regarding which he or the party he is representing may not exercise the voting right pursuant to section 135, in order to exercise the voting right,
- 5. Surrenders shares of stock to some other party, regarding which he or the party he is representing may not exercise the voting right pursuant to section 20 (7), section 21 (4), sections 71b, 71d, fourth sentence, section 134 (1), sections 135, 136, 142 (1), second sentence, section 285 (1), for purposes of exercising the voting right, or uses such shares of stock surrendered to him to exercise the voting right,
- 6. Demands special benefits as counter-performance, or has such special benefits promised to him, or accepts them, in return for not casting a vote, or casting it in a certain sense, when a vote is taken at the general meeting or at a separate meeting, or
- 7. Offers, promises, or grants special benefits as counter-performance in return for someone not casting a vote, or casting it in a certain sense, when a vote is taken at the general meeting or at a separate meeting.

(3a) Anyone shall be committing an administrative offence who intentionally or recklessly

- 1. Fails to forward the invitation convening the general meeting, in contravention of section 121 (4a), first sentence, also in conjunction with section 124 (1), third sentence, or does not properly forward it or not completely, or fails to forward it in due time, or

2. Who, in contravention of section 124a, fails to make accessible information, or does not properly make it accessible, or not completely.

(3b) Anyone shall be committing an administrative offence who, as a member of the supervisory board or as a member of an audit committee of a company that is publicly traded in the sense of section 264d of the Commercial Code (HGB), that is a credit institution as defined by the Capital Requirements Regulation (CRR) in the sense of section 1 (3d), first sentence, of the Banking Act (KWG), to the exception of the institutions named in section 2 (1) nos. 1 and 2 of the Banking Act, or that is an insurance undertaking in the sense of Article 2 paragraph 1 of the Council Directive 91/674/EEC of 19 December 1991 on the annual account and consolidated accounts of insurance undertakings (OJ L 374 of 31 December 1991, p. 7), last amended by Directive 2006/46/EC (OJ L 224 of 16 August 2006, p. 1),

1. Fails to monitor the independence of the auditor or audit firm subject to the stipulations of Article 4 paragraph 3 subparagraph 2, of Article 5 paragraph 4 subparagraph 1, first sentence, or of Article 6 paragraph 2 of Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (OJ L 158 of 27 May 2014, p. 77, L 170 of 11 June 2014, p. 66) or
2. Submits a recommendation for the appointment of an auditor or an audit firm that is not based on a demand made by the supervisory authority pursuant to section 36 (1), second sentence, of the Act on the Supervision of Insurance Enterprises (Versicherungsaufsichtsgesetz) and

- a) That fails to meet the requirements set out in Article 16 paragraph 2 subparagraph 2 or 3 of Regulation (EU) No 537/2014, or
- b) That has not been preceded by a selection procedure pursuant to Article 16 paragraph 3 subparagraph 1 of Regulation (EU) No 537/2014.

(3c) Anyone shall be committing an administrative offence who, as a member of a supervisory board of a company that is publicly traded in the sense of section 264d of the Commercial Code (HGB) or that is a credit institution as defined by the Capital Requirements Regulation (CRR) in the sense of section 1 (3d), first sentence, of the Banking Act (KWG), to the exception of the institutions named in section 2 (1) nos. 1 and 2 of the Banking Act, where such supervisory board has not appointed an audit committee, submits a suggestion to the general meeting for the appointment of an auditor or an audit firm that fails to meet the requirements set out in Article 16 paragraph 5 subparagraph 1 of Regulation (EU) No 537/2014.

(3d) Anyone shall be committing an administrative offence who, as a member of a supervisory board of a company of the type set out in subsection (3c), which supervisory board has appointed an audit committee, submits a suggestion to the general meeting for the appointment of an auditor or an audit firm that fails to meet the requirements set out in Article 16 paragraph 5 subparagraph 1 or subparagraph 2, first sentence or second sentence, of Regulation (EU) No 537/2014.

(4) In the cases governed by subsections (3b) to (3d), the administrative offence is punishable by a fine of up to fifty thousand (50,000) euros, in the other cases by a fine not exceeding twenty-five thousand (25,000) euros.

(5) The Federal Financial Supervisory Authority (BaFin) is the administrative authority in the sense of section 36 (1) no. 1 of the Act on Regulatory Offences (OWiG) in the cases governed by subsections (3b) to (3d) for credit institutions as defined by the Capital Requirements Regulation (CRR) in the sense of section 1 (3d), first sentence, of the Banking Act (KWG), to the exception of the institutions named in section 2 (1) nos. 1 and 2 of the Banking Act, and for insurance undertakings in the sense of Article 2 paragraph 1 of Council

Directive 91/674/EEC, in all other regards, the Federal Office of Justice (BfJ) is said administrative authority.

Section 406 (repealed)

Section 407

Coercive penalty payments

- (1) Where members of the management board or liquidators fail to comply with section 52 (2), second to fourth sentences, section 71c, section 73 (3), second sentence, sections 80, 90, 104 (1), section 111 (2), section 145, sections 170, 171 subsection (3) or subsection (4), first sentence, in conjunction with subsection (3), sections 175, 179a (2), first to third sentences, section 214 (1), section 246 (4), sections 248a, 259 (5), section 268 (4), section 270 (1), section 273 (2), sections 293f, 293g (1), section 312 (1), section 313 (1), section 314 (1), the court of registration maintaining the register is to induce them to comply with said regulations by levying a coercive penalty payment against them; section 14 of the Commercial Code (HGB) shall remain unaffected. The individual coercive penalty payment may not be levied in an amount in excess of 5,000 euros.
- (2) The applications for entry in the Commercial Register pursuant to sections 36, 45, 52, 181 (1), sections 184, 188, 195, 210, 223, 237 (4), sections 274, 294 (1), section 319 (3) shall not be enforced by levying a coercive penalty payment.

Section 407a

Notifications to the auditing oversight body

- (1) The administrative authority competent pursuant to section 405 (5) shall transmit to the auditing oversight body with the Federal Office for Economic Affairs and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*) all decisions as to fines pursuant to section 405 subsections (3b) to (3d).
- (2) In criminal proceedings, the subject of which is an offence pursuant to section 404a, and in which public charges have been preferred, the public prosecutor's office shall transmit to the auditing oversight body the decision concluding the proceedings. Where an appellate remedy is sought against the decision, the decision is to be transmitted with reference being made to the remedy being sought.

Section 408

Liability to punishment of general partners of a public partly limited partnership

Sections 399 to 407 shall apply *mutatis mutandis* to the public partly limited partnership. To the extent they concern members of the management board, they shall apply, in the case of a public partly limited partnership, to the general partners.

Section 409

Application in Berlin

The present Act shall apply, subject to the stipulations made in section 13 (1) of the Third Transitory Law (*Drittes Überleitungsgesetz*) of 4 January 1952 (Federal Law Gazette (*Bundesgesetzblatt*) I p. 1) also in the *Land* of Berlin. Any ordinances having the force of law enacted by reason of the present Act shall apply in the *Land* of Berlin pursuant to section 14 of the Third Transitory Law.

Section 410

Entry into force

This Act shall enter into force on 1 January 1966.