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Translation provided by Samson-Übersetzungen GmbH, Dr. Carmen von Schöning.  
Stand: Die Übersetzung berücksichtigt die Änderung(en) des Gesetzes durch Artikel 13 des Gesetzes vom 11. Dezember 2023 (BGBl. 2023 I Nr. 354)  
Version information: The translation includes the amendment(s) to the Act by Article 13 of the Act of 11 December 2023 (Federal Law Gazette 2023 I, no. 354)

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## **Stock Corporation Act (Aktiengesetz – AktG)**

Stock Corporation Act of 6 September 1965 (Federal Law Gazette I, p. 1089), as last amended by Article 13 of the Act of 11 December 2023 (Federal Law Gazette 2023 I, no. 354)

### **Book 1 Stock corporation**

#### **Part 1 General provisions**

##### **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 are liable to the creditors for the company's liabilities.
- (2) The capital stock 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 considered a trading company even if the purpose of the enterprise does not consist of carrying on a trade.
- (2) Listed companies within the meaning 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 (*Handelsgesetzbuch* – HGB) or pursuant to any other statutory provisions.

## **Section 5**

### **Seat**

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

## **Section 6**

### **Capital stock**

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

## **Section 7**

### **Minimum nominal amount of the capital stock**

The minimum nominal amount of the capital stock 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 euro. Any shares of stock having a lower nominal amount are null and void. The issuers of shares of stock are 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 attaches to no-par-value shares. The no-par-value shares of a company represent equal portions of its capital stock. The stake in the capital stock allocated to the individual no-par-value share may not be lower than one euro. Subsection (2) sentences 2 and 3 applies accordingly.
- (4) For par-value shares, the portion of the capital stock they represent is determined based on the ratio between their nominal amount and the capital stock, while for no-par-value shares, it is determined based on the number of shares of stock.
- (5) The shares of stock are indivisible.
- (6) The above provisions 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 capital stock allocated to the no-par-value share (minimum issue price).
- (2) Issuing shares of stock at a higher price is permissible.

## **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, or if
  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 within the meaning of section 1 (3) sentence 1 of the Securities Deposit Act (*Depotgesetz – DepotG*),
    - 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) sentence 1 of the Securities Deposit Act, or if

3. the certification of the ownership interest is precluded and the share of stock is entered in a central securities register as stipulated in section 12 of the Act on Electronic Securities (*Gesetz über elektronische Wertpapiere*).

For as long as, in the case described in sentence 2 no. 2, the global certificate has not been deposited, section 67 is to be applied accordingly.

(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 are 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.

(6) The by-laws are to preclude the certification of the ownership interest for those shares of stock that are entered as electronic shares of stock in an electronic securities register. Entry in a crypto securities register in accordance with section 16 of the Act on Electronic Securities is permissible only if this has been permitted expressly in the by-laws.

## **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 form a class of stock.

## **Section 12**

### **Voting right**

Each share of stock confers the right to vote. According to the provisions of the present Act, multiple-vote shares may be issued, as may be preferential stock as shares of stock without a voting right.

## **Section 13**

### **Signature on share certificates**

It suffices 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. In the case of electronic shares of stock, no signature is affixed.

## **Section 14**

### **Jurisdiction**

Unless otherwise determined, the term "court" as used in the present Act refers 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 is 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 is 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 are equivalent to treasury shares of the enterprise.
- (3) The portion of the voting rights to which an enterprise is entitled is 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) sentence 3 are not to be included in the aggregate number of all voting rights.
- (4) Shares will be considered 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 considered 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 (2) sentence 1 and (4) applies 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 are considered controlling and controlled enterprises.

(4) Section 328 is not to be applied to enterprises that are controlling or controlled enterprises pursuant to subsection (2) or (3).

## **Section 20**

### **Notification duties**

(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 (2) sentence 1 and (4) applies in establishing whether more than one quarter of the shares of stock belongs to an enterprise.

(2) For purposes of the notification duty stipulated by subsection (1), the shares of stock belonging to the enterprise 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 also is to 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 is to do so without undue delay and in writing.

(5) Where the ownership interest ceases to exist in the amount requiring notification pursuant to subsection (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 is to 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 is to 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) 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 duty. This does 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 provided subsequently.

(8) Subsections (1) to (7) do not apply to shares of stock of an issuer within the meaning of section 33 (4) of the Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG).

## **Section 21**

### **Notification duties 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 of this fact without undue delay and in writing. Section 16 (2) sentence 1 and subsection (4) applies accordingly 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 of this fact 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 of this fact 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) exist for as long as the company fails to comply with the notification duty. Section 20 (7) sentence 2 applies accordingly.

(5) Subsections (1) to (4) do not apply to shares of stock of an issuer within the meaning of section 33 (4) of the Securities Trading Act.

## **Section 22**

### **Proof of ownership interest regarding which a notification has been issued**

An enterprise that has been notified in accordance with section 20 (1), (3) or (4), or in accordance with section 21 (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 capital stock 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 it is intended to manufacture and trade;
3. the amount of the capital stock;
4. the division of the capital stock 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 notices by publication.

(5) The by-laws may deviate from the provisions 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**

##### **Notices of the company by publication**

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

#### **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 are not effective in relation to the company. Following the entry of the company in the Commercial Register, it will not be possible to remedy such ineffectiveness 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 years.

(5) Only once the company has been entered in the Commercial Register for 30 years and at least 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 it is intended for stockholders to make contributions that do not consist of paying in the issue price of the shares (contributions in kind), or where it is intended for the company 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 allotted for the contribution in kind, or the remuneration to be granted for the acquisition of assets. Where the company is intended to acquire an asset for which remuneration is granted that it is intended to net against the contribution made by a stockholder, this is considered 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 will 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 are not ineffective. 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, will be set off from the continuing duty of the stockholder to make a cash contribution. Such set-off is not to 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) If an agreement has been made with the stockholder prior to the contribution having been made, according to which the stockholder 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 within the meaning of subsection (3), then this will release the stockholder from their 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 registration pursuant to section 37.

(5) Section 26 (4) applies to the amendment of specifications that have been made in a legally effective manner, while section 26 (5) applies 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 statutory auditor**

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

(2) The provisions governing the appointment of supervisory board members representing the company's employees are not to be applied 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 give notice by publication, in due time prior to expiry of the first supervisory board's term of office, of those statutory provisions that, in its view, are to govern the composition of the next supervisory board; sections 96 to 99 are to be applied.

(4) The supervisory board appoints 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 provisions that, in the founders' view, govern the composition of the supervisory board. However, if that number is no more

than two members of the supervisory board, the founders are to appoint three members of the supervisory board.

(2) Unless the by-laws stipulate otherwise, the supervisory board appointed in accordance with subsection (1) sentence 1 has a quorum if half of its members, at a minimum, however, three 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 give notice by publication of those statutory provisions that, in its view, are to govern the composition of the supervisory board. Sections 97 to 99 apply accordingly. The members of the supervisory board then in office will cease to so hold office only if the supervisory board is to be constituted according to other provisions than those the founders believed to govern, or if the founders appointed three 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) does 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) sentence 2.

(5) Section 30 (3) sentence 1 does 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 is to set out the key 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 years;
3. in the case of an enterprise being transferred to the company: the operating profits generated in the past two 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 any members of the management board or of the supervisory board have claimed a special benefit for themselves, 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. any member of the management board or of the supervisory board have claimed a special benefit for themselves, 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) sentence 1) may take the stead, on the instructions of the founders, of a formation auditor in performing the audit; the provisions governing the formation audit apply accordingly. Where it is not the notary performing the audit, the court is to appoint the formation auditors. A complaint may be lodged against the decision taken.
- (4) As a rule, solely the following are to 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 applies where the founders or persons for the account of whom the founders have acquired shares of stock are able to substantially influence 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 forgone insofar as it is intended to contribute the following:
1. transferable securities or money market instruments within the meaning of section 2 (1) and (2) of the Securities Trading Act, provided such securities or instruments are valued at the weighted average price at which they were traded, in the course of the last three months prior to the day on which they in fact were contributed, on one or several organised markets within the meaning of section 2 (11) of the Securities Trading Act,
  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 months the date on which the contribution was in fact made.
- (2) Subsection (1) is not to be applied if 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 day on which they in fact were 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 capital stock, 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 forgone pursuant to section 33a, providing this information may be forgone in the report on the audit performed 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 will take the final decision. There is no right of appeal against the court's decision. For as long as the founders refuse to comply with the decision, no report on the audit will be submitted.

(3) The formation auditors are entitled to reimbursement for their reasonable cash expenditures and to remuneration for their activities. The court will establish the expenditures and the remuneration. A complaint may be lodged against the decision taken; a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement can be pursued in accordance with the Code of Civil Procedure (*Zivilprozessordnung*).

### **Section 36**

#### **Application for registration of the company**

(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 registration 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 only once 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 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 registration**

(1) The application for registration 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, in accordance with 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 is 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 registration, the members of the management board are to give an assurance that no circumstances are given that would disqualify them from being appointed as stipulated in section 76 (3) sentence 2 nos. 2 and 3 as well as in sentences 3 and 4, and that they have been instructed as to their unrestricted duty to provide information to the court. Their instruction pursuant to section 53 (2) of the Act on the Federal Central Criminal Register (*Bundeszentralregistergesetz* – 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 registration 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 registration:

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 specifications 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 reports on the audit performed by the members of the management board and of the supervisory board as well as the reports on the audit performed by the formation auditors, along with the supporting records and documents.
5. (repealed)

(5) Section 12 (2) of the Commercial Code applies accordingly to the submission of documents pursuant to the present Act.

(6) (repealed)

### **Section 37a**

#### **Application for registration 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 forgone pursuant to section 33a, this is to be declared in the application for registration. The object of each contribution in kind or acquisition of assets is to be described. The application for registration 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 registration also are to give an assurance that they have not become aware of any exceptional circumstances that, in the course of the last three months prior to the day on which the securities or money market instruments in fact were contributed, might have significantly influenced the weighted average price of said securities or money market instruments within the meaning 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 within the meaning of section 33a (1) no. 2 is significantly lower, on the date on which they in fact were contributed, than the value assumed by the expert.

(3) The following are to be attached to the application for registration:

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 months prior to the day on which they in fact were 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 duly and properly has been established and whether an application for its registration duly and properly has been filed. Where this is not the case, the court is to refuse to register the company.

(2) The court may also refuse to register the company if the formation auditors declare, or if it is obvious, that the formation report or the report on the audit performed by the members of the management board and of the supervisory board is inaccurate or incomplete or does not comply with statutory provisions. The same applies 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 registration includes the declaration stipulated by section 37a (1) sentence 1, the court is to review exclusively 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 register the company.

(4) The court may refuse to register the company 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 of 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 provisions or that are to be entered in the Commercial Register or of which notice is to be given by publication by the court,
2. violates provisions 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 provided: the business name and the seat of the company, a business address within Germany, the purpose of the enterprise, the amount of the capital stock, 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 on the company and such person has an address within Germany, this information is to be entered as well; in relation to third parties, the authorisation to receive declarations of intent and to accept service of documents will be considered as continuing in force until it is cancelled in the Commercial Register and notice of such cancellation has been given by publication 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 registered 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 registered.

#### **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 does not exist as such. Anyone acting in the name of the company prior to its having been registered will be personally liable; where several individuals take any action, they are 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 will not require the consent of the creditor in order to be effective if the assumption of the obligation is agreed within three months of the company having been registered 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 are null and void. The issuers will 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 said 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 is to do so without undue delay. The entries made for the current seat as well as the records and documents kept by the court having jurisdiction up to that point in time 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 electronic means. The court at the

new seat is to review whether the relocation was resolved upon in due and proper manner and whether the stipulations of section 30 of the Commercial Code have been observed. Where this is the case, the court is to enter the relocation of the seat in the register and in so doing is to include in its Commercial Register the entries of which it has been notified without performing any further reviews. The relocation of the seat enters into force upon its being registered. 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 the stipulations of section 30 of the Commercial Code have been observed. If this is the case, then the court is to enter the relocation of the seat in the register. The relocation of the seat enters into force upon its being registered.

## **Section 46**

### **Liability and responsibilities of the founders**

(1) The founders are liable as joint and several debtors to the company for the accuracy and completeness of the statements made for the purpose 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 are responsible for ensuring that any entity determined as the entity that is to accept payments towards the capital stock (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 are liable as joint and several debtors to compensate the company for such damage.

(3) A founder is released from these obligations if they were neither aware of the facts giving rise to the duty to provide compensation nor, while exercising the due care of a prudent businessperson, had reason to be aware of them.

(4) Where the company suffers a loss because a stockholder is unable to pay their debts as they become due or because the stockholder is unable to make a contribution in kind, those founders are 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 their inability to pay their debts as they become due or their inability to perform in accordance with their obligations.

(5) Besides the founders, those persons are 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 are 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 they received any remuneration that, contrary to provisions, is not included 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 years following the company's registration, in order to place such shares of stock on the market, if they were aware of the inaccuracy or incompleteness of the statements made for the purpose of the company's formation (section 46 (1)), or if they were 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 duties in the course of the company's formation will be liable as joint and several debtors to compensate the company for the damage resulting therefrom; in particular, they are responsible for ensuring that an entity determined as the entity that is to accept payments towards the capital stock (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 (4) sentences 3 and 4 and (6), 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 (1) to (4) of the Commercial Code governing the liability and responsibilities of the statutory auditor applies accordingly.

#### **Section 50**

##### **Waiver and compromise**

The company may waive its claims to compensation, or conclude a compromise regarding these claims, in relation to 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 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 capital stock, raises an objection and has such objection recorded in the minutes. The above limitation in time does not apply where the party obligated to provide compensation is unable to pay their debts as they become due and concludes a compromise with their creditors in order to avert insolvency proceedings or if the compensation duty 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 will become statute-barred within five years. The period of prescription will 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 per cent of the capital stock, according to which it is intended that 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 capital stock, and which agreements are concluded in the course of the first two years following the

company's entry in the Commercial Register, will 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 likewise will be ineffective.

(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 as a rule 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 sentences 2 and 3 will cease to exist 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 (2) and (3) governing the formation report applies accordingly 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 (3) to (5), sections 34 and 35 governing the formation audit apply accordingly. Subject to the pre-requisites set out in section 33a, the audit by the formation auditors may be forgone.

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

(6) Upon 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 registration. Where an external formation audit is forgone pursuant to subsection (4) sentence 3, section 37a applies accordingly.

(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 provisions, or that the remuneration granted for the assets to be purchased is excessive, the court has the option of refusing to register the company. Where the application for registration includes the declaration stipulated by section 37a (1) sentence 1, section 38 (3) applies accordingly.

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

(9) The above provisions do 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 and 49 to 51 governing the company's claims to compensation apply accordingly to post-formation agreements. The members of the management board and of the supervisory board take the stead of the founders. They are to exercise the due care of a

prudent manager faithfully complying with their duties. Inasmuch as time limits commence running upon the company being entered in the Commercial Register, the entry of the post-formation agreement in the register takes 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 obligation of stockholders**

- (1) The obligation 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) sentence 1 or section 53b (1) sentence 1 or (7) of the Banking Act (*Kreditwesengesetz* – 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 are considered receivables of the company.
- (4) The company's claim to having the contributions made will become statute-barred 10 years after it has arisen. Where insolvency proceedings are opened for the company's assets, the prescription will not commence prior to the expiry of six months after the time at which said proceedings were opened.

##### **Section 55**

##### **Incidental obligations 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 obligation to perform on a recurrent basis, such performance not consisting of money, in addition to making contributions to the capital stock. 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 obligation 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 obligation, 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 to newly issued shares of stock conferred in the context of a conditional capital increase. A violation of this provision will not render the acquisition ineffective.
- (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 to 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 they have not acquired such share of stock for their own account. They are 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 their having acquired the share of stock for their own account, they will 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 is liable for the contribution in its full amount. This does not apply if the member of the management board proves that there is no fault on their 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 is not considered a restitution. Sentence 1 does 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 against the stockholder to counter-performance or to restitution. Moreover, sentence 1 is not to be applied to the restitution of a stockholder's loan, nor is it to be applied 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 retained earnings only in the event that the general meeting approves and establishes the annual financial statements. At a maximum, solely half of the surplus for the year may be allocated to other retained earnings based on such a stipulation of the by-laws. In this context, amounts to be allocated to the legal reserve 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 financial statements, they may allocate a part of the surplus for the year to other retained earnings, 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 retained earnings on the basis of such stipulation of the by-laws if the other retained earnings are in excess of half of the capital stock, or inasmuch as they would exceed half of the capital stock following such allocation. Subsection (1) sentence 3 applies accordingly.

(2a) Notwithstanding the stipulations of subsections (1) and (2), the management board and the supervisory board may allocate to the other retained earnings 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 earnings or may carry forward such amounts as profits. Furthermore, the general meeting may also resolve on an appropriation different from that set out sentence 1, or other 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 will 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 earnings. 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 will 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 capital stock.

(2) Where the contributions to the capital stock have not been paid in for all shares of stock in the same ratio, the stockholders will receive in advance, out of the profits eligible for distribution, an amount of four per cent of the contributions made. Where the profits do not suffice for this purpose, the amount is determined based on a correspondingly lower rate. Contributions made in the course of the financial year are to 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, regardless of whether or not net income has been recognised for the year, for any recurrent performance to which the stockholders are obligated pursuant to the by-laws, in addition to the contributions to the capital stock, provided such remuneration is not in excess of the value of the performance.

## **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 provisions of the present Act. Where they have received amounts constituting a participation in the profits, this obligation will be incumbent on them 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 will exercise the right of the company's creditors against the stockholders for the duration of said proceedings.

(3) The claims governed by the present provisions will become statute-barred after 10 years have lapsed since receipt of the performance. Section 54 (4) sentence 2 applies accordingly.

## **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 are to pay interest from the date on which said amount falls due at a rate of five per cent 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 in may be granted a period of grace, while being warned that, once the time limit 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 months, the last at least one month prior to expiry of the period of grace. A minimum period of three 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, it will suffice, instead of publishing the notices, to send a single call letter individually addressed to the defaulting stockholders; in the process, a minimum period of grace must be granted amounting to one 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 to the benefit of the company by notice in the company's publications of record. 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 will be issued; these are to 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 will be liable to the company for these amounts.

#### **Section 65**

##### **Duty of preceding endorsers to pay**

- (1) Each of the expelled stockholder's preceding endorsers entered in the share register will 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 will be assumed that payment cannot be obtained if it is not received in the course of one month following the call for payment and the notification of the preceding endorser. The new certificate is to be delivered in return for payment of the amount in arrears.
- (2) Each preceding endorser will be obligated to pay only those amounts that are called in in the course of two years. The time limit will 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. Notice of the time and location of the sale at public auction as well as the items to be sold at same is to be given by publication. The expelled stockholder and their preceding endorsers are to be notified separately; such notification may be forgone if it is not expedient. The notice by publication must be made and the notification must be issued no later than two weeks prior to the sale at public auction.

## **Section 66**

### **No relief of the stockholders from their duties to perform**

- (1) The stockholders and their preceding endorsers cannot be relieved of their duties to perform as defined in sections 54 and 65. It is not permissible to set off a claim of the company pursuant to sections 54 and 65.
- (2) Subsection (1) applies accordingly to the obligation to provide restitution for performance received in contravention of the provisions of the present Act, to the liability of the expelled stockholder in the event of a default, as well as to the duty 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 capital stock 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, first name, date of birth, an address and an electronic 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. Where a stockholder is a legal entity or a partnership with legal capacity, their business name or name, seat and address are to be entered in the share register. A civil law partnership may be entered in the share register and changes may be made to its entry only if it has been entered in the company register. The stockholder is under obligation to provide to the company the particulars set out in sentences 1 and 2. The by-laws may stipulate further details as to the pre-requisites under which it is permissible to enter in a holder's own name shares of stock belonging to some other party. Shares of stock belonging to a German, EU or foreign investment entity in accordance with the Investment Code (*Kapitalanlagegesetzbuch* – KAG), the shares or shares of stock in which are not exclusively held by professional or semi-professional investors, will be considered 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 will be considered shares of stock in the management company of the investment entity. For purposes of transmitting the details stipulated in sentences 1 and 2, the company establishes a notification system for the issuance of electronic shares of stock in cooperation with the body maintaining the register of the central register in accordance with section 12 (2) of the Act on Electronic Securities or of the crypto securities register in accordance with section 16 (2) of said Act.
- (2) Only parties who have been entered in the share register will enjoy rights or be subject to duties arising from the shares of stock in their relationship with the company. However, no voting rights will attach to entries that are in excess of a maximum threshold specified in the by-laws pursuant to subsection (1) sentence 5 or regarding which the by-laws stipulate a disclosure duty as to the fact that the shares of stock belong to some other party, and this duty has not been complied with. Furthermore, no voting rights will attach to shares for as long as a demand for information pursuant to subsection (4) sentence 2 or 3 has not been complied with following expiry of the time limit and warning indicating the loss of the voting rights has been issued.
- (3) The cancellation and new entry in the share register will be performed upon the corresponding notification having been provided and proof having been submitted. The company may effect an entry also on the basis of a notification in accordance with section 67d (4).
- (4) The intermediaries 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 will be reimbursed for the costs necessarily

incurred. The party registered is to notify the company without undue delay, upon the latter's corresponding demand, of the extent to which the shares of stock regarding which said party is entered in the share register in fact belong to them; should this not be the case, the party registered is to provide the particulars required under subsection (1) sentences 1 and 2 for that party on behalf of whom the party registered is holding the shares. This applies accordingly to that party whose data are transmitted pursuant to sentence 2 or pursuant to this sentence. Subsection (1) sentence 6 applies accordingly; sentence 1 applies to the allocation of costs. Where the holder of registered shares of stock is not entered in the share register, the intermediary maintaining the securities account 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. Where an intermediary is separately entered in the share register only temporarily in the context of registered shares of stock being transferred, this entry does not trigger any duties as a result of subsection (2) and will not lead to the application of restrictions set out in the by-laws as stipulated by subsection (1) sentence 5. Section 67d remains unaffected.

(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 time limit within which they may lodge an objection. Where a party involved objects within the time limit, no cancellation will be made.

(6) The stockholder may demand that the company inform them about the data concerning their person that have been entered in the share register. In the case of unlisted companies, the by-laws may make further provisions. The company may use the data contained in the register as well as the data provided under the terms of subsection (4) sentences 2 and 3 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 provisions apply accordingly to temporary share certificates.

### **Section 67a**

#### **Transmission of information regarding corporate events; definitions**

(1) Listed companies are to transmit information regarding corporate events as defined in subsection (6), where such information is not communicated to the stockholders directly or by other parties, as follows for forwarding to the stockholders:

1. to the parties entered in the share register, insofar as the company has issued registered shares of stock,
2. in all other cases to the intermediaries serving as depositories of the shares of stock in the company.

Section 125 applies to information serving the invitation convening the general meeting.

(2) The information may be transmitted by third parties instructed accordingly. The information is to be transmitted by electronic means to the intermediaries. In terms of its format, content and limitation in time, the transmission of information in accordance with subsection (1) is governed by Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 laying down minimum requirements implementing the provisions of Directive 2007/36/EC of the European Parliament and of the Council as regards shareholder identification, the transmission of information and the facilitation of the exercise of shareholders rights (OJ L 223 of 4 September 2018, p. 1), as amended. The transmission of information may be limited in keeping with the requirements set out in Article 8 (4) read in conjunction with table 8 of Commission Implementing Regulation (EU) 2018/1212.

(3) An intermediary in the chain is to forward to the next intermediary information as defined in subsection (1) sentence 1, which it has received from some other intermediary or from the company, within the time limits stipulated by Article 9 (2) sub-paragraph 2 or 3 and (7) of

Commission Implementing Regulation (EU) 2018/1212, unless the intermediary is aware that the next intermediary is receiving such information from another source. This also applies to information of a listed company whose seat is in some other Member State of the European Union. Subsection (2) sentence 1 applies accordingly.

(4) An intermediary is a person providing services as a depository or as a manager of securities, or by maintaining securities accounts for stockholders or other persons if the services are connected to shares of stock in companies having their seat in a Member State of the European Union or in another state party to the Agreement creating the European Economic Area.

(5) An intermediary in the chain is an intermediary serving as depository for shares of stock in the company for some other intermediary. The last intermediary is that intermediary serving a stockholder as depository for shares of stock in a company.

(6) Corporate events are the events defined in Article 1 no. 3 of Commission Implementing Regulation (EU) 2018/1212.

#### **Section 67b**

##### **Transmission of information by intermediaries to the stockholders**

(1) The last intermediary is to transmit to the stockholder the information received in accordance with section 67a (1) sentence 1, and is to do so in keeping with Article 2 (1) and (4), Article 9 (2) sub-paragraph 1, (3) and (4) sub-paragraph 3 as well as Article 10 of Commission Implementing Regulation (EU) 2018/1212. Section 67a (2) sentences 1 and 4 applies accordingly.

(2) Subsection (1) also applies to information of a listed company whose seat is in some other Member State of the European Union.

#### **Section 67c**

##### **Transmission of information by intermediaries to the company; confirmation of shareholding**

(1) The last intermediary is to transmit the information received from the stockholder of a listed company regarding the latter's exercise of their shareholder rights either directly to the company or to an intermediary in the chain. Intermediaries are to forward the information received in accordance with sentence 1 either directly to the company or to the next intermediary in the chain. Sentences 1 and 2 apply accordingly to the forwarding of instructions by the stockholder regarding the exercise of rights conferred by registered shares of stock in listed companies to the intermediary entered in the share register.

(2) The stockholder may issue instructions regarding the transmission of information in accordance with subsection (1). Section 67a (2) sentence 1 applies accordingly. In terms of its format, content and limitation in time, the transmission of information in accordance with subsection (1) is governed by the requirements stipulated by Article 2 (1) and (3), Articles 8 and 9 (4) of Commission Implementing Regulation (EU) 2018/1212. It is possible to transmit and forward accumulated information provided this is done in a timely manner. Subsections (1) and (2) apply also to information of a listed company whose seat is in some other Member State of the European Union.

(3) The last intermediary is to issue to the stockholder, upon the latter's demand and without undue delay, confirmation in text form of the stockholder's shareholding to allow the stockholder to exercise their shareholder rights at the general meeting, or is to transmit such proof to the company in accordance with subsection (1); said confirmation is to comply with the requirements stipulated by Article 5 of Commission Implementing Regulation (EU) 2018/1212.

#### **Section 67d**

##### **Entitlement of the company in relation to intermediaries to obtain information**

(1) The listed company may request that an intermediary serving as depository of shares of stock in the company disclose information regarding the identity of stockholders and

regarding the next intermediary. In terms of its format and content, this request is governed by the requirements stipulated by Commission Implementing Regulation (EU) 2018/1212.

(2) Information regarding the identity of stockholders consists of the data set out in Article 3 (2) read in conjunction with table 2 (C) of Commission Implementing Regulation (EU) 2018/1212. In the case of non-registered companies, their shareholders are to be identified by providing the information set out in sentence 1. Where several beneficiaries are entitled to one share of stock, they are to be identified by providing the information set out in sentence 1.

(3) The company's request for information is to be forwarded by each intermediary to the next intermediary in the chain, within the time limit stipulated by Article 9 (6) sub-paragraph 1, 2 or 3 sentence 3 and (7) of Commission Implementing Regulation (EU) 2018/1212, until this request has been received by the last intermediary.

(4) The last intermediary is to transmit the information that serves to comply with the company's request for information. This does not apply wherever the company requests that transmission be effected by an intermediary in the chain; in such event, intermediaries are under obligation to forward the information to this intermediary or to the next intermediary, respectively, in each case without undue delay. The intermediary the company is requesting to effect transmission is under obligation to transmit to the company the information received without undue delay. In terms of its format, content and limitation in time, the reply to the request for information is governed by the requirements stipulated by Articles 2, 3, 9 (6) sub-paragraphs 2 and 3 and (7) of Commission Implementing Regulation (EU) 2018/1212.

(5) Subsections (1) to (4) also apply to the request for information by a listed company whose seat is in some other Member State of the European Union. Section 67a (2) sentence 1 applies accordingly to subsections (1) to (5) sentence 1.

#### **Section 67e**

##### **Processing and rectification of stockholders' personal data**

(1) Companies and intermediaries may process stockholders' personal data for purposes of identification, of communicating with stockholders, companies and intermediaries, of exercising the shareholder rights, of maintaining the share register and of cooperating with the stockholders.

(2) Where the companies or intermediaries become aware that a stockholder no longer is a stockholder of the company, they may store that stockholder's personal data for no longer than twelve months, unless stipulated otherwise by law. Storage of the data for a longer period by the company moreover is permissible for as long as this is required for legal proceedings.

(3) By disclosing information regarding the identity of stockholders to the company, or to intermediaries obligated to forward such information, in accordance with section 67d, intermediaries will not be violating contractual or legal prohibitions.

(4) Anyone who was identified by incomplete or incorrect information as a stockholder may demand that the company and the intermediary providing said information rectify the data without undue delay.

#### **Section 67f**

##### **Costs; power to make statutory instruments**

(1) Subject to the provisions made in sentence 2, the company will bear the costs incurred by the intermediaries for their efforts and expenditures that are necessary according to sections 67a to 67d, also read in conjunction with section 125 (1), (2) and (5), and according to section 118 (1) sentences 3 to 5 as well as subsection (2) sentence 2 thereof and section 118a (1) sentence 4, insofar as such efforts and expenditures are based on methods reflecting advancements in technology. This does not apply to the following costs:

1. the costs of the necessary efforts and expenditures by the last intermediary for the transmission of information to the stockholder by non-electronic means pursuant to section 67b (1) sentence 1 and

2. the costs incurred by the company that has issued registered shares of stock for the necessary efforts and expenditures by the intermediaries for the transmission and forwarding, by the intermediary entered in the share register, of information to the stockholder as stipulated by section 125 (2) and (5) read in conjunction with sections 67a and 67b.

The intermediaries are to disclose the fees charged for the efforts and expenditures entailed by each service provided in accordance with sections 67a to 67e, section 118 (1) sentence 3 to 5 as well as subsection (2) sentence 2, section 118a (1) sentence 4, section 125 (1) sentence 1, (2) and (5) and section 129 (5). The disclosure is to be made separately to the company and to those of the stockholders to whom the intermediaries are providing the service. Differences between the fees charged for the exercise of rights in Germany and in cross-border cases are permissible only if they are justified and correspond to the differences in the costs factually arising for the provision of the services.

(2) Notwithstanding any provisions made otherwise in the present Act, the duties stipulated in sections 67a to 67e, 125 (1) sentence 1, (2) and (5) as well as the confirmations provided for by section 118 (1) sentence 3 to 5 as well as subsection (2) sentence 2 thereof, section 118a (1) sentence 4 and section 129 (5) are to observe the requirements made in Commission Implementing Regulation (EU) 2018/1212.

(3) The Federal Ministry of Justice and Consumer Protection has the authority, upon having coordinated the matter with the Federal Ministry for Economic Affairs and Energy and the Federal Ministry of Finance, to prescribe by statutory instrument the details of the reimbursement of the intermediaries by the company for the expenditures they incur for the following actions

1. transferring the particulars pursuant to section 67 (4),
2. the transmission and forwarding of information and notifications in accordance with sections 67a to 67d, 118 (1) sentence 3 to 5 as well as subsection (2) sentence 2 thereof, section 118a (1) sentence 4 and section 129 (5) and
3. the reproduction, transmission and forwarding of notifications pursuant to section 125 (1), (2) and (5) read in conjunction with sections 67a and 67b.

Blanket allowances may be established. The statutory instrument does not require the consent of the Bundesrat.

## **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 (*Wechselgesetz* – WG) apply accordingly as regards the form of the endorsement, the legitimisation of the holder and their obligation 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 is under obligation to review whether the sequence of endorsements corresponds to formal and regulatory requirements; however, the company is not under obligation to review the signatures.
- (4) The above provisions apply accordingly 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 are 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 will 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 applies 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**

If 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, then a claim to transfer of title against a credit institution, a financial services provider, a securities institution or an enterprise pursuing activities in accordance with section 53 (1) sentence 1 or section 53b (1) sentence 1 or (7) of the Banking Act is equivalent to ownership of the share of stock. The period of ownership of a predecessor in title is attributed to the stockholder if they have purchased the share of stock in any of the following manners: without monetary consideration, from their 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 (*Versicherungsaufsichtsgesetz – VAG*) or section 14 of the Act on Savings and Loan Associations (*Gesetz über Bausparkassen – 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 it is intended to offer the shares of stock 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 sentence 1 read in conjunction with section 29 (1), section 207 (1) sentence 1, section 313 (1), also read in conjunction with section 327, or section 340 (1) of the Transformation Act (*Umwandlungsgesetz – UmwG*);
4. if the purchase is made without monetary consideration or if a credit institution or securities 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 provisions governing the reduction of the capital stock;
7. if it is a credit institution, financial services provider, securities institution 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 per cent of the capital stock; the resolution must stipulate the lowest and highest equivalent value. The authorisation may be valid for a maximum of five years; or
8. based on an authorisation granted by the general meeting that is valid for a maximum of five years and that stipulates the lowest and highest equivalent value as well as the portion of the capital stock, which must not exceed 10 per cent. It is prohibited to have as a purpose the trade in treasury shares of stock. Section 53a is to be applied to purchases and disposals. Purchases and disposals via the stock exchange are 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 (3) and (4) and section 193 (2)

no. 4 are to be applied accordingly. 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 amount to more than 10 per cent of the capital stock, taken 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. Furthermore, such purchase is 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 capital stock 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 will be permissible only if the issue price for the shares of stock has been paid in 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 capital stock allocated to them, the portion of the capital stock 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 year after they have been purchased.

(4) A violation of subsection (1) or (2) will not render the purchase of treasury shares of stock ineffective. However, a transaction under the law of obligations regarding the purchase of treasury shares of stock will 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 does not apply to legal transactions entered into in the normal course of business of credit institutions, financial services providers or securities institutions, nor does it apply to the payment of an advance or the granting of a loan or the provision of security for purposes of a purchase of shares by company employees or employees of an enterprise affiliated with same; however, the legal transaction will 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 capital stock 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. Moreover, sentence 1 does 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 is null and void by which it is intended to entitle or obligate this party 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 (1) or (2) by making this purchase.

#### **Section 71b**

##### **Rights attaching to treasury shares of stock**

The company is not 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 (1) or (2), these shares of stock must be disposed of within one year of having been purchased.

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

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

#### **Section 71d**

##### **Purchase of treasury shares of stock by third parties**

A third party acting in their 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, 8 and (2). The same applies 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 their 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 capital stock pursuant to section 71 (2) sentence 1 and section 71c (2), these shares are considered shares of stock in the company. In all other cases, section 71 (3) and (4) and sections 71a to 71c apply accordingly. 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 provide reimbursement 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 is equivalent to the purchase of treasury shares of stock pursuant to section 71 (1) and (2) and section 71d. However, a credit institution, financial services provider or securities institution may, in the normal course of its business, accept treasury shares of stock in pledge up to the portion of the capital stock as determined in section 71 (2) sentence 1. Section 71a applies accordingly.

(2) A violation of subsection (1) will render the acceptance in pledge of treasury shares of stock ineffective 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 will 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 (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* – FamFG). Section 799 (2) and section 800 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) apply accordingly.

(2) Where profit participation certificates have been issued to the bearer, the invalidation of the share of stock or of the temporary share certificate will cause the claim also 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 does not conflict with 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 share 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 capital stock. Certificates of registered shares of stock cannot be invalidated on the grounds of the stockholder's designation having become inaccurate. A complaint may be lodged against the decision taken by the court; there is no right of appeal against the decision granting the authorisation.

(2) The call to produce the share certificates is to include a warning that they may be invalidated otherwise; the call is to indicate the authorisation granted by the court. The invalidation is subject to the pre-requisite of notice of the call having been given by publication in the manner stipulated for the period of grace in section 64 (2). The invalidation is effected by notice in the company's publications of record. The notice is to 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, they are 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 capital stock, section 226 applies.

#### **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 no longer is suited for circulation, the beneficiary may demand that the company provide them with a new certificate in return for their producing the old one, provided that the substantial content and the distinctive features of the certificate are still clearly recognisable. The beneficiary is to bear the costs arising in this regard and is to 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**

#### **Division 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 capital stock of more than three million euros, the management board is to be comprised of at least two persons unless the by-laws stipulate that it is to consist of one person. The provisions governing the appointment of a member of the board responsible for human resources and social welfare matters (*Arbeitsdirektor*) 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

1. who, as a person under custodianship as concerns matters of their property, is subject wholly or in part to a reservation of consent (section 1825 of the Civil Code);

2. who, 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. who 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 insolvency proceedings to be opened (delay in filing a petition for insolvency),
- b) criminal offences pursuant to sections 283 to 283d of the Criminal Code (*Strafgesetzbuch – 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 (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG*),
- d) false representation of facts pursuant to section 400, section 331 of the Commercial Code, section 346 of the Transformation Act or section 17 of the Act on the Financial Accounting by Certain Enterprises and Corporate Groups (*Publizitätsgesetz – PubliG*), or
- e) who has been convicted pursuant to sections 263 to 264a or sections 265b to 266a of the Criminal Code to imprisonment of at least one year;

this disqualification will apply for the duration of five years from the date on which the corresponding judgment has become final and binding; in this context, that period is not included in the computation for which the perpetrator was detained in an institution upon the order of governmental authorities.

Sentence 2 no. 2 applies accordingly if the person is subject to a comparable prohibition in another Member State of the European Union or in another state party to the Agreement creating the European Economic Area. Sentence 2 no. 3 applies accordingly 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 sentence 2.

(3a) Where the management board of listed companies, to which the Employee Co-determination Act (*Mitbestimmungsgesetz – 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 (*Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie – MontanMitbestG*), in the adjusted version published in the Federal Law Gazette III, classification number 801-2 – (Act on Co-determination in the Coal, Iron and Steel Industry) – or the Act Supplementing 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 (*Gesetz zur Ergänzung des Gesetzes über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie – MontanMitbestErgG*) in the adjusted version published in the Federal Law Gazette III, classification number 801-3 (Supplementary Co-determination Act) applies, consists of more than three persons, at least one woman and at least one man must be a member of the management board. An appointment of a member of the management board in violation of this requirement as to gender participation is null and void.

(4) The management board of listed companies or companies that are subject to co-determination rights stipulates target values for the share of women working in positions at the first and second management levels below the management board. The target values must describe the share of women at the respective management level and must

correspond, where percentages are cited, to full numbers of persons. Where the management board stipulates the target value “zero” for the share of women at either of the management levels, it is to provide the reasons on which this resolution is based in clear and understandable terms. The reasoning must present the details of the deliberations on which the decision is based. Where the share of women is lower than 30 per cent at the time the target values are laid down, the target values stipulated no longer may be lower than the share respectively attained. Concurrently, time limits are to be set within which the target values are to be attained. In each case, the time limits 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 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 represents the company before the courts and outside of court. Where a company does not have a management board (lack of management), the company is represented by the supervisory board for the case that declarations of intent are made to it or documents served on it.

(2) Where the management board consists of several persons, any and all members of the management board 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 suffices for such declaration to be made to a member of the management board or, in the case governed by subsection (1) sentence 2, to a member of the supervisory board. Declarations of intent to the company may be made to, and documents for the company may be served on, 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) sentence 2.

(3) The by-laws may also stipulate that individual members of the management board 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) sentence 2 applies accordingly.

(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 applies accordingly 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 chairperson of the supervisory board, providing their family names and at least one fully spelled-out first name. The chairperson of the management board is to be designated as such. Where information is provided regarding the company's capital, its capital stock 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 in for the shares of stock.

(2) The particulars pursuant to subsection (1) sentences 1 and 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 filling in the specific information respectively required for the individual case.

(3) Order forms are considered business letters within the meaning of subsection (1).

Subsection (2) is not to be applied 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 provisions of subsections (1) to (3) 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, and all liquidators are to be named.

## **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 registration.

(3) The new members of the management board are to give an assurance in the application for registration that no circumstances are given that would disqualify them from being appointed as stipulated in section 76 (3) sentence 2 nos. 2 and 3 as well as in sentences 3 and 4, and that they have been instructed concerning their unrestricted duty to provide information to the court. Section 37 (2) sentence 2 is to be applied.

(4) (repealed)

## **Section 82**

### **Restrictions of 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 provisions 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 will be under obligation to make preparations for measures falling within the sphere of responsibility of the general meeting. The same applies 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 appoints members of the management board for a maximum term of five years. A re-appointment or extension of the term of office, in each case for a maximum of five years, is permissible. This will require a new resolution to be adopted by the supervisory board, which may be so adopted at the earliest one year prior to expiry of the current term of office. Solely for appointments for a term shorter than five 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 years. This applies accordingly to the employment agreement; however, the employment agreement may provide that it is to continue in force until the expiry of the term should the term of office be extended.

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

(3) A member of a management board consisting of several persons is entitled to request that the supervisory board revoke their appointment if said member temporarily is unable to fulfil the duties entailed by their appointment due to the protection accorded to working mothers, due to the member's taking parental leave, due to their giving care to a family member or due to their having fallen ill. Where a management board member exercises this right, the supervisory board must revoke the appointment of said management board member

1. and in so doing must make a commitment, in the case of the protection of working mothers, to re-appoint them upon expiry of the periods of protection set out in section 3 (1) and (2) of the Maternity Protection Act (*Mutterschutzgesetz – MuSchG*),

2. and in so doing must make a commitment, in the cases of parental leave being taken, care being given to a family member or the management board member having fallen ill, to re-appoint them following a period of up to three months as requested by the management board member; the supervisory board may refrain from revoking the appointment for grave cause.

In the cases set out in sentence 2 no. 2, the supervisory board may revoke the appointment of the management board member, upon the latter's request, while making a commitment to re-appoint them following a period of up to 12 months. The end foreseen for the prior term of office will continue in force also as the end of the term of office following the re-appointment. In all other cases, the provisions of subsection (1) remain unaffected. The requirement made in section 76 (2) sentence 2 as to the management board having to consist of, at a minimum, two persons, is deemed met also during the period governed by sentences 2 or 3 if, without the revocation, this requirement were met. Any instances in which the number of management board members falls below the minimum stipulated by the by-laws during the period governed by sentences 2 or 3 do not merit consideration. Section 76 (3a) and section 393a (2) no. 1 do not apply to appointments during the period governed by sentences 2 or 3 if, without the revocation, the requirement as to gender participation were met. Section 88 is to be applied accordingly during the period governed by sentences 2 or 3.

(4) The supervisory board may revoke the appointment as member of the management board and the designation as chairperson of the management board for grave cause. Such grave cause consists 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 applies also

to the management board appointed by the first supervisory board. The withdrawal is effective until its ineffectiveness has been determined by a court's declaratory judgment and this has become final and binding. The claims attaching to the employment agreement are governed by the general provisions.

(5) The provisions of the Act on Co-determination in the Coal, Iron and Steel Industry relating to 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 their appointment remain unaffected.

## **Section 85**

### **Appointment by the court**

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

(1a) Section 76 (3a) likewise applies to the appointment by the court.

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

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

## **Section 86**

**(repealed)**

## **Section 87**

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

(1) In specifying 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 listed companies, the remuneration structure is to be oriented towards the promotion of a sustainable and long-term development of the company. Accordingly, a multi-year assessment basis as a rule is to govern the variable remuneration components; the supervisory board generally is to agree a means of providing for limitations in order to take account of extraordinary developments. Sentence 1 applies accordingly 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 specifications 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 (3), the court as a rule 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 sentence 1 in the first three years following the date on which the management board member ceases to work for the company. Such reduction will not affect the employment agreement in any other regard. However, the member of the management board may terminate their employment agreement with effect as per the end of the following calendar quarter, observing a period of notice of six 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, that member may demand compensation for the damages suffered, as a result of the service relationship having been cancelled, only for the two years following the date on which the service relationship has expired.

(4) Upon a demand being filed in accordance with section 122 (2) sentence 1, the general meeting may reduce the maximum remuneration established in accordance with section 87a (1) sentence 2 no. 1.

### **Section 87a**

#### **Remuneration system of listed companies**

(1) The supervisory board of the listed company is to resolve on a clear and understandable system for the remuneration of the members of the management board. At a minimum, the remuneration system is to provide for the details of the following matters; however, it is to do so for remuneration components only insofar as they in fact form part of the system:

1. the determination of a maximum remuneration for the members of the management board;
2. the contribution the remuneration is to make to promoting the company's business strategy and its long-term development;
3. all fixed and variable remuneration components and their relative share of the remuneration in each case;
4. all financial and non-financial criteria for granting variable remuneration components, including
  - a) an explanation of how these criteria will contribute to promoting the objectives set out under no. 2, and
  - b) a description of the methods used to determine whether the performance criteria have been met;
5. deferral periods applying to the disbursement of remuneration components;
6. means available to the company to reclaim variable remuneration components;
7. in the case of share-based remuneration:
  - a) time limits,
  - b) the conditions for holding shares of stock following the acquisition, and
  - c) an explanation of how this remuneration will contribute to promoting the objectives set out under no. 2;
8. as regards remuneration-related legal transactions:
  - a) their term and the pre-requisites for their termination, including the applicable periods of notice,
  - b) any undertakings to pay compensation for dismissal, and
  - c) the main features of the pension and early retirement schemes;
9. an explanation of how the remuneration terms and employment conditions of the company's employees were taken into account in specifying the remuneration system, including an explanation as to which group of employees was involved;

10 a presentation of the procedure applied in establishing the remuneration system and in implementing it, as well as the procedure for reviewing it, including the role that any potentially affected committees played and the measures that were taken to avoid and deal with conflicts of interest;

11. in the event of a remuneration system being submitted that has been reviewed in accordance with section 120a (3):

- a) an explanation of all key changes made and
- b) a summary of the extent to which the coordination with the stockholders regarding the remuneration system and the remuneration reports as well as the stockholders' comments were taken into account.

(2) The supervisory board of the listed company formally is to establish the remuneration of the members of the management board based on a remuneration system submitted to the general meeting pursuant to section 120a (1) for its endorsement. The supervisory board may deviate from the remuneration system temporarily where this is necessary in the interests of the company's well-being over the long term, provided the remuneration system specifies the procedure for so deviating from the system as well as the elements of the remuneration system that may be so derogated from.

## **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 also may 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 management board member that they allow the transactions they have entered into for their own account to be considered transactions entered into for the account of the company, and that they surrender the remuneration obtained for the transactions entered into for the account of some other party, or that they assign their claim to the remuneration.

(3) The company's claims will become statute-barred following the expiry of three 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 will become statute-barred, irrespective of this awareness, or grossly negligent lack of awareness, following the expiry of five 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 months in advance of said transactions. 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, is equivalent to granting a loan. This does 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) sentences 2 to 5 applies accordingly.

(3) Subsection (2) applies 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 or of an agent empowered to bind the company in all aspects of its business. Furthermore subsection (2) applies 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 or an agent empowered to bind the company in all aspects of its business 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) sentences 2 and 3 applies accordingly. This will 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 is to be applied, the provisions of the Banking Act apply instead of subsections (1) to (5).

## **Section 90**

### **Reports to the supervisory board**

(1) The management board is to 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 undertaking (section 290 (1), (2) of the Commercial Code), the report also is to address subsidiary undertakings and joint ventures (section 310 (1) of the Commercial Code). Furthermore, a report also is to be submitted to the chairperson 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 likewise is to be regarded as an important event occasioning such a report.

(2) The reports pursuant to subsection (1) sentence 1 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 financial statements 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 likewise may demand that such a report be submitted, however, the addressee will be solely the supervisory board.

(4) The reports are to comply with 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) sentence 3, 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 also will be transmitted to each member of the supervisory board upon a corresponding demand being made, unless the supervisory board has resolved otherwise. The chairperson of the supervisory board is to notify the members of the supervisory board concerning the reports pursuant to subsection (1) sentence 3 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.

(3) Moreover, the management board of a listed company is to put in place an internal control system and risk management system that is suitable and effective in light of the scope of the business activities pursued by the enterprise and in light of its risk situation.

## **Section 92**

### **Duties of the management board in the case of loss, over-indebtedness or inability to pay debts as they fall due**

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

(2) (repealed)

## **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 the relevant duties. No dereliction of duties will be given in those instances in which the member of the management board, in taking an entrepreneurial decision, was within their rights to reasonably assume that they were 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.

(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 from their actions. Where it is in dispute whether or not they exercised the due care of a prudent manager faithfully complying with the relevant duties, the onus of proof is upon them. Where the company has taken out insurance to protect a member of the management board against risks arising from their professional activities for the company, the insurance policy is to provide for a deductible of at least 10 per cent of the damage, up to a minimum of 150 per cent of the annual fixed remuneration of the member of the management board.

(3) The members of the management board are 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 their issue price having been fully paid in,
5. the company's assets are distributed,
6. (repealed),
7. remuneration is 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 duty to provide compensation does not arise in relation to 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 duty to provide compensation. The company may waive its claims to compensation, or conclude a compromise regarding these claims, only once three 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 capital stock, raises an objection and has it recorded in the minutes. The limitation in time does not apply where the party obligated to provide compensation is unable to pay their debts as they become due and concludes a compromise with their creditors in order to avert insolvency proceedings or if the compensation duty 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 applies, 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 the relevant duties; subsection (2) sentence 2 applies accordingly. The duty to provide compensation will not be cancelled in relation to the

creditors by a waiver by the company or by its concluding a compromise, nor will 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 is to 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 provisions will 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 10 years; in the case of other companies after 5 years.

#### **Section 94**

##### **Deputy members of the management board**

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

#### **Division 2**

##### **Supervisory board**

#### **Section 95**

##### **Number of members of the supervisory board**

The supervisory board consists of three 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 supervisory board members is that set out below for companies having a capital stock

|              |                       |
|--------------|-----------------------|
| of up to     | 1,500,000 euros: 9,   |
| of more than | 1,500,000 euros: 15,  |
| of more than | 10,000,000 euros: 21. |

The above provisions do not affect any provisions in derogation herefrom made in the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry and the Supplementary Co-determination Act.

#### **Section 96**

##### **Composition of the supervisory board**

(1) The supervisory board is composed as follows:  
in the case of companies to which the Employee Co-Determination Act applies: of supervisory board members representing the stockholders and the employees;  
in the case of companies to which the Act on Co-determination in the Coal, Iron and Steel Industry applies: of supervisory board members representing the stockholders and the employees and of further members;  
in the case of companies to which sections 5 to 13 of the Supplementary Co-determination Act apply: of supervisory board members 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 (*Drittelbeteiligungsgesetz* – DrittelbG) applies: of supervisory board members 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 (*Gesetz über die Mitbestimmung der Arbeitnehmer bei einer grenzüberschreitenden Verschmelzung* – MgVG) of 21 December 2006 (Federal Law Gazette I p. 3332), as amended, applies: of supervisory board members 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 Change of the Legal Form or of a Cross-Border Division (*Gesetz über die Mitbestimmung der Arbeitnehmer bei grenzüberschreitendem Formwechsel und grenzüberschreitender Spaltung* – MgFSG) of 4 January 2023 (Federal Law Gazette 2023 I

no. 10), as amended, applies: of supervisory board members representing the stockholders and the employees,

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

(2) In the case of listed companies to which the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry or the Supplementary Co-determination Act applies, the supervisory board is to be composed of women at a minimum ratio of 30 per cent and of men at a minimum ratio of 30 per cent. 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 chairperson 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, then this will not render the composition of the respective other side ineffective. 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 will 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 sentence 1 are to be applied to the election of supervisory board members representing the employees.

(3) In the case of listed companies that have resulted from a cross-border merger, a cross-border change of the legal form or a cross-border division whose supervisory or administrative organ consists, in accordance with the Act on Employee Co-Determination in the Case of a Cross-Border Merger or the Act on Employee Co-Determination in the Case of a Cross-Border Change of the Legal Form or of a Cross-Border Division, 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, in each case, at least 30 per cent. Subsection (2) sentences 2, 4, 6 and 7 applies accordingly.

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

### **Section 97**

#### **Notice by publication of the composition of the supervisory board**

(1) Where the management board takes the view that the composition of the supervisory board does not comply with the statutory provisions 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 provisions 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 provisions 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 month of the notice having been published in the Federal Gazette.

(2) Where the matter has not been referred to the court having jurisdiction pursuant to section 98 (1) within one month of the notice having been published in the Federal Gazette, the new supervisory board is to be constituted in accordance with the statutory provisions cited in the notice published by the management board. The stipulations of the by-laws regarding the composition of the supervisory board and the number of its members, as well

as the stipulations concerning the election, removal from office and delegation of members of the supervisory board will cease to have effect at the closure of the first general meeting convened following expiry of the time limit for referring the matter to the court, and at the latest six months following expiry of said time limit, inasmuch as they contradict the statutory provisions that then are to be applied. At the same point in time, the office of the current members of the supervisory board will expire. A general meeting taking place within the six-month time limit 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 provisions are to govern the composition of the supervisory board, exclusively that regional court is to 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 provisions 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 provisions 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 a minimum, one tenth or one hundred of the employees who themselves vote, pursuant to the statutory provisions 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 provisions the application of which is in dispute or uncertain,
10. unions that would have a nomination right pursuant to the statutory provisions the application of which is in dispute or uncertain.

Where the application of the Employee Co-Determination Act or the application of provisions of the Employee Co-Determination Act is in dispute or uncertain, then besides the parties entitled to file a petition pursuant to sentence 1, 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 within the meaning of the Employee Co-Determination Act also will be entitled to file a petition.

(3) Subsections (1) and (2) apply accordingly if it is in dispute whether or not the statutory auditor has correctly assessed the ratio of the turnover that is relevant pursuant to section 3 or section 16 of the Supplementary Co-determination Act.

(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 provisions set out in the decision. Section 97 (2) applies accordingly subject to the proviso that the time limit of six months is to commence running upon the ruling having become final and binding.

### **Section 99 Procedure**

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

(2) The regional court 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) are to be heard.

(3) The regional court is to issue its decision by way of a court order setting out the reasons for such decision. An appeal can be lodged against the decision taken by the regional court. Such appeal may be based solely on a violation of the law; section 72 (1) sentence 2 and section 74 (2) and (3) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction as well as section 547 of the Code of Civil Procedure apply accordingly. The appeal 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, by a statutory instrument, the decision regarding the appeal for the judicial districts of several higher regional courts to one of the higher regional courts or to the supreme court for the territory of a *Land*. The *Land* government may transfer the corresponding authorisation to the *Land* department of justice.

(4) The court is to serve its decision on the petitioner and to the company. Further, it is to give notice of its decision, without providing the grounds on which it is based, in the company's publications of record. Any party entitled to file a petition pursuant to section 98 (2) may lodge a complaint. The time limit within which a complaint must be lodged commences running upon notice of the decision being given by publication in the Federal Gazette; however, it will not commence running for the petitioner and the company prior to the decision having been served on them.

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

(6) The costs may be imposed, in their entirety or in part, on the petitioner where this is equitable. The parties involved are not 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 their property, is subject wholly or in part to a reservation of consent (section 1825 of the Civil Code), 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 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 listed company in the course of the past two years unless they are elected upon having been nominated by stockholders holding more than 25 per cent of the voting rights in the company.

A number of up to five of the seats on the supervisory board are not to be included in computing the maximum number pursuant to sentence 1 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 holds in the trading companies forming part of the group that are under obligation to form a supervisory board. The memberships in supervisory boards within the meaning of no. 1, in which the member in question has been elected chairperson, are to be counted double in establishing the maximum number pursuant to sentence 1 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, the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry, the Supplementary Co-determination Act, the Act on One-Third Employee Representation in the Supervisory Board, the Act on Employee Co-Determination in the Case of a Cross-Border Merger, and the Act on Employee Co-Determination in the Case of a Cross-Border Change of the Legal Form or of a Cross-Border Division.

(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 public interest entities as defined in section 364d sentence 2 of the Commercial Code, at least one member of the supervisory board must have expertise in the field of accounting and at least one further supervisory board member must have expertise in the field of auditing accounts; 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 are elected by the general meeting unless they are to be delegated to the supervisory board or are to be elected as supervisory board members representing the employees pursuant to the Employee Co-Determination Act, the Supplementary Co-determination Act, the Act on One-Third Employee Representation in the Supervisory Board, the Act on Employee Co-Determination in the Case of a Cross-Border Merger or the Act on Employee Co-Determination in the Case of a Cross-Border Change of the Legal Form or of a Cross-Border Division. The general meeting is bound by nominations exclusively pursuant to sections 6 and 8 of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry.

(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 are not considered a special class of stock. The delegation rights may be conferred, in the aggregate, for at most a third of the number of supervisory board members representing the stockholders as stipulated by the law or in 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 or the Supplementary Co-determination Act; this substitute member will become a member of the supervisory board if the member of the supervisory board ceases to hold such office prior to expiry of their term of office. The substitute member may be appointed only concurrently with the member of the supervisory board. The provisions applying to the supervisory board member are to be applied to the appointment of the substitute member, as well as to cases in which the appointment is null and void or an action for avoidance is brought.

## **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 is not counted.
- (2) The office of a substitute member ceases 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 requires a majority comprising, at a minimum, 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 is to 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 capital stock, or to a stake of 1 million euros. A complaint may 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 applies, besides subsection (3) hereof: the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry, the Supplementary Co-determination Act, the Act on One-Third Employee Representation in the Supervisory Board, the Act on the Involvement of Employees in a European Company (*SE-Beteiligungsgesetz* – SEBG), the Act on Employee Co-Determination in the Case of a Cross-Border Merger, and the Act on Employee Co-Determination in the Case of a Cross-Border Change of the Legal Form or of a Cross-Border Division.
- (5) The provisions applying to the removal from office of the member of the supervisory board for whom the substitute member has been appointed 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 also may file such 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 of those employees, or one hundred of them, 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, the supervisory board is to consist also of members representing the employees, then besides the parties entitled to file a petition pursuant to sentence 3, 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 within the meaning of the Employee Co-Determination Act having voting rights are entitled to file a petition. A complaint may be lodged against the decision taken.

(2) Where, for a period longer than three 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 time limit upon a corresponding petition having been filed. The entitlement to file a petition is governed by subsection (1). A complaint may be lodged against the decision taken.

(3) Subsection (2) is to be applied to a supervisory board in which employees have a co-determination right pursuant to the Employee Co-Determination Act, the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry or the Supplementary Co-determination Act, 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 or the

Supplementary Co-determination Act, upon being nominated by the other members of the supervisory board,

2. that any case invariably will be an urgent case if the supervisory board is not comprised of all those 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 also is to include members of the supervisory board representing the employees, 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 will apply only insofar as the number of supervisory board members 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 their person, the court-appointed supervisory board member also must meet these pre-requisites. Where a member of the supervisory board, regarding the election of whom an umbrella organisation of the unions, a union or the works councils would have nomination rights, is to be replaced, the court as a rule is to consider the nominations made by these bodies unless overriding interests of the company or of the general public conflict with the appointment of the person so nominated; the same applies, 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 listed companies, to which the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry or the Supplementary Co-determination Act 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) sentences 1 to 5.

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

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

## **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 they 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 management board members, or of management board members who are prevented from serving as such, but may do so solely for a period of time that has been limited in advance, and at a maximum for one 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 year. During their term of office as deputies of management board members, the members of the supervisory board may not pursue any activities as a supervisory board member. 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 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 stipulations of the by-laws, the supervisory board is to elect from among its midst a chairperson and at least one deputy chairperson. The management board is to file an application for entry in the Commercial Register of the persons elected. The deputy chairperson will enjoy the rights and have the duties of the chairperson only when the latter is prevented from serving as such.

(2) Minutes are to be prepared of the supervisory board meetings that the chairperson is to sign. The minutes are to state the place and date of the meeting, the participants, the business set out in the agenda, the substantial content of the deliberations, and the resolutions adopted by the supervisory board. A violation of sentence 1 or sentence 2 will not render the resolution ineffective. 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 accounts, and in this regard particularly the selection and the independence of the statutory auditor, the quality of the auditing of accounts and the services additionally provided by the statutory auditor. The audit committee may make recommendations or suggestions on how to warrant the integrity of the accounting process. Moreover, the supervisory board of the listed company may appoint a committee that is to adopt a resolution regarding the consent stipulated by section 111b (1). Any related parties involved in the transaction within the meaning of section 111a (1) sentence 2 are not eligible for appointment as members of said committee. The majority of the committee's members must be persons regarding whom there are no concerns regarding a conflict of interest due to their relationship with a related party. The tasks pursuant to subsection (1) sentence 1, section 59 (3), section 77 (2) sentence 1, section 84 (1) sentences 1 and 3, (2) and (3) sentences 2 and 3 as well as (4) sentence 1, section 87 (1) and (2) sentences 1 and 2, section 111 (3), section 171, section 314 (2) and (3), as well as the adoption of 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) The supervisory board of a company that is a public-interest entity as defined in section 316a sentence 2 of the Commercial Code is to institute an audit committee within the meaning of subsection (3) sentence 2. Where the supervisory board consists of no more than three members, it will also be the audit committee. The audit committee must meet the pre-requisites set out in section 100 (5). Each member of the audit committee may obtain information, via the committee chairperson, directly from the heads of those corporate units of the company that are responsible within the company for those tasks that are within the remit of the audit committee in accordance with subsection (3) sentence 2. The committee chairperson is to inform all members of the audit committee of the information so obtained.

Where information is obtained in accordance with sentence 4, the management board is to be informed of this fact without undue delay.

### **Section 108**

#### **Resolutions adopted by the supervisory board**

- (1) The supervisory board takes 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 has 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 members must participate in adopting the resolution. The supervisory board is 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 votes delivered. The written 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 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) As a rule, no persons are to participate in 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. If the statutory auditor is involved as an expert, then the management board will not participate in this meeting unless the supervisory board or the committee regard the management board's participation to be necessary.
- (2) Members of the supervisory board who are not members of a committee may participate in the committee's meetings unless determined otherwise by the chairperson of the supervisory board.
- (3) The by-laws may allow persons who are not members of the supervisory board to participate in the meetings of the supervisory board and its committees instead of those supervisory board members who are prevented from participating in them, provided the latter have granted authority to them in text form.
- (4) Any statutory provisions in derogation herefrom 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 their demand, that the chairperson of the supervisory board convene a meeting of the supervisory board without undue delay. The meeting must take place within two 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 themselves convene a meeting of the supervisory board, while 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 meetings per calendar half year. The supervisory board of unlisted companies may resolve that it is to come together for one 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 instructs the statutory auditor to audit the annual financial statements and the consolidated financial statements pursuant to section 290 of the Commercial Code. 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), or of the consolidated non-financial statement or the separate consolidated non-financial report (section 315b of the Commercial Code).
- (3) The supervisory board is to convene a general meeting where this is required by the company's best interests. It suffices 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 be implemented only 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 requires 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 boards of listed companies or companies that are subject to co-determination rights stipulate target values for the share of women sitting on the supervisory board and the management board. The target values must describe the share of women targeted for the body respectively concerned and must correspond, where percentages are cited, to full numbers of persons. Where the supervisory board stipulates the target value "zero" for the share of women sitting on the supervisory board or management board, it is to provide the reasons on which this resolution is based in clear and understandable terms. The reasoning must present the details of the deliberations on which the decision is based. Where the share of women is lower than 30 per cent at the time the target values are laid down, the target values stipulated no longer may be lower than the share respectively attained. Concurrently, time limits are to be set within which the target values are to be attained. In each case, the time limits may not be longer than five years. If the requirement as to the minimum ratio pursuant to section 96 (2) or (3) already applies to the supervisory board, the stipulations are to be made solely for the management board. If the requirement as to gender participation stipulated by section 76 (3a) applies to the management board, then the duty to set a target value for the management board likewise will lapse.
- (6) The members of the supervisory board may not have others perform the tasks incumbent on them.

## **Section 111a**

### **Related party transactions**

- (1) Related party transactions are legal transactions or measures
  1. by which an object or some other asset is transferred or permission for its use is granted, for monetary consideration or without such monetary consideration, and
  2. that are entered into with related parties as defined in sentence 2.

Related parties are related enterprises or persons within the meaning of the international accounting standards that have been adopted, in each case as amended, by Commission Provision (EC) No. 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Provision (EC) No. 1606/2002 of the European Parliament and

of the Council (OJ L 320 of 29 November 2008, p. 1; L 29 of 2 February 2010, p. 34), most recently amended by Commission Regulation (EU) 2019/412 (OJ L 73 of 15 March 2019, p. 93). Instances in which a party refrains from acting do not constitute transactions within the meaning of sentence 1.

(2) Transactions entered into with related parties in the due course of business as an arm's length transaction are not considered related party transactions within the meaning of sections 107 and sections 111a to 111c. In order to regularly assess whether the pre-requisites pursuant to sentence 1 are given, the listed company will institute an internal procedure from which the related parties involved in the transaction are precluded. However, the by-laws may determine that sentence 1 is not to be applied.

(3) Furthermore, the following are not considered related party transactions within the meaning of sections 107 and sections 111a to 111c:

1. transactions with subsidiary undertakings within the meaning of the international accounting standards adopted by Commission Provision (EC) No. 1126/2008, the shares of stock in which are held directly or indirectly at 100 per cent by the company, or in which no other related party of the company has an interest, or that have their seat in a Member State of the European Union and the shares of stock of which are admitted to trading on a regulated market located in a Member State or operated there within the meaning of Article 4 (1) no. 21 of the Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173 of 12 June 2014, p. 349; L 74 of 18 March 2015, p. 38; L 188 of 13 July 2016, p. 28; L 273 of 8 October 2016, p. 35; L 64 of 10 March 2017, p. 116; L 278 of 27 October 2017, p. 56), last amended by Directive (EU) 2016/1034 (OJ L 175 of 30 June 2016, p. 8);
2. transactions requiring the consent or authorisation by the general meeting;
3. all of the transactions entered into and measures taken by way of implementing consents or authorisations granted by the general meeting, in particular
  - a) measures serving the procurement of capital or serving the reduction of capital (sections 182 to 240), inter-company agreements (sections 291 to 307) and transactions on the basis of such an agreement,
  - b) the transfer of the entire assets of the company pursuant to section 179a,
  - c) the purchase of treasury shares of stock pursuant to section 71 (1) nos. 7 and 8, clause preceding sentence 2,
  - d) agreements of the company with founders within the meaning of section 52 (1) sentence 1,
  - e) the expulsion of minority stockholders pursuant to sections 327a to 327f as well as
  - f) transactions performed in the context of a transformation within the meaning of the Transformation Act;
4. transactions concerning the remuneration granted or owed to the members of the management board or supervisory board in accordance with section 113 (3) or section 87a (2);
5. transactions of credit institutions or securities institutions that were ordered or endorsed by the competent authority in order to safeguard their stability;
6. transactions offered to all stockholders at the same terms.

### **Section 111b**

#### **Reservation of consent by the supervisory board in the case of related party transactions**

(1) A transaction entered into by the listed company with related parties, the economic value of which, taken either by itself or together with the transactions entered into with the same party in the course of the ongoing financial year prior to conclusion of the transaction in question, exceeds 1.5 per cent of the sum total of the fixed assets and current assets of the company pursuant to section 266 (2) (A) and (B) of the Commercial Code, as these have been itemised in the financial statements most recently adopted, requires the prior consent of the supervisory board or of a committee appointed in accordance with section 107 (3) sentences 4 to 6.

(2) When the supervisory board adopts the resolution provided for by subsection (1), those members of the supervisory board may not exercise their voting rights who are involved in the transaction as related parties or regarding whom there are concerns regarding a conflict of interest due to their relationship with the related party.

(3) Where the company is a parent undertaking (section 290 (1) and (2) of the Commercial Code) and has not been released, in accordance with section 290 (5) or sections 291 to 293 of the Commercial Code, from the duty to draw up consolidated financial statements and a consolidated management report, the sum total of the fixed assets and current assets of the corporate group will take the stead of the sum total of the fixed assets and current assets of the company as stipulated by section 298 (1) read in conjunction with section 266 (2) (A) and (B) of the Commercial Code, as these have been itemised in the consolidated financial statements most recently adopted or, in the cases governed by section 315e of the Commercial Code, the sum total of the corresponding assets itemised in the consolidated financial statements in accordance with international accounting standards will take the stead of the sum total of the fixed assets and current assets of the company.

(4) Where the supervisory board refuses to grant its consent, the management board may demand that the general meeting adopt a resolution regarding such consent. The related parties involved in the transaction may not exercise their voting rights for themselves or for some other party when the general meeting adopts such resolution.

### **Section 111c**

#### **Disclosure of related party transactions**

(1) The listed company is to disclose, without undue delay and in the manner stipulated by subsection (2), the particulars of those related party transactions that require consent pursuant to section 111b (1). Where the consent requirement for a certain transaction is triggered, in accordance with section 111b (1), by several transactions having been taken together, these transactions likewise are to be disclosed.

(2) The disclosure is to be effected in a manner allowing the public to easily access the information. The disclosure is to be effected in accordance with the provisions made in section 3a (1) to (4) of the Ordinance specifying the publication, notification and disclosure duties under the Securities Trading Act (*Wertpapierhandelsanzeigeverordnung*) of 13 December 2004 (Federal Law Gazette I p. 3376), last amended by Article 1 of the ordinance of 19 October 2018 (Federal Law Gazette I p. 1758). The disclosure must include all key information that is required in order to evaluate whether the transaction is appropriate from the perspective of the company and those stockholders who are not related parties. This comprises, at a minimum, information on the nature of the relationship with the related parties, the names of the related parties, as well as the date and the value of the transaction. Moreover, the information is to be made publicly accessible on the company's website for a period of no fewer than five years.

(3) Where the related party transaction consists of inside information pursuant to Article 17 of the Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse provision) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC,

2003/125/EC and 2004/72/EC (OJ L 173 of 12 June 2014, p. 1; L 287 of 21 October 2016, p. 320; L 348 of 21 December 2016, p. 83), last amended by Regulation (EU) 2016/1033 (OJ L 175 of 30 June 2016, p. 1), the particulars required under subsection (2) are to be included in the disclosure stipulated by Article 17 of Regulation (EU) No. 596/2014. In this event, the obligation stipulated by subsection (1) will cease to exist. Article 17 paragraphs (4) and (5) of Regulation (EU) No. 596/2014 applies accordingly.

(4) Where the company is a parent undertaking within the meaning of the international accounting standards adopted by Commission Provision (EC) No. 1126/2008, subsection (1) sentence 1 as well as subsections (2) and (3) apply accordingly to a transaction entered into by a subsidiary undertaking with related parties of the company insofar as said transaction, had it been entered into by the company, would have required consent to be granted in accordance with section 111b (1) and (3).

#### **Section 112**

##### **Representation of the company in relation to members of the management board**

The supervisory board represents the company in relation to members of the management board in court and outside of court. Section 78 (2) sentence 2 applies accordingly.

#### **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. As a rule, the remuneration is to be appropriate in relation to the tasks of the members of the supervisory board and to the company's economic situation.

(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 adopts resolutions regarding the approval of the actions taken by the members of the first supervisory board and the discharge to be granted to them.

(3) In the case of listed companies, the remuneration granted to the members of the supervisory board is to be resolved upon, at a minimum, every four years. It is permissible to adopt a resolution confirming the remuneration; in all other cases, subsection (1) sentence 2 applies. The resolution is to provide information on the matters governed by section 87a (1) sentence 2 in a clear and understandable form, or is to include same by reference. If the remuneration is established by the by-laws, then providing said information in the by-laws may be forgone. No avoidance may be sought regarding the resolution due to a violation of sentence 3. Section 120a (2) and (3) is to be applied accordingly.

#### **Section 114**

##### **Contracts with members of the supervisory board**

(1) Where a member of the supervisory board enters into obligation in relation to the company, outside of their 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, the contract's effectiveness will 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 against the company to having the enrichment achieved by the activities performed surrendered to them will 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 granted longer than three 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 will 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) applies 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 a 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) sentences 3 and 4 applies accordingly. This does 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 is to be applied, the provisions of the Banking Act will 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 applies accordingly 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) sentence 3 concerning the duty of the members of the management board to exercise skill and care as well as their liability and responsibilities, as does section 15b of the Insolvency Statute (*Insolvenzordnung*). In particular, the members of the supervisory board are under an obligation of secrecy regarding any confidential reports they may have received as well as regarding their confidential deliberations. More particularly, they are under obligation to provide compensation should they have established remuneration that is inappropriate (section 87 subsection (1)).

### **Division 3**

#### **Exploitation of influence over the company**

### **Section 117**

#### **Duty to provide compensation for damages**

(1) Anyone who intentionally compels, by exploiting their 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 will be under obligation to provide compensation to the company for the damage it has suffered as a result. Such party also will 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 loss resulting for 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 are 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 the relevant duties, the onus of proof is upon them. The duty of the members of the management board and of the supervisory board to provide compensation will not arise in relation to the company and also not in relation to 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 duty to provide compensation.

(3) In addition to that person, furthermore, those parties are 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) sentences 3 and 4 applies accordingly to the release from the duty in relation to the company to provide compensation.

(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. Any waiver by the company of its claims to compensation, or any conclusion by the company of a compromise regarding these claims, will not serve to release it from the duty 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 exercises the right of the company's creditors for the duration of said proceedings.

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

(7) The above provisions do 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.

#### **Division 4 General meeting**

##### **Subdivision 1 Rights of the general meeting**

##### **Section 118 General provisions**

(1) Unless stipulated otherwise by the law, the stockholders 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 participate in the general meeting also without being present at the place at which it is being held and without an authorised representative, and that they may exercise the entirety or some of their rights, as a whole or in part, by way of electronic communication. Where the voting right is exercised by electronic means, the company is to confirm by electronic means the receipt of the vote cast electronically to the party casting the vote in accordance with the requirements stipulated under Article 7 (1) and Article 9 (5) sub-paragraph (1) of Commission Implementing Regulation (EU) 2018/1212. Insofar as the confirmation is issued to an intermediary, the intermediary is to transmit the confirmation to the stockholder without undue delay. Section 67a (2) sentence 1 and subsection (3) applies accordingly.

(2) The by-laws may provide, or may grant authority to the management board to provide, that stockholders may cast their votes also without participating in the meeting, in writing or

by way of electronic communication (absentee ballot). Subsection (1) sentence 3 to 5 applies accordingly.

(3) The members of the management board and of the supervisory board as a rule are to attend the general meeting. However, the by-laws may provide for certain cases in which the members of the supervisory board may participate 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 meeting to provide, that the general meeting may be broadcast by means of video and audio transmission.

### **Section 118a** **Virtual general meeting**

(1) The by-laws may provide, or may grant authority to the management board to provide, that the meeting is held without the stockholders or their authorised representatives being physically present at the place at which it is being held (virtual general meeting). Where a virtual general meeting is held, the following pre-requisites are to be met:

1. the entire meeting is transmitted in video and audio form,
2. it is possible for stockholders to exercise their voting right by way of electronic communication, namely by their participating by electronic means or by casting an absentee ballot by electronic means, as well as by way of granting a power of attorney,
3. the stockholders participating in the meeting by electronic means are granted the right to propose motions and to make nominations by way of video communication technology at the meeting,
4. the stockholders are granted a right to seek information in accordance with section 131 by way of electronic communication,
5. if the management board avails itself of the option provided for under section 131 (1a) sentence 1, then the report by the management board or its substantial content will be made accessible to the stockholders by no later than seven days prior to the general meeting,
6. the stockholders are granted the right to submit statements in accordance with section 130a (1) to (4) by way of electronic communication,
7. the stockholders participating in the meeting by electronic means are granted a right to speak at the general meeting by means of video communication technology in accordance with section 130a (5) and (6),
8. the stockholders participating in the meeting by electronic means are granted a right to lodge an objection against a resolution adopted by the general meeting by way of electronic communication.

Section 121 (7) applies to the calculation of the time limit defined in sentence 2 no. 5; in the case of listed companies, the report is to be made accessible via the company's website. Section 118 (1) sentence 3 and 4 as well as section 67a (2) sentence 1 and (3) apply accordingly.

(2) As a rule, the members of the management board are to attend the general meeting at the place at which it is being held. The same applies to the members of the supervisory board unless they may participate by means of video and audio transmission, as provided for by section 118 (3) sentence 2. The person chairing the meeting and, in the cases governed by section 176 (2) sentence 1 and 2, the statutory auditor are to attend the general meeting at the place at which it is being held. A representative exercising voting rights who has been named by the company in accordance with section 134 (3) sentence 5 can attend the general meeting at the place at which it is being held.

(3) A provision of the by-laws as per subsection (1) sentence 1 according to which virtual general meetings may be held must be limited in time. Holding virtual general meetings may be provided for by such a provision for a maximum period of five years following the company's entry in the Commercial Register.

(4) An authorisation of the management board by the by-laws as per subsection (1) sentence 1 to provide for virtual general meetings to be held must be limited in time. It can be granted for a maximum period of five years following the company's entry in the Commercial Register.

(5) If provisions or authorisations as per subsection (1) sentence 1 are made or granted by amending the by-laws, then

1. the provision may provide for virtual general meetings to be held up to a maximum period of five years following the entry of the amendment of the by-laws in the Commercial Register, and

2. the authorisation can be granted to the management board for a maximum period of five years following the entry of the amendment of the by-laws in the Commercial Register.

(6) Where this Act or some other act provides that documents are to be made accessible at the general meeting, the documents are to be made accessible to the stockholders who are participating in the general meeting by electronic means for the duration of the meeting via the company's website or via a third-party website that can be accessed via the company's website.

## **Section 119**

### **Rights of the general meeting**

(1) The general meeting adopts 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, the Supplementary Co-determination Act, the Act on One-Third Employee Representation in the Supervisory Board, the Act on Employee Co-Determination in the Case of a Cross-Border Merger, or the Act on Employee Co-Determination in the Case of a Cross-Border Change of the Legal Form or of a Cross-Border Division;

2. the appropriation of the net income;

3. the remuneration system and the remuneration report for members of the listed company's management board and supervisory board;

4. 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;

5. the appointment of the statutory auditor;

6. amendments of the by-laws;

7. measures serving the procurement of capital and the reduction of capital;

8. 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;

9. 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**

- (1) Every year in the first eight months of the financial year, the general meeting adopts 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 capital stock or to a stake of 1 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 as a rule are to be tied to the deliberations regarding the appropriation of the net income.
- (4) (repealed)

## **Section 120a**

### **Vote on the remuneration system and on the remuneration report**

- (1) The general meeting of a listed company adopts a resolution regarding the endorsement of the system governing the remuneration of the members of the management board submitted to it by the supervisory board whenever the remuneration system substantially is modified, at a minimum, however, every four years. The resolution does not establish any rights or duties. No avoidance pursuant to section 243 may be sought regarding the resolution. A resolution confirming the remuneration system is permissible.
- (2) The resolution and the remuneration system are to be published without undue delay on the company's website and are to be kept accessible to the public, at no charge, for as long as the remuneration system is valid and in force, at a minimum, however, for 10 years.
- (3) If the general meeting has not endorsed the remuneration system, then a remuneration system that has been subjected to review is to be submitted for resolution no later than at the subsequent regular general meeting.
- (4) The general meeting of the listed company resolves on the endorsement of the remuneration report for the preceding financial year prepared and audited in accordance with section 162. Subsection (1) sentences 2 and 3 is to be applied.
- (5) In the case of small and medium-sized listed companies within the meaning of section 267 (1) and (2) of the Commercial Code, no resolution need be adopted in accordance with subsection (4) if the remuneration report of the previous financial year is submitted to the general meeting for its discussion as a separate item of business on the agenda.

## **Subdivision 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 is convened by the management board, which adopts 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 are considered to have authority. The right of other persons to convene the general meeting as stipulated by law or in the by-laws remains 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 listed companies, 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 participating in the meeting and exercising the voting right as well as, if applicable, the record date pursuant to section 123 (4) sentence 2 and its significance;
2. the procedure 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 transmit proof to the company regarding the appointment of an authorised representative, as well as
  - b) by absentee ballot or by way of electronic communication pursuant to section 118 (1) sentence 2 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 time limits set 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 is considered the date of the notice. The notification of the parties entered in the share register is sufficient.

(4a) In the case of listed companies 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) sentence 2, 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.

(4b) In the case of the virtual general meeting, the invitation convening the general meeting also must state how stockholders and their authorised representatives can participate in the general meeting by electronic means. Additionally, the invitation convening the general meeting is to indicate that a physical presence of the stockholders and their authorised representatives at the place at which the general meeting will be held is ruled out. In the case of the virtual general meeting of listed companies, information on the procedure for votes to be cast is to be provided, in derogation from subsection (3) sentence 3 no. 2 letter (b), by way of electronic communication. Moreover, in the case of these companies, reference additionally is to be made to section 126 (4) and, if the management board avails itself of the option provided for under section 131 (1a) sentence 1, additionally to section 131 (1a) to (1f), as well as the fact that the report by the management board or its substantial content will be made accessible in accordance with section 118a (1) sentence 2 no. 5.

(5) Unless stipulated otherwise in the by-laws, the general meeting as a rule is to be held at the seat of the company. Where the shares of stock in the company are admitted to trading on the regulated market at a German stock exchange, then, unless stipulated otherwise in the by-laws, the general meeting also can be held at the seat of the stock exchange. In the case of the virtual general meeting, sentences 1 and 2 do not apply.

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

(7) In the case of time limits 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 are not to be applied accordingly. In the case of unlisted companies, the by-laws may provide for a different calculation of the time limit.

### **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 capital stock, 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 capital stock. The petitioners are to submit proof that they have been holders of the shares of stock since a minimum of 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) is to be applied accordingly.
- (2) In like manner, stockholders whose shares of stock, in the aggregate, are at least equivalent to one twentieth of the capital stock or to a stake of 500,000 euros, may demand that items of business be set out in the agenda and that notice be given by publication. Each item of business to be newly added to the agenda must include the reasons on which it is based or a proposal for a resolution. The demand within the meaning of sentence 1 must be received by the company at the latest 24 days prior to the general meeting, in the case of listed companies at the latest 30 days prior to the general meeting; the date on which the demand is received is not to be included in calculating the period.
- (3) Where the demand is not complied with, the court may grant authority to the stockholders who have made the demand to convene the general meeting or to give notice by publication of the item of business. Concurrently, the court may determine the chairperson of the general meeting. The invitation convening the general meeting or the notice must indicate the authorisation by the court. A complaint may 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 bears 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**

#### **Time limit, registration for the general meeting, proof**

- (1) The general meeting is to be convened at the latest 30 days prior to the date set for it. The date on which the general meeting is convened is not to be included in calculating the time limit.
- (2) The by-laws may make participation in 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 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 time limit, which is to be measured in days. The date on which the registration is received is not to be included in calculating the time limit. The minimum time limit set out in subsection (1) is extended by the days of the time limit set for registration.
- (3) The by-laws may determine the manner in which proof is to be submitted of the entitlement to participate in the general meeting or to exercise the voting right; in such event, subsection (2) sentence 5 applies accordingly.

(4) In the case of bearer shares of listed companies, proof pursuant to section 67c (3) will suffice. In the case of listed companies, the confirmation of shareholding pursuant to section 67c (3) is to reflect the circumstances given as per the close of business of the twenty-second 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 days prior to the 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 time limit, which is to be measured in days. The date on which the registration is received is not to be included in calculating the period. Only those parties are considered stockholders of the company in their relationship with same, in terms of their participation in 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 listed companies, the entitlement to participate in the meeting or to exercise the voting right follows, pursuant to section 67 (2) sentence 1 from entry in the share register.

#### **Section 124**

##### **Notice by publication of demands for supplementation; guidance regarding resolutions**

(1) Where the minority pursuant to section 122 (2) has demanded that items of business be set out in the agenda, notice of said items of business is to be given by publication 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) applies accordingly; moreover, in the case of listed companies, section 121 (4a) applies accordingly. 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 provisions 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 listed company, to which the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry or the Supplementary Co-determination Act 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) sentence 3 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) sentence 1.

If it is intended that the general meeting adopt a resolution regarding an amendment of the by-laws, the remuneration system for the members of the management board, the remuneration of the supervisory board pursuant to section 113 (3), the remuneration report or as regards a contract that is to enter into force only upon having been consented to by the general meeting, then notice is to be given by publication in the case of an amendment of the by-laws, the wording of the amendment of the by-laws, in the case of a contract designated above, the substantial content of that contract, and in all other cases, the full content of the documents relating to the individual objects of the resolution. Sentence 3 applies also in the case of section 120a (5).

(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 as a rule is to adopt a resolution; for resolutions to be adopted pursuant to section 120a (1) sentence 1 and for the election of members of the supervisory board and auditors, such guidance is to be provided solely by the supervisory board. In the case of companies that are public-interest entities as defined in section 316a sentence 2 of the Commercial Code, the nomination made by the supervisory

board for the election of the statutory auditor is to be based on the recommendation of the audit committee. Sentence 1 does 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, 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 as auditors are to state their names, the profession exercised, and their 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 will 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 remain unaffected.

(4) No resolutions may be adopted regarding items of business set out in the agenda of which no notice duly and properly has been given by publication. 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 listed companies, 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 it is not intended to have a resolution 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 voting by proxy or voting by absentee ballot, unless these forms are not directly transmitted to the stockholders.

A demand made by stockholders within the meaning 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 of a company that has issued shares of stock that are not exclusively registered shares of stock is to notify the following of the invitation convening the general meeting:

1. the intermediaries serving as depositories of the shares of stock in the company,
2. the stockholders and intermediaries that had demanded that such notice be given them, and
3. the associations of stockholders that had demanded that such notice be given them or that had exercised voting rights at the last general meeting.

The date of the notification is not to be included in calculating the period. If the agenda is to be amended pursuant to section 122 (2), then notice of the amended agenda is to be given

where the general meeting is that of a listed company. 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 listed companies, information on the candidates' membership in other supervisory boards mandated by law as a rule 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 as a rule is to be attached.

(2) The management board of a company that has issued registered shares of stock is to provide the same notification as of the start of the twenty-first day prior to the general meeting to the parties entered in the company's share register as well as to the stockholders and intermediaries that had demanded that such notice be given to them, and the associations of stockholders that had demanded that such notice be given to them or that had exercised voting rights at the last general meeting.

(3) Each member of the supervisory board may demand that the management board send them 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) The requirements of Commission Implementing Regulation (EU) 2018/1212 apply as regards the content and format of a minimum amount of information to be provided in the notifications pursuant to subsections (1) sentence 1 and (2). Section 67a (2) sentence 1 applies accordingly to subsections (1) and (2). In the case of listed companies, the intermediaries serving as depositories for shares of stock in the company are under obligation, in accordance with sections 67a and 67b, to forward and transmit the information pursuant to subsections (1) and (2), unless the intermediary is aware that the stockholder is receiving such information from another source. The same applies to unlisted companies subject to the proviso that the provisions of Commission Implementing Regulation (EU) 2018/1212 are not to be applied.

## **Section 126**

### **Motions by stockholders**

(1) Motions by stockholders are to be made accessible to the beneficiaries set out in section 125 (1) to (3), subject to the pre-requisites listed therein, including the name of the stockholder, the reasons on which the motions are based, and a statement, if any has been made, by the management regarding its position, provided that the stockholder has sent, at the latest 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 is not to be included in calculating the period. In the case of listed companies, the counter-motion is to be made accessible via the company's website. Section 125 (3) applies accordingly.

(2) A counter-motion and the reasons on which it is based 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 key 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 substantially the same reasons, has been made accessible pursuant to section 125 in the past five years to at least two general meetings of the company, and if less than one twentieth of the capital stock represented voted for this counter-motion at the general meeting;

6. if the stockholder indicates that they will not participate in the general meeting and will not have a proxy represent them;

7. if, in the past two years at two general meetings, the stockholder has failed to propose or to have proposed a counter-motion regarding which they have 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 item of business to be resolved upon, the management board may combine the counter-motions and the reasons provided for them.

(4) In the case of the virtual general meeting, motions that are to be made accessible in accordance with subsections (1) to (3) are considered as having been proposed at the time at which they are made accessible. The company is to enable the voting right to be exercised regarding such motions as soon as the stockholders are able to provide proof that the pre-requisites for exercising the voting right as stipulated by the law or as specified in the by-laws have been met. If the stockholder who has proposed the motion is not properly legitimised and, insofar as registration is required, has not duly registered for the general meeting, the motion need not be addressed at the general meeting.

### **Section 127**

#### **Nominations by stockholders**

Section 126 applies accordingly to nominations by stockholders of candidates for the supervisory board or as statutory auditors. No reasons need be provided 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) sentence 4 and section 125 (1) sentence 5. The management board is to supplement the nomination by a stockholder of candidates for the supervisory board of listed companies, to which the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry or the Supplementary Co-determination Act 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) sentence 3 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) sentence 1.

### **Section 127a**

#### **Stockholders' forum**

(1) Stockholders or associations of stockholders may call on other stockholders in the stockholder forum of the Federal Gazette 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, the statement of its position published on its website concerning the call.

(5) The Federal Ministry of Justice and Consumer Protection has the authority to stipulate, by a statutory instrument, the external design of the stockholders' forum and further details, particularly as regards the call, the indication, the fees, time limits for erasure, claim to erasure, cases of abuse, and inspection.

## **Section 128 (repealed)**

### **Subdivision 3**

#### **Minutes of the deliberations. Right to seek information**

## **Section 129**

### **Rules of procedure, list of participants, proof of votes having been counted**

(1) The general meeting may adopt rules of procedure, with a majority comprising, at a minimum, three quarters of the capital stock 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 present in person or being represented by a proxy and of the stockholders' proxies, specifying their name and place of residence as well as, in the case of par-value shares, the amount and, in the case of multiple-vote shares, the number of voting rights allocated to each share; in the case of no-par-value shares, the number of shares represented by each proxy, while specifying their class of stock. In the case of the virtual general meeting, the stockholders participating in the meeting by electronic means or being represented thereat by a proxy by electronic means and the stockholders' proxies participating in the meeting by electronic means are to be included in the list defined in sentence 2.

(2) Where powers of attorney to exercise the voting right have been granted to an intermediary 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 is to 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 their own name, the voting right for shares not belonging to them 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 applies 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, in the case of the virtual general meeting to all stockholders and stockholders' proxies who are participating in the meeting by electronic means. Upon a corresponding demand being made, each stockholder is to be granted the right to inspect the list of attendees/participants for up to two years after the general meeting.

(5) The party casting the vote may demand, within one month of the day of the general meeting, that the company confirm whether the vote cast was counted and how it was counted. The company is to issue the confirmation in accordance with the requirements made in Article 7 (2) and Article 9 (5) sub-paragraph (2) of Commission Implementing Regulation (EU) 2018/1212. Insofar as the confirmation is issued to an intermediary, the

intermediary is to transmit such confirmation to the stockholder without undue delay. Section 67a (2) sentence 1 and (3) applies accordingly.

### **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 applies to any demand made by a minority pursuant to section 120 (1) sentence 2 and pursuant to section 137. In the case of unlisted companies, it suffices to have the minutes signed by the chairperson 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.

(1a) The notary is to observe the course of the general meeting while being present at the place at which the general meeting is being held.

(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 chairperson's establishment of the respective resolution adopted. In the case of listed companies, the establishment of the resolution adopted also comprises, for each such resolution,

1. the number of shares of stock for which valid votes were cast, whereby multiple-vote shares are to be stated separately, citing the number of votes allocated to them,
2. the portion of the registered capital stock that is constituted by the capital stock 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 sentence 2, the person chairing the meeting may limit the establishment of the resolution having been adopted in each case to the statement that the necessary majority was obtained, unless a stockholder demands a comprehensive establishment pursuant to sentence 2.

(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 is not 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) sentence 3, a copy of the minutes signed by the chairperson of the supervisory board, in each case with a copy of its annexes.

(6) Listed companies must publish on their website, within seven days of the general meeting, the results of the voting as established, including the information pursuant to subsection (2) sentence 2.

### **Section 130a** **Right to make statements and right to speak at virtual general meetings**

(1) In the case of the virtual general meeting, stockholders are entitled to submit statements prior to the meeting regarding the items of business set out in the agenda, doing so by way of electronic communication using the address provided for this purpose in the invitation convening the general meeting. This right may be restricted to stockholders who have duly registered for the general meeting. The scope of the statements reasonably may be restricted in the invitation convening the general meeting.

(2) Statements are to be submitted by no later than five days prior to the meeting.

(3) The statements submitted are to be made accessible to all stockholders by no later than four days prior to the meeting. The ability to access the statements may be restricted to stockholders duly registered for the meeting. In the case of listed companies, the statements are to be made accessible via the company's website; in the case governed by sentence 2,

accessibility may be effected via a third-party website. Section 126 (2) sentence 1 nos. 1, 3 and 6 applies accordingly.

(4) Section 121 (7) applies to the calculation of the time periods set out in subsections (2) and (3) sentence 1.

(5) The stockholders participating in the meeting by electronic means are to be granted a right to speak at the meeting by means of video communication technology. The form of video communication offered by the company is to be used for the spoken contributions. The spoken contribution may consist of motions and nominations under section 118a (1) sentence 2 no. 3, the demand for information under section 131 (1), follow-up questions under section 131 (1d) as well as of further questions under section 131 (1e). Section 131 (2) sentence 2 applies accordingly.

(6) The company may reserve the right, in the invitation convening the general meeting, to test the functionality of the video communication between the stockholder and the company at the meeting and prior to the spoken contribution and to refuse to admit the spoken contribution if said functionality is not assured.

### **Section 131**

#### **Stockholder's right to seek information**

(1) The management board is to inform each stockholder at the general meeting, upon a corresponding demand 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 duty to provide information also extends 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) sentence 3, section 276 or section 288 of the Commercial Code, each stockholder may request that, at the general meeting deliberating on the annual financial statements, the annual financial statements be made available to them in the form that they would be in without these eased requirements. The duty of the management board of a parent undertaking to provide information (section 290 (1) and (2) of the Commercial Code) at the general meeting to which the consolidated financial statements and the consolidated management report are submitted also extends to cover the situation of the group and the enterprises included in the consolidated financial statements.

(1a) In the case of the virtual general meeting, subsection (1) sentence 1 is to be applied subject to the proviso that the management board may stipulate that questions by the stockholders are to be submitted by way of electronic communication no later than three days prior to the general meeting. Section 121 (7) applies to the calculation of the time limit. Questions not submitted in due time need not be considered.

(1b) The scope in which questions may be submitted may reasonably be restricted in the invitation convening the general meeting. The right to submit questions may be restricted to stockholders duly registered for the meeting.

(1c) The company is to make accessible to all stockholders, prior to the general meeting, the questions duly submitted and is to provide answers to such questions no later than by one day prior to the meeting; section 121 (7) applies to the calculation of the time limit. In the case of listed companies, the questions are to be made accessible and the answers are to be provided via the company's website. Section 126 (2) sentence 1 no. 1, 3 and 6 applies accordingly to the accessibility of the questions. If the answers have been continuously accessible one day prior to commencement of the general meeting and while the meeting is ongoing, the management board may refuse, at the meeting, to provide information regarding those questions.

(1d) Each stockholder participating in the general meeting by electronic means is to be granted a right, by way of electronic communication, to ask follow-up questions regarding all of the answers provided by the management board before the meeting and while it is ongoing. Subsection (2) sentence 2 applies also to the right to ask follow-up questions.

(1e) Moreover, each stockholder participating in the general meeting by electronic means is to be granted the right, by way of electronic communication, to ask questions regarding facts and circumstances that have come about only after the time limit defined in subsection (1a) sentence 1 has expired. Subsection 2 sentence 2 applies also to this right to ask questions.

(1f) The person chairing the meeting may establish that the right to seek information under subsection (1), the right to ask follow-up questions under subsection (1d) and the right to ask questions under subsection (1e) may be exercised at the general meeting exclusively by means of video communication technology.

(2) The information provided is to comply with 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 them to make further determinations concerning the details in this regard.

(3) The management board may refuse to provide information:

1. inasmuch as the provision of the information, when assessed 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 financial statements;
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 within the meaning of section 264 (2) of the Commercial Code; this does not apply if the general meeting approves and establishes the annual financial statements;
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, a financial services provider or a securities institution, no information need be provided regarding the accounting and valuation methods applied, nor regarding the netting performed in the annual financial statements, management report, consolidated financial statements or consolidated management report;
7. inasmuch as such information is continuously accessible on the company's website for a minimum of seven 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 their capacity as such, and this was done outside of the general meeting, it is to be provided to every other stockholder making a corresponding demand 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. In the case of the virtual general meeting, it is to be warranted that each stockholder participating in the general meeting by electronic means is able to transmit their demand under sentence 1 by way of electronic communication. The management board may not refuse to provide the information in accordance with subsection (3) sentence 1 nos. 1 to 4. Sentences 1 to 3 do not apply if a subsidiary undertaking (section 290 (1) and (2) of the Commercial Code), a joint venture (section 310 (1) of the Commercial Code) or an

associated enterprise (section 311 (1) of the Commercial Code) issues the information to a parent undertaking (section 290 (1) and (2) of the Commercial Code) for purposes of including the company in the consolidated financial statements of the parent undertaking and the information is required for this purpose.

(5) Where a stockholder is denied the information sought, the stockholder may demand that their question and the grounds for refusing to provide the information be included in the minutes of the meeting. In the case of the virtual general meeting, it is to be warranted that each stockholder participating in the meeting by electronic means is able to transmit their demand under sentence 1 by way of electronic communication.

### **Section 132**

#### **Court decision on the right to seek information**

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

(2) Any stockholder is entitled to file such a petition who has not been provided with the information demanded and, where a resolution has been adopted regarding the item of business set out in the agenda to which the information pertained, any stockholder likewise will be entitled to file such a petition who was present in person at the general meeting and who raised an objection at the general meeting and had it recorded in the minutes. In the case of the virtual general meeting, the following stockholders participating in the meeting by electronic means are entitled to file a petition:

1. any stockholder to whom the information demanded has not been provided,
2. any stockholder who has lodged an objection by way of electronic communication, if a resolution has been adopted regarding the item of business set out in the agenda to which the information pertained.

The petition is to be filed within two weeks after the general meeting at which it was refused to provide the information sought.

(3) Section 99 (1) and (3) sentences 1 and 2 as well as sentences 4 to 6 and subsection (5) sentences 1 and 3 apply accordingly. A complaint can be lodged only if the regional court 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 is to be applied accordingly.

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

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

### **Subdivision 4**

#### **Voting right**

### **Section 133**

#### **Principle of the simple majority of the votes cast**

(1) The resolutions adopted by the general meeting 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 an unlisted company 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 are to 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 are to 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 are not to be taken into account in calculating a majority ratio of capital required by law or the by-laws.

(2) The voting right commences 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) sentence 3, this does not conflict with the commencement of the voting right; this does 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 grants one vote; in the case of higher contributions, the proportion of votes is 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 is governed by the amount of the contributions made; in this context, making the minimum contribution grants one vote. Fractions of votes are to 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 listed companies. At a minimum, the listed company 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 years; section 135 (5) applies accordingly.

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

#### **Section 134a**

##### **Definitions; scope of application**

(1) As defined in sections 134b to 135,

1. an institutional investor is:
  - a) an undertaking authorised to carry on life insurance business within the meaning of section 8 (1) read in conjunction with Annex 1 no. 19 to 24 of the Insurance Supervisory Act,
  - b) an undertaking authorised to carry on reinsurance business within the meaning of section 8 (1) and (4) of the Insurance Supervisory Act, insofar as these activities relate to obligations under life insurance,
  - c) an institution for occupational retirement provision pursuant to sections 232 to 244d of the Insurance Supervisory Act;
2. an asset manager is:

- a) a financial services institution authorised to provide portfolio management services within the meaning of section 1 (1a) sentence 2 no. 3 of the Banking Act,
  - b) a securities institution authorised to provide portfolio management services within the meaning of section 2 (2) no. 9 of the Act on the Supervision of Securities Institutions (*Wertpapierinstitutsgesetz* – WpIG)
  - c) a capital management company authorised in accordance with section 20 (1) of the Investment Code;
3. a proxy adviser is:  
an undertaking analysing disclosures and other information provided by listed companies, on a commercial basis and for monetary consideration, in order to inform investors by its research, consultancy services or voting recommendations for purposes of their exercising their voting rights.

(2) For institutional investors, asset managers and proxy advisers, sections 134b to 135 apply only insofar as they are subject to the following provisions of Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (OJ L 184 of 14 July 2007, p. 17), last amended by Directive (EU) 2017/828 (OJ L 132 of 20 May 2017, p. 1):

- 1. for institutional investors: Article 1 (2) (a) and (6) (a),
- 2. for asset managers: Article 1 (2) (a) and (6) (b), and
- 3. for proxy advisers: Article 1 (2) (b) and (6) (c) as well as Article 3j (4).

#### **Section 134b**

##### **Engagement policy, engagement report, voting behaviour**

(1) Institutional investors and asset managers are to disclose a policy in which they describe their engagement in the investee companies (engagement policy), and in which the following items are addressed in particular:

- 1. how shareholder rights are exercised, in particular in the context of their investment strategy,
- 2. how investee companies are monitored on relevant matters,
- 3. how opinions are shared with the companies' organs and the stakeholders of the companies,
- 4. how they cooperate with other stockholders, as well as
- 5. how conflicts of interest are managed.

(2) Institutional investors and asset managers are to publicly disclose, on an annual basis, how their engagement policy has been implemented. The report is to include a general description of voting behaviour, an explanation of the most significant votes and the use of the services of proxy advisors.

(3) Institutional investors and asset managers are to publicly disclose their voting behaviour, unless the vote cast was insignificant due to the subject matter of the vote or the size of the holding in the company.

(4) Where institutional investors and asset managers fail to meet one or several of the requirements set out in subsections (1) to (3), or fail to do so fully, they are to explain the reasons therefor.

(5) The information required under subsections (1) to (4) is to be made publicly available for a minimum of three years on the website of the institutional investors and the asset managers and is to be updated, at minimum, on an annual basis. In derogation therefrom,

institutional investors may refer to the website of the asset managers or to other websites that are free of charge and publicly accessible if the information required under subsections (1) to (4) is available there.

#### **Section 134c**

##### **Duties of institutional investors and asset managers to make disclosures**

(1) Institutional investors are to disclose how the main elements of their investment strategy are consistent with the profile and duration of their liabilities and how they contribute to the medium to long-term performance of their assets.

(2) Where an asset manager invests on behalf of an institutional investor, the institutional investor is to disclose such information regarding its agreement with the asset manager that explains how the asset manager aligns its investment strategy and investment decisions with the profile and duration of the liabilities of the institutional investor. The disclosure particularly comprises information on

1. how the medium to long-term performance of the company is taken into account in the investment decision,
2. the engagement with the company, particularly by exercising shareholder rights, including securities lending,
3. the method applied by the asset manager, how the asset manager's performance is evaluated and how the asset manager is remunerated,
4. how the agreed portfolio turnover and the desired portfolio turnover costs are monitored by the institutional investor,
5. the term of the agreement with the asset manager.

Where no agreement was made regarding individual of the items of information, the institutional investor is to explain why this was not done.

(3) Institutional investors are to make publicly available the information stipulated under subsections (1) and (2) either in the Federal Gazette or on their website for a period of no fewer than three years and are to update it, at a minimum, on an annual basis. The disclosure may also be effected by the asset manager on its website or on some other website that is free of charge and publicly accessible; in this case, it suffices to provide the website from which the information can be obtained.

(4) Asset managers who have concluded an agreement as defined in subsection (2) are to report on annual basis to the institutional investors how their investment strategy and the implementation thereof are aligned with said agreement and how they contribute to the medium to long-term performance of the assets. A publication of the report in keeping with subsection (3) sentence 2 may take the stead of the report to the institutional investor. The report includes information on

1. the key material medium to long-term risks,
2. the composition of the portfolio, the portfolio turnover and the portfolio turnover costs,
3. how the medium to long-term performance of the company was taken into account in the investment decision,
4. the use proxy advisers,
5. the policy on securities lending and how conflicts of interest are dealt with in the context of engagement activities in the companies, in particular by exercising shareholder rights.

## **Section 134d**

### **Duties of proxy advisers to make disclosures**

(1) Proxy advisers are to declare annually that they have applied, and continue to apply, the requirements of a specified code of conduct, or they are to declare from which of the requirements of the code of conduct they have departed or are departing and which measures they have adopted instead. Where proxy advisers do not apply a code of conduct, they are to state the reasons therefor.

(2) Proxy advisers are to annually disclose information on

1. the key features of the methodologies and models they apply as well as the main information sources they use,
2. the procedures put in place to ensure quality and to prevent and manage potential conflicts of interest,
3. the qualifications of the staff involved in providing proxy advice,
4. how national market conditions as well as legal, regulatory and company-specific conditions are taken into account,
5. the key features of the voting policies they apply for the individual markets,
6. how and how often the dialogue is sought with the affected companies and their stakeholders.

(3) The information stipulated under subsections (1) and (2) is to be made publicly accessible, separately or together, on the website of the proxy advisers for a period of no fewer than three years and is to be updated on an annual basis.

(4) Proxy advisers are to inform their clients without undue delay of any conflicts of interest as well as regarding the corrective measures taken in their regard.

## **Section 135**

### **Exercise of the voting right by intermediaries and commercial proxy services**

(1) An intermediary 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 intermediary, 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 intermediary 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 intermediary offers to exercise the voting right pursuant to sentence 4 no. 1 or no. 2, then it is to concurrently tender the service, within the scope of what reasonably can 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. The intermediary is to indicate to the stockholder on an annual basis 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 sentence 4, and the award of a contract pursuant to sentence 5, including any changes

thereto, are to be facilitated for the stockholder by providing them with a form sheet or an onscreen form.

(2) An intermediary intending to exercise the voting right on the basis of a power of attorney pursuant to subsection (1) sentence 4 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 intermediary 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 duties as well as the due and proper exercise of the voting right and its documentation. In providing its guidance, the intermediary 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 intermediary 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 intermediary's supervisory board, the intermediary is to indicate this fact. The same applies if the intermediary holds an ownership interest in the company that section 33 of the Securities Trading Act 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 years.

(3) Where the stockholder has not issued any instructions to the intermediary on how to exercise the voting right, then the intermediary is to exercise the voting right, in the case governed by subsection (1) sentence 4 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, the stockholder would endorse the voting rights being exercised in derogation from the intermediary's guidance. Where the intermediary has deviated, in exercising the voting right, from instructions issued by the stockholder or, if the stockholder has not issued any instructions, where the intermediary has deviated 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 intermediary 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 applies during the general meeting of a company in which the intermediary holds more than 20 per cent, directly or indirectly, of the capital stock; in computing the level of a holding, indirect holdings within the meaning of section 35 (3) to (6) of the Securities Trading Act are not to be taken into account.

(4) An intermediary intending to exercise at a general meeting the voting right based on a power of attorney pursuant to subsection (1) sentence 4 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) sentence 3 as well as subsection (3) sentences 1 to 3 apply accordingly.

(5) Where the power of attorney so permits, the intermediary may grant sub-power of attorney to persons who are not its employees. Unless specified otherwise by the power of attorney, the intermediary exercises the voting right on behalf of the party entitled to such voting right. Where the company has permitted absentee balloting, the intermediary 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 suffices, in the case of listed companies, 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) An intermediary 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 applied accordingly to the authorisation.

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

(8) Subsections (1) to (7) apply accordingly to associations of stockholders, to proxy advisers and to persons who tender, on a commercial basis, the service to stockholders of exercising their voting right at the general meeting; this does 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 obligation of the intermediary, the proxy advisers as well as of the persons who tender, on a commercial basis, the service to stockholders of exercising their voting right at the general meeting, 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) (repealed)

### **Section 135a** **Multiple-vote shares**

(1) The by-laws may provide for registered shares of stock having multiple voting rights. At a maximum, the multiple voting rights may amount to 10 times the voting right defined in section 134 (1) sentence 1. A resolution adopted by the general meeting to allot multiple voting rights to shares of stock or to issue multiple-vote shares requires the consent of all stockholders affected.

(2) In the case of listed companies, and also in the case of companies whose shares of stock are included for trading on the regulated unofficial market in accordance with section 48 of the Stock Exchange Act (*Börsengesetz*), the multiple voting rights will expire in the event of the share of stock being transferred. They will expire no later than 10 years after the company has been listed on the stock exchange or after the shares of stock are included for trading on the regulated unofficial market unless the by-laws stipulate a shorter period of time. The time limit provided for in sentence 2 may be extended in the by-laws by a certain time limit of up to 10 years. The resolution on the extension may be adopted at the earliest one year prior to expiry of the time limit defined in sentence 2 and requires a majority comprising, at a minimum, three quarters of the capital stock represented at the time such resolution is adopted. The by-laws may stipulate a greater majority ratio of capital. Where several classes of stock exist of shares with voting rights, the resolution adopted by the general meeting requires the consent of the stockholders of each class of stock in order to enter into force. The stockholders of each class of stock are to adopt a separate resolution regarding such consent. Sentences 4 and 5 apply to such separate resolution.

(3) The by-laws may impose further requirements.

(4) In the case of resolutions on matters defined in section 119 (1) no. 5 and in section 142 (1), multiple-vote shares entitle to one vote only.

### **Section 136** **Suspension of the voting right**

(1) No-one may exercise the voting right for themselves or for some other party if the resolution to be adopted concerns the question of whether their actions are to be approved and they are to be granted discharge or whether they are to be released from a liability or whether it is intended to have the company assert a claim against them. The voting right for shares of stock not entitling the stockholder to exercise the voting right pursuant to sentence 1 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, the stockholder's motion is to 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 capital stock represented.

#### **Subdivision 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 apply accordingly to convening the separate meeting and the participation in same as well as to the right to seek information, while the provisions governing resolutions adopted by the general meeting apply accordingly to separate resolutions. If stockholders who are entitled to participate in the vote on the separate resolution demand that a separate meeting be convened or that notice of business that is subject to a separate vote be given by publication, then it will 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.

#### **Subdivision 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 capital stock.

##### **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 they are 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 will 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 will 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, will not, in and of itself, 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 requires the consent of all stockholders affected in order to enter into force.
- (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, likewise requires 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 to 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 requires 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, in its entirety or in part, the pre-emptive right of the holders of preferential stock for such newly issued shares of preferential stock, section 186 (3) to (5) applies accordingly to the separate resolution.
- (4) Where the preferential right to profits has been cancelled, the shares of stock grant voting rights.

#### **Subdivision 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 the 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 themselves nor on behalf of some other party, if the audit is intended 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 that are 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 in accordance with sentence 2 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 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 capital stock 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 also applies to actions and events in the past, provided they are not more than 10 years in the past, if the company was listed 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 a minimum of three 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 applies accordingly to an agreement concluded in order to avoid such a special audit.
- (3) Subsections (1) and (2) do 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 capital stock 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 is 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 the special auditor being biased or if there are concerns regarding their reliability. The petition is to be filed within two weeks of the date of the general meeting.

(5) Besides hearing the parties involved, the court also is to hear the supervisory board and, in the case governed by subsection (4), the special auditor appointed by the general meeting. A complaint may be lodged against the decision taken. The regional court in the judicial district of which the company has its seat hands 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 establishes the expenditures and the remuneration. A complaint may be lodged against the decision taken; filing a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement can be pursued in accordance with the Code of Civil Procedure.

(7) Where the Federal Republic of Germany is the home country (section 2 (13) of the Securities Trading Act) for the company as issuer of securities within the meaning of section 2 (1) of the Securities Trading Act that are admitted to official listing, to the exception of shares and shares of stock in open investment funds within the meaning of section 1 (4) of the Investment Code, the management board, in the case governed by subsection (1) sentence 1 and, in the case governed by subsection (2) sentence 1, the court is to inform the Federal Financial Supervisory Authority (*Bundesanstalt für die Finanzdienstleistungsaufsicht* – BaFin) of the appointment of the special auditor and of the special auditor's report on the audit; 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) will be governed by the provisions of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction.

## **Section 143**

### **Selection of special auditors**

(1) Solely the following as a rule are to 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 a statutory auditor pursuant to section 319 (2) and (3), section 319b of the Commercial Code or who ought to have been prohibited from being a statutory auditor 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 a statutory auditor pursuant to section 319 (2) and (4), section 319b of the Commercial Code or that ought to have been prohibited from being a statutory auditor during the time in which the action was taken and event occurred that are to be audited. Furthermore, no-one may be a special auditor of a company that is a public-interest entity as defined in section 316a sentence 2 of the Commercial Code who provides non-audit services in accordance with Article 5 (1) 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 has provided non-audit

services during the period in which the action was taken or the event occurred that is to be audited.

(3) (repealed)

#### **Section 144**

##### **Liability and responsibilities of the special auditor**

Section 323 of the Commercial Code regarding the liability and responsibilities of the statutory auditor applies accordingly.

#### **Section 145**

##### **Rights of the special auditors. Report on the audit**

(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 in relation to a group member company as well as in relation to 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 in the judicial district of which the company has its seat hands down the decision regarding the petition pursuant to subsection (4). Section 142 (5) sentence 2 and (8) applies accordingly.

(6) The special auditors are to submit a written report on the results of their audit. The report on the audit must also address any facts that are suited, upon becoming known, to cause 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 report on the audit. The management board is to submit the report to the supervisory board and is to give notice of it 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 is to 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 under 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 as a rule is to be asserted within six 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 capital stock or

to a stake in same of 1 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 sentence 1 of this provision, if the court holds that this is suitable for the proper assertion of such claims. Where the court finds for the petitioner, the company will bear the court costs. A complaint may 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 establishes the expenditures and the remuneration. A complaint may be lodged against the decision taken; filing a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement can be pursued in accordance with the Code of Civil Procedure.

(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 capital stock 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) sentence 1. The court will 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 duties or the alleged damage;
2. the stockholders provide proof that they have called on the company to itself bring an action, setting a reasonable time limit, but that this was to no avail;
3. facts exist justifying 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 conflict with the assertion of the claim to compensation.

(2) That regional court in the judicial district of which the company has its seat decides 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 will take the decision instead of the civil division. Where this serves to ensure uniform adjudication, the *Land* government may transfer the decision, by a statutory instrument 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 suspends 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 binding or until the time limit set for bringing the action has expired. Prior to its decision, the court is to give the respondent the opportunity to state its position. The immediate complaint can 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 is entitled to itself assert the claim to compensation before the courts at any point in time; 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 will become inadmissible. The company is 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 sentences 1

and 2, the current petitioners or plaintiffs will be summoned to 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 months of the decision having become final and binding and provided the stockholders have once again called on the company to itself bring an action, setting a reasonable time limit, but to no avail. The action is to be brought against the persons named in section 147 (1) sentence 1, demanding that performance be provided to the company. An intervention by the stockholders as joint parties no longer will 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 takes effect, even in those cases in which it dismisses the complaint, for and against the company and the remaining stockholders. This applies accordingly to any compromise of which notice is to be given by publication in accordance with section 149; however, it will 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, the petitioner is to bear the costs of the proceedings for leave to bring an action. If 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, it is to 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) sentences 3 and 4, 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 will be reimbursed overall only for the costs of one 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 binding, the listed company 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 duties to enter into effect, the notice must be full and complete. The effectiveness of procedural measures serving to bring the proceedings to an end remains unaffected. Any performance made in spite of the ineffectiveness may be reclaimed.

(3) The above provisions apply accordingly to agreements concluded in order to avoid court proceedings.

### **Part 5**

#### **Accounting. Appropriation of profits**

**Division 1**  
**Annual financial statements and management report, declaration of compliance and remuneration report**

**Section 150**  
**Legal reserve. Capital reserve**

(1) A legal reserve is to be formed on the balance sheet of the annual financial statements to be drawn up pursuant to sections 242 and 264 of the Commercial Code.

(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 legal reserve, until the legal reserve and the capital reserve pursuant to section 272 (2) nos. 1 to 3 of the Commercial Code, in the aggregate, are at least equivalent to one tenth of the capital stock or whichever greater part of the capital stock is specified in the by-laws.

(3) Where the legal reserve and the capital reserve pursuant to section 272 (2) nos. 1 to 3 of the Commercial Code do not exceed, in the aggregate, one tenth of the capital stock or whichever greater part of the capital stock 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 retained earnings;
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 retained earnings.

(4) Where the legal reserve and the capital reserve pursuant to section 272 (2) nos. 1 to 3 of the Commercial Code exceed, in the aggregate, one tenth of the capital stock or whichever greater part of the capital stock 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 is not permissible if, concurrently, retained earnings are reversed for purposes of distributing the profits.

**Section 150a**  
**(repealed)**

**Section 151**  
**(repealed)**

**Section 152**  
**Provisions regarding the balance sheet**

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

(2) Regarding the item "capital reserve," the following is 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 earnings, 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) are not to be applied to stock corporations that are micro share capital companies within the meaning of section 267a of the Commercial Code where they avail themselves of the eased requirements pursuant to section 266 subsection (1) sentence 4 of the Commercial Code. Small stock corporations within the meaning of section 267 (1) of the Commercial Code 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**

##### **Provisions governing the profit and loss account**

(1) The following items are to be additionally reported in the profit and loss account 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 reserve
3. withdrawals from retained earnings
  - a) from the legal reserve
  - 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 stipulated by the by-laws
  - d) from other retained earnings
4. allocations to retained earnings
  - a) to the legal reserve
  - 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 stipulated by the by-laws
  - d) to other retained earnings
5. net income/net loss.

The information set out in sentence 1 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, is to 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) are not to be applied to stock corporations that are micro share capital companies within the meaning of section 267a of the Commercial Code where they avail themselves of the eased requirements pursuant to section 275 (5) of the Commercial Code.

**Section 159  
(repealed)**

**Section 160  
Provisions 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 to 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 capital stock allocated to same are to be stated as well as the portion of the capital stock 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 likewise are 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 capital stock allocated to same, the portion of the capital stock 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 to 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 as per section 20 (1) or (4) of the present Act or pursuant to section 33 (1) or (2) of the Securities Trading Act; 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 is to 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 is not to be applied to stock corporations that are small share capital companies within the meaning of section 267 (1) of the Commercial Code.

Subsection (1) no. 2 is to be applied to these stock corporations subject to the proviso that the corporation needs to 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 stipulated by the Corporate Governance Code**

(1) The management board and the supervisory board of a listed company are to 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 in the official section of the Federal Gazette have been and are being complied with or which of the Code's recommendations have not been applied or are not being applied, with the reasons therefor being provided. The same applies to the management board and the supervisory board of a company that has exclusively issued other securities than shares of stock for trading on an organised market as defined in section 2 (11) of the Securities Trading Act and the issued shares of stock of which are traded, on the company's own initiative, only via a multilateral trading system as defined in section 2 (8) sentence 1 no. 8 of the Securities Trading Act.

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

### **Section 162**

#### **Remuneration report**

(1) The management board and supervisory board of the listed company draw up, on an annual basis, a clear and understandable report on the remuneration granted and owed in the previous financial year to each of the current or former members of the management board and of the supervisory board by the company and by enterprises of the same group (section 290 of the Commercial Code). The remuneration report is to include the following particulars, providing the names of the persons referred to in sentence 1, insofar as the corresponding arrangements in fact have been made:

1. all fixed and variable remuneration components, their relative share of the remuneration in each case as well as an explanation of how they correspond to the relevant remuneration system, how the remuneration promotes the company's long-term development and how the performance criteria were applied;
2. a presentation allowing comparisons to be made of the annual change in remuneration, of the performance of the company, and of the average remuneration on a full-time equivalent basis of employees of the company over the five most recent financial years, including an explanation of which group of employees was involved;
3. the number of shares and share options granted or offered, and the main conditions for the exercise of the rights including the exercise price and date and any change thereof;
4. information on whether use was made of the possibility to reclaim variable remuneration components and if so, how this was done;
5. information on any deviations from the remuneration system for the management board, including an explanation of why the deviations became necessary, and the indication of the specific elements of the remuneration system derogated from;

6. an explanation of how the resolution adopted by the general meeting pursuant to section 120a (4) or the discussion pursuant to section 120a (5) were taken into account;

7. an explanation of how the maximum remuneration set for the members of the management board was adhered to.

(2) As regards the remuneration for each individual member of the management board, the remuneration report furthermore is to provide information regarding such benefits that

1. were offered to a member of the management board by a third party with a view to that member's activities as a member of the management board or that were granted in the course of the financial year,

2. were offered to a member of the management board for the event of the premature termination of their activities, along with any modifications of this offer agreed in the course of the previous financial year,

3. were offered to a member of the management board for the event of the regular termination of their activities, along with their net present value and the amount the company expended or allocated to reserves for this purpose in the course of the previous financial year, along with any modifications of this offer agreed in the course of the previous financial year,

4. were offered to a former member of the management board whose activities have terminated in the course of the previous financial year in connection with this termination and that were granted in the course of the previous financial year.

(3) The remuneration report is to be audited by the statutory auditor. The statutory auditor is to audit whether the information required under subsections (1) and (2) was provided. The statutory auditor is to draw up an opinion on the remuneration report. This is to be attached to the remuneration report. Section 323 of the Commercial Code applies accordingly.

(4) The remuneration report and the opinion provided for by subsection (3) sentence 3 are to be made publicly accessible, free of charge, by the company on its website for 10 years following the resolution adopted according to section 120a (4) sentence 1 or following the submission according to section 120a (5).

(5) The remuneration report may not include any data that refer to the family situation of individual members of the management board or of the supervisory board. No personal data of former members of the management board or of the supervisory board are to be published in any remuneration reports that are to be drawn up following the expiry of 10 years after the end of the financial year in which the member concerned terminated their activities. In all other cases, personal data are to be removed from the remuneration reports that are accessible via the website following expiry of the time limit stipulated in subsection (4).

(6) The remuneration report need not include any information that, when assessed applying prudent business judgment, is suited to cause a greater than insignificant disadvantage to the company. Where the company avails itself of the possibility available under sentence 1 and where the reasons for not including such information cease to exist following publication of the remuneration report, the information is to be included in the subsequent remuneration report.

## **Division 2**

### **Audit of the annual financial statements**

#### **Subdivision 1**

#### **Audit by statutory auditors**

**Sections 163 to 169  
(repealed)**

**Subdivision 2  
Audit by the supervisory board**

**Section 170  
Submission to the supervisory board**

(1) The management board is to submit the annual financial statements and the management report to the supervisory board without undue delay after they have been drawn up. Sentence 1 applies accordingly to standalone financial statements pursuant to section 325 (2a) of the Commercial Code as well as, in the case of parent undertakings (section 290 (1) and (2) of the Commercial Code), to the consolidated financial statements and the consolidated management report. If a separate non-financial report (section 289b of the Commercial Code), a separate consolidated non-financial report (section 315b of the Commercial Code), the report on income tax information (sections 342b, 342c, 342d (2) no. 2 of the Commercial Code) and the declaration in accordance with section 342d (2) no. 1 of the Commercial Code has been prepared, it is to be submitted pursuant to sentence 1 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 earnings | ... |
| 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 reports on the audit. The submissions and reports on the audit 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 financial statements, the management report and the proposal regarding the appropriation of the net income; in the case of parent undertakings (section 290 (1) and (2) of the Commercial Code), it also is to audit the consolidated financial statements and the consolidated management report. Where the annual financial statements or the consolidated financial statements are to be audited by a statutory auditor, said statutory 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 their audit, in particular on any findings they have made regarding key weaknesses of the internal control system and of the risk management system as concerns the accounting process. The statutory auditor informs on any circumstances giving rise to the concern that they might be biased and regarding any performance they have provided in addition to auditing the accounts. If a separate non-financial report (section 289b of the Commercial Code), a separate consolidated non-financial report (section 315b of the Commercial Code), the report on income tax information (sections 342b, 342c, 342d (2) no. 2 of the Commercial Code) and the declaration in accordance with section 342d (2) no. 1 of the Commercial Code 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 also is to 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 listed companies, 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 financial statements are to be audited by a statutory auditor, the supervisory board is to furthermore state its position regarding the result of the audit of the annual financial statements performed by the statutory auditor. 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 financial statements drawn up by the management board. In the case of parent undertakings (section 290 (1) and (2) of the Commercial Code), sentences 3 and 4 apply accordingly to the consolidated financial statements.

(3) The supervisory board is to forward its report within one 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 time limit, the management board is to set a time limit for the supervisory board, and is to do so without undue delay, such period amounting to no more than one month. If the report is not forwarded to the management board prior to expiry of this further time limit, then the annual financial statements will be considered to not have been endorsed by the supervisory board; in the case of parent undertakings (section 290 (1) and (2) of the Commercial Code), the same applies regarding the consolidated financial statements.

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

### **Division 3**

#### **Approval and establishment of the annual financial statements. Appropriation of profits**

##### **Subdivision 1**

#### **Approval and establishment of the annual financial statements**

##### **Section 172**

#### **Approval and establishment by the management board and the supervisory board**

Where the supervisory board endorses the annual financial statements, 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 financial statements 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 financial statements to the general meeting, or where the supervisory board has not endorsed the annual financial statements, the general meeting approves and establishes the annual financial statements. Where the supervisory board of a parent undertaking (section 290 (1) and (2) of the Commercial Code) has not endorsed the consolidated financial statements, the general meeting decides on the endorsement.

(2) The provisions applicable to the manner in which annual financial statements are drawn up are to be applied to the approval and establishment of same. In approving and establishing the annual financial statements, the general meeting may only allocate those amounts to retained earnings that are to be so allocated pursuant to the law or the by-laws.

(3) Where the general meeting amends annual financial statements that have been audited by a statutory auditor by reason of the corresponding statutory duty, any resolutions

regarding the approval and establishment of the annual financial statements 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 will enter into force only once an unqualified audit report has been issued by reason of the new audit regarding the amendments. The amendments will become null and void if no unqualified audit report is issued regarding such amendments within two weeks of the resolution having been adopted.

## **Subdivision 2**

### **Appropriation of profits**

#### **Section 174**

(1) The general meeting adopts a resolution as regards the appropriation of the net income. In so doing, it is bound to the annual financial statements 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 earnings;
4. any profits carried forward;
5. the additional expenses resulting from the resolution adopted.

(3) The resolution does not result in an amendment of the annual financial statements as approved and established.

## **Subdivision 3**

### **Regular general meeting**

#### **Section 175**

##### **Convening the 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 financial statements as approved and established along with the management report and standalone financial statements pursuant to section 325 (2a) of the Commercial Code 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 undertaking (section 290 (1) and (2) of the Commercial Code), 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 months of the financial year.

(2) The annual financial statements, standalone financial statements pursuant to section 325 (2a) of the Commercial Code 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 undertaking (section 290 (1) and (2) of the Commercial Code), sentences 1 and 2 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 stipulated in sentences 1 and 3 are 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 financial statements or where it is to decide on the endorsement of the consolidated financial statements,

subsections (1) and (2) apply accordingly to the invitation convening the general meeting for the approval and establishment of the annual financial statements, or for the endorsement of the consolidated financial statements, and likewise apply accordingly to how the documents submitted are made accessible and the copies are issued. The deliberations as to the approval and establishment of the annual financial statements as a rule are to 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 financial statements as approved and established or, if the general meeting is to approve and establish the annual financial statements, upon the general meeting that is to approve and establish the annual financial statements having been convened, the management board and the supervisory board will be bound to the declarations regarding the annual financial statements made in the report of the supervisory board (sections 172, 173 (1)). In the case of a parent undertaking (section 290 (1) and (2) of the Commercial Code), sentence 1 applies accordingly to the declaration by the supervisory board regarding the endorsement of the consolidated financial statements.

#### **Section 176**

##### **Documents submitted. Presence of the statutory auditor**

(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 listed companies, an explanatory report on the information provided under the terms of sections 289a and 315a of the Commercial Code. At the outset of the meeting, the management board as a rule is to explain the documents it has submitted, while the chairperson of the supervisory board as a rule is to explain the report of the supervisory board. In this context, the management board as a rule also is to state its position regarding any shortfall for the year or any loss that substantially has impaired the annual earnings. Sentence 3 is not to be applied to credit institutions or securities institutions.

(2) Where the annual financial statements are to be audited by a statutory auditor, such auditor is to participate in the deliberations regarding the approval and establishment of the annual financial statements. Sentence 1 applies accordingly to the deliberations regarding the endorsement of consolidated financial statements. The statutory auditor is not under obligation to provide any information to a stockholder.

#### **Division 4**

##### **Notice by publication of the annual financial statements**

#### **Section 177**

**(repealed)**

#### **Section 178**

**(repealed)**

#### **Part 6**

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

#### **Division 1**

##### **Amendment of the by-laws**

#### **Section 179**

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

(1) Any amendment of the by-laws requires 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 requires a majority of at least three quarters of the capital stock represented at the time of its adoption. 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 it is intended to modify the ratio of several classes of stock to the detriment of a particular class of stock, the resolution adopted by the general meeting requires, in order to enter into force, 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) applies to such separate resolution.

#### **Section 179a**

##### **Obligation to transfer the assets of the company in their entirety**

(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 provisions of the Transformation Act, requires a resolution to be adopted by the general meeting in accordance with 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 obligations stipulated in sentences 1 and 2 cease to exist 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 registration of the company's dissolution.

#### **Section 180**

##### **Consent of the stockholders affected**

(1) Any resolution imposing incidental obligations on stockholders requires the consent of all stockholders affected in order to enter into force.

(2) The same applies 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 registration; it must bear a certificate from a notary that the amended stipulations 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 suffices, in registering the amendment, to refer to the records and documents filed with the court.

(3) The amendment will enter into force only once it has been entered in the Commercial Register kept at the seat of the company.

#### **Division 2**

##### **Measures serving the procurement of capital**

##### **Subdivision 1**

##### **Capital increase in return for contributions**

#### **Section 182**

##### **Pre-requisites**

(1) An increase of the capital stock in return for contributions may only be resolved upon by a majority amounting to at least three quarters of the capital stock 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 capital stock increases.

(2) Where several classes of stock exist of shares with voting rights, the resolution adopted by the general meeting requires the consent of the stockholders of each class of stock in order to enter into force. The stockholders of each class of stock are to adopt a separate resolution regarding such consent. Subsection (1) applies to such separate resolution.

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

(4) The capital stock as a rule is not to be increased for as long as outstanding contributions to the current capital stock 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 does not impede the increase of the capital stock.

### **Section 183**

#### **Capital increase based on contributions in kind; repayment of contributions**

(1) Where a contribution in kind (section 27 (1) and (2)) is made, the resolution adopted as to the increase of the capital stock 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 has been expressly published by due and proper notice along with the specifications pursuant to sentence 1.

(2) Section 27 (3) and (4) applies accordingly.

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

### **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 having been met, the audit of a contribution in kind (section 183 (3)) may be forgone. The following subsections apply if an audit is so forgone.

(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 stipulated by section 37a (1) and (2). The implementation of the capital stock increase may not be entered in the Commercial Register prior to expiry of four weeks since the notice has been published.

(3) Where the pre-requisites set out in section 33a (2) are given, the local court 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 per cent of the capital stock 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 capital stock increase (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 (4) and (5), sections 34 and 35 apply accordingly.

### **Section 184**

#### **Application for registration of the resolution**

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

(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) applies accordingly if an audit of the contribution in kind is forgone pursuant to section 183a (1).

### **Section 185**

#### **Subscription of the new shares of stock**

(1) The new shares of stock are 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 as a rule is to be issued in duplicate. It is to set out:

1. the date on which the resolution was adopted to increase the capital stock;
2. the issue price of the shares of stock, the amount of the specified payments, as well as the scope of incidental obligations;
3. the specifications made for the case of a capital increase based on contributions in kind and, if several classes of stock are issued, the amount of the capital stock allocated to each class of stock,
4. the point in time at which the subscription will become non-binding, unless the implementation of the capital stock 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 obligation of the subscriber besides the reservation made in subsection (1) no. 4, are null and void.

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

(4) Any restriction not set out in the certificate of subscription is not effective in relation to the company.

### **Section 186**

#### **Pre-emptive right to newly issued shares of stock**

(1) Each stockholder must be allotted, upon their having made the corresponding demand, a portion of the new shares of stock corresponding to their portion of the current capital stock. A time limit is to be determined of at least two weeks within which the pre-emptive right to newly issued shares of stock is to be exercised.

(2) The management board is to give notice, in the company's publications of record, of the issue price or the basis it has used to set said issue price and, concurrently, a subscription period pursuant to subsection (1) and is to transmit same pursuant to section 67a. Where only the basis on which the issue price has been set 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 days prior to expiry of the subscription period.

(3) The pre-emptive right to newly issued shares of stock may be precluded, in its entirety or in part, only in the resolution adopted as to the increase of the capital stock. 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 requires a majority comprising, at a minimum, three quarters of the capital stock represented at the time of its adoption. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. Precluding the pre-emptive right to newly issued shares of stock is permissible in particular in those cases in which the capital increase in return for contributions in cash does not exceed 20 per cent of the capital stock and the issue price is not significantly lower than the stock exchange price.

(4) A resolution by which the pre-emptive right to newly issued shares of stock is precluded in its entirety 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 to newly issued shares of stock; the report is to cite the reasons on which the proposed issue price is based.

(5) It is not to be regarded as a preclusion of the pre-emptive right to newly issued shares of stock if, according to the resolution, the acquisition of the new shares of stock by a credit institution, a securities institution or by an enterprise pursuing activities as defined in section 53 (1) sentence 1 or section 53b (1) sentence 1 or (7) of the Banking Act, is to be subject to the obligation to offer the new shares of stock to the stockholders for subscription. The management board is to give notice by publication of this offer for subscription together with the particulars stated in subsection (2) sentence 1, along with a final issue price pursuant to subsection (2) sentence 2; the same applies if it is intended that the acquisition of the new shares of stock by a different party than a credit institution, securities institution or enterprise within the meaning of sentence 1 is to be subject to the obligation to offer them to the stockholders for subscription.

### **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 to newly issued shares of stock.

(2) Any commitments given prior to the resolution as to the capital stock increase being adopted are not effective in relation to the company.

### **Section 188**

#### **Application for registration of the implementation and its entry in the register**

(1) The management board and the chairperson of the supervisory board are to file an application for entry in the Commercial Register of the implementation of the capital stock increase.

(2) Section 36 (2), section 36a and section 37 (1) apply accordingly to the application for registration. 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 registration:

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 specifications 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 registration of the implementation of the capital stock increase and the entry of this fact in the register may be tied to the application for registration of the resolution adopted as to the increase and its entry in the register.

(5) (repealed)

### **Section 189**

#### **Entry into force of the capital increase**

Upon the implementation of the capital stock increase having been entered in the Commercial Register, the capital stock is to be increased.

### **Section 190**

**(repealed)**

### **Section 191**

#### **Prohibited issuance of shares of stock and temporary share certificates**

Prior to the implementation of the capital stock increase being registered, 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 are liable as joint and several debtors to the holders for any damages resulting from the issuance.

### **Subdivision 2**

#### **Conditional capital increase**

### **Section 192**

#### **Pre-requisites**

(1) The general meeting may adopt a resolution to increase the capital stock that is to be implemented only insofar as a right of exchange or pre-emptive right to 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 as a rule is to 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 60 per cent, and the nominal amount of the capital resolved upon pursuant to

1. subsection (2) no. 1 may not exceed half,
2. subsection (2) no. 3 may not exceed 20 per cent

of the capital stock that is available at the time the resolution regarding the conditional capital increase is adopted. Section 182 (1) sentence 5 applies accordingly. Sentence 1 does 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 within the meaning of

section 1 (1b) of the Banking Act, sentence 1 furthermore does 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 provisions or requirements imposed on it for restructuring or liquidation purposes. Conditional capital to which sentence 3 or sentence 4 has application is not 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 provisions made below governing the pre-emptive right to newly issued shares of stock apply accordingly to the right of exchange.

### **Section 193**

#### **Requirements to be met by the resolution**

(1) The resolution as to the conditional capital increase requires a majority of at least three quarters of the capital stock represented at the time of its adoption. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. Section 182 (2) and section 187 (2) 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 suffices if the resolution, or the resolution under section 221 that is tied thereto, specifies the minimum issue price or the basis for setting 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 to 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 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 is not considered 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 (3) and (4) applies accordingly; in each case, the time at which the shares of a new issue are so issued takes the stead of the time at which the application for registration is filed pursuant to section 27 (3) sentence 3 and the time of the entry pursuant to section 27 (3) sentence 4.

(3) Subsections (1) and (2) do 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 (3) to (5), sections 34 and 35 apply accordingly.

(5) Section 183a applies accordingly.

## **Section 195**

### **Application for registration of the resolution**

- (1) The management board and the chairperson 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) sentence 3 applies accordingly.
- (2) The following documents are to be attached to the application for registration:
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) applies accordingly if an audit of the contribution in kind is forgone 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 will 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 will be null and void. The issuers are 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 to newly issued shares of stock is exercised by a written declaration. The declaration (declaration as to the exercise of the subscription right) as a rule is to 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 stipulated by section 193 (2), the specifications intended to be made in accordance with 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 has the same effect as does a declaration of subscription. Any declarations as to the exercise of the subscription rights will be null and void if their content does not correspond to what has been set out in subsection (1) or if they provide for any restrictions on the obligation 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 they have exercised the rights of a stockholder, or if they have fulfilled obligations 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 will not be effective in relation to 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 retained earnings, 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 does 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 capital stock will have been increased.

## **Section 201**

### **Application for registration of the issuance of shares of a new issue**

- (1) The management board is to 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 to newly issued shares of stock, such list having been signed by the management board, are to be attached to the application for registration. 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 registration, 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)

## **Subdivision 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 capital stock up to a specified nominal amount (authorised capital) by issuing new shares of stock in return for contributions. It is not possible to provide for the issuance of multiple-vote shares.
- (2) The authorisation may also be granted by an amendment of the by-laws; it will continue in force for a maximum period of five years following entry in the register of the amendment of the by-laws. The resolution adopted by the general meeting requires a majority of at least three quarters of the capital stock represented at the time of its adoption. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. Section 182 (2) applies.
- (3) The nominal amount of the authorised capital may not exceed one half of the capital stock given at the time of the authorisation. The new shares of stock as a rule are to be issued solely with the consent of the supervisory board. Section 182 (1) sentence 5 applies accordingly.
- (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 apply accordingly to the issuance of the new shares of stock unless the provisions set out below lead to a different conclusion. The authorisation to issue new shares of stock set out in the by-laws takes the stead of the resolution adopted as to the increase of the capital stock.
- (2) The authorisation may provide that the management board is to decide on the preclusion of the pre-emptive right to newly issued shares of stock. Where an authorisation making this provision is granted by an amendment of the by-laws, section 186 (4) applies accordingly.
- (3) The new shares of stock as a rule are not to be issued for as long as outstanding contributions to the current capital stock 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 does not impede the issuance of the new shares of stock. The first application for registration of the implementation of the capital stock increase is to state which contributions have not yet been made to the current capital stock and why they cannot be obtained.
- (4) Subsection (3) sentences 1 and 4 does 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 decides 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 stipulations in this regard. The decision of the management board requires 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 to 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 financial statements certified by an unqualified audit report 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 retained earnings pursuant to section 58 (2). The provisions governing a capital increase in return for contributions in cash apply to the issuance of the new shares of stock, to the exception of section 188 (2). The annual financial statements as approved and established are to be attached, along with the audit report, to the application for registration of the implementation of the capital stock increase. Furthermore, the parties filing the application for registration are to also make the declaration stipulated by section 210 (1) sentence 2.

## **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 as a rule is to take the decision solely upon having obtained the consent of the supervisory board.
- (3) Section 27 (3) and (4) applies accordingly.

(4) Subsections (2) and (3) do 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 (3) to (5), sections 34 and 35 apply accordingly. Section 183a is to be applied accordingly. 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 (1) and (2).

(6) Inasmuch as no audit is performed of the contribution in kind, section 184 (1) sentence 3 and (2) also applies accordingly to the application for entry in the Commercial Register of the fact that the capital increase has been implemented (section 203 (1) sentence 1 and 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) applies accordingly if an audit of the contribution in kind is forgone 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 (2) and (3) as well as section 49 regarding the formation of the company apply accordingly. The management board takes the stead of the founders and the application for registration of the implementation of the capital stock increase and its entry in the register takes the stead of the application for registration of the company and its entry in the register.

#### **Subdivision 4**

##### **Capital increase using company funds**

#### **Section 207**

##### **Pre-requisites**

(1) The general meeting may resolve to increase the capital stock by converting the capital reserve and retained earnings to capital stock.

(2) Section 182 (1) and section 184 (1) apply accordingly to the resolution and to the application for registration of same. Companies with no-par-value shares may increase their capital stock 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 the capital reserve and retained earnings**

(1) The capital reserve and the retained earnings that it is intended to convert to capital stock must have been recognised as "capital reserve" or "retained earnings" in the most recent 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 retained earnings and the allocations made to same may be converted to capital stock in their full amount; the capital reserve and the legal reserve as well as the allocations to same may be converted to

capital stock only insofar as they are higher, in the aggregate, than one tenth of the capital stock thus far or whichever higher portion of same is specified in the by-laws.

(2) The capital reserve and the retained earnings 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 earnings 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 most recent annual balance sheet if the annual balance sheet has been audited and the approved annual balance sheet is certified by the unqualified audit report of the statutory auditor and if its cut-off date does not precede by more than eight months the date on which the application is filed for the resolution to be entered in the Commercial Register.

(2) Where the resolution is not based on the most recent annual balance sheet, the balance sheet must comply with sections 150, 152 and with sections 242 to 256a and sections 264 to 274a of the Commercial Code. At a maximum, the balance sheet cut-off date may precede by eight months the date on which the application is filed for the resolution to be entered in the Commercial Register.

(3) The balance sheet must be audited by a statutory auditor in order to establish whether it complies with sections 150, 152 and with sections 242 to 256a and sections 264 to 274a of the Commercial Code. It must be certified by an unqualified audit report.

(4) Unless the general meeting elects a different auditor, that auditor is considered elected who was elected by the general meeting to audit the most recent annual financial statements or appointed by the court. Unless the special aspects of the auditor's engagement lead to a different conclusion, section 318 (1) sentences 3 and 4, section 319 (1) to (4), section 319b (1), section 320 (1) and (2), section 321, section 322 (7) and section 323 of the Commercial Code are to be applied accordingly to the audit and, in the case of a company that is a public-interest entity as defined in section 316a sentence 2 of the Commercial Code, also Article 5 (1) of Regulation (EU) No. 537/2014.

(5) Unless the special aspects of the auditor's engagement lead to a different conclusion, section 341k of the Commercial Code is to be applied to the audit of the balance sheet prepared by insurance companies.

(6) In the case governed by subsections (2) to (5), section 175 (2) applies accordingly to making accessible the balance sheet and to the provision of copies.

## **Section 210**

### **Application for registration of the resolution and its entry in the register**

(1) The balance sheet on which the capital increase is based along with the audit report, and, in the case governed by section 209 (2) to (6), also the most recent annual balance sheet unless it has already been filed pursuant to section 325 (1) of the Commercial Code, are to be attached to the application for entry in the Commercial Register of the resolution. The parties filing the application for registration 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 registration, that would conflict with the capital increase had this been resolved upon on the date on which the application for registration 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 months the date on which the application is filed for the resolution to be entered in the register and if a declaration as stipulated in subsection (1) sentence 2 has been made.

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

(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 registered, the capital stock will have been increased.

(2) (repealed)

#### **Section 212**

##### **Beneficiaries of the capital increase**

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

#### **Section 213**

##### **Fractional shares of stock**

(1) Where the capital increase results in a portion of the current capital stock 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**

##### **Call made on the stockholders**

(1) Following the entry in the register of the resolution as to the increase of the capital stock 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 and is to be transmitted pursuant to section 67a. The notice is to state:

1. the amount by which the capital stock 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 year of notice of the call having been given by publication despite three reminders having been issued previously that warn of the consequences.

(2) After one year has lapsed since the notice of the call has been given by publication, 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 times at intervals of at least one month. The last such publication must be made before 18 months have lapsed since notice of the call was published.

(3) After one year has lapsed since the last notice by publication 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) sentences 2 to 6 applies accordingly.

(4) Subsections (1) to (3) apply accordingly 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 participate in the increase of the capital stock.
- (2) Shares of stock that have been paid in only in part participate in the increase of the capital stock in accordance with their proportion in the capital stock. 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 capital stock 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 capital stock increase, 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 are 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 capital stock was increased as calculated on the basis of the nominal amount of the capital stock. Where further payments are made, these rights will expand in proportion with such payments. In the case governed by section 271 (3), the amounts of the increase are considered 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 capital stock, 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 obligations of the stockholders.

## **Section 217**

### **Commencement of the participation in the profits**

- (1) Unless otherwise determined, new shares of stock participate in the profits of the entire financial year in which the increase of the capital stock was resolved upon.
- (2) It may be stipulated in the resolution adopted as to the increase of the capital stock that the new shares of stock already are to participate in the profits of the most recent financial year expired prior to the resolution as to the capital increase having been adopted. In such event, the increase of the capital stock is to be resolved upon prior to a resolution being adopted regarding the appropriation of the net income of the most recent financial year expired prior to the resolution. The resolution adopted as to the appropriation of the net income of the most recent financial year expired before said resolution as to the capital increase was adopted will enter into force only once the capital stock has been increased. If the resolution adopted as to the capital increase has not been entered in the Commercial Register within three months of the resolution having been adopted, the resolution adopted as to the increase of the capital stock and the resolution adopted as to the appropriation of the net income of the most recent financial year expired before said resolution as to the capital increase having been adopted will be null and void. The period is tolled for as long as an action for avoidance or an action for annulment is pending.

## **Section 218**

### **Contingent capital**

The contingent capital increases in the same ratio as the capital stock. If 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 capital stock 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 are considered acquisition costs of the shares of stock purchased prior to the increase of the capital stock 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 capital stock 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 capital stock. The accrual of shares of stock is not to be recognised on the balance sheet as an addition.

#### **Subdivision 5**

##### **Convertible bonds. Income bonds**

#### **Section 221**

(1) Bonds entailing a right of exchange or pre-emptive right to 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 requires a majority of at least three quarters of the capital stock represented at the time of its adoption. The by-laws may stipulate a different majority ratio of capital and may impose further requirements. Section 182 (2) applies.

(2) An authorisation of the management board to issue convertible bonds may be granted for a maximum period of five years. The management board and the chairperson of the supervisory board are to deposit with the Commercial Register the resolution adopted as to the issuance of the convertible bonds as well as a declaration regarding their issuance. Notice of the resolution and the declaration is to be given in the company's publications of record.

(3) Subsection (1) applies accordingly 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 apply accordingly.

#### **Division 3**

##### **Measures serving the reduction of capital**

#### **Subdivision 1**

##### **Ordinary capital reduction**

#### **Section 222**

##### **Pre-requisites**

(1) A reduction of the capital stock may be resolved upon only by a majority amounting to at least three quarters of the capital stock 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 requires the consent of the stockholders of each class of stock in order to enter into force. The stockholders of each class of stock are to adopt a separate resolution regarding such consent. Subsection (1) applies to such separate resolution.

(3) The resolution is to specify the purpose for which the reduction is being performed, namely whether it is intended to have parts of the capital stock repaid.

(4) In the case of companies with par-value shares, the reduction of the capital stock requires the nominal amount of the shares of stock to be reduced. Inasmuch as the portion of the reduced capital stock allocated to the individual share of stock would fall below the minimum amount pursuant to section 8 (2) sentence 1 or (3) sentence 3, the reduction is 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 registration of the resolution**

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

### **Section 224**

#### **Entry into force of the capital reduction**

Upon the resolution as to the reduction of the capital stock having been registered, the capital stock will 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 registered, provided they come forward for this purpose within six months of the notice, unless they are able to demand satisfaction of their claims. This right is to be indicated to the creditors in a notice by publication regarding the entry in the register. Those creditors are not 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 capital stock only once six 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 obligation to make contributions will not enter into force prior to the point in time specified, nor will 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 capital stock.

### **Section 226**

#### **Invalidation of shares of stock**

(1) Where it is intended to merge shares of stock by way of being exchanged, by stamping the share certificates or by some other procedure, in order to implement the reduction of the capital stock, 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 applies to share certificates that have been produced in a number below 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 is to include a warning that they may otherwise be invalidated. The invalidation is subject to the pre-requisite of notice of the call having

been given by publication in the manner stipulated in section 64 (2) for the period of grace. The invalidation will be effected by notice in the company's publications of record. The notice is to 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. Notice of the time and location of the sale at public auction as well as the items to be sold at same is to be given by publication. The parties involved are to be notified separately; such notification may be forgone if it is not expedient. The notice by publication must be made and the notification must be issued no later than two 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 registration 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 capital stock has been implemented.

(2) The application for registration of the implementation of the reduction of the capital stock and the entry of this fact in the register may be tied to the application for registration of the resolution adopted as to the reduction and its entry in the register.

#### **Section 228**

##### **Reduction below the minimum nominal amount**

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

#### **Subdivision 2**

##### **Simplified capital reduction**

#### **Section 229**

##### **Pre-requisites**

(1) A reduction of the capital stock intended to offset impairments in value, to cover other losses or to allocate amounts to the capital reserve 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 is permissible only after that part of the legal reserve and the capital reserve has been reversed in advance, along with the retained earnings, by which these reserves, taken together, exceed 10 per cent of the capital stock that remains after the reduction. The simplified capital reduction is not permissible for as long as profits carried forward exist.

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

#### **Section 230**

##### **Prohibition of payments to the stockholders**

The amounts obtained from the reversal of the capital reserve or the retained earnings 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 obligation to make

contributions. They may be used solely for purposes of offsetting impairments in value, covering other losses and allocating amounts to the capital reserve or the legal reserve. Using them for any one of the above purposes is permissible only insofar as they have been specified in the resolution as the purpose for which the capital stock is being reduced.

#### **Section 231**

##### **Limited allocation to the capital reserve and to the legal reserve**

The allocation of the amounts obtained from the reversal of other retained earnings to the legal reserve, and of the amounts obtained from the capital reduction to the capital reserve, is permissible only insofar as the capital reserve and the legal reserve, taken together, do not exceed 10 per cent of the capital stock. In this context, the nominal amount resulting from the reduction, and at a minimum the minimum nominal amount stipulated in section 7, will be considered the capital stock. In calculating the amount permissibly allocable, those amounts that are to be allocated to the capital reserve in the period following the adoption of the resolution as to the capital reduction will 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 reserve 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 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 reserve.

#### **Section 233**

##### **Distribution of profits. Protection of creditors**

(1) Profits may not be distributed before the legal reserve and the capital reserve, taken together, have reached 10 per cent of the capital stock. In this context, the nominal amount resulting from the reduction, and at a minimum the minimum nominal amount stipulated in section 7, will be considered the capital stock.

(2) The payment of a participation in the profits amounting to more than four per cent is permissible only for a financial year commencing no earlier than two years after the resolution as to the capital reduction was adopted. This does 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 months after the annual financial statements on which the distribution of profits is based have been entered in the business register. 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 creditors are to be made aware of the satisfaction and provision of security by a separate declaration, which is to be transmitted, together with the annual financial statements, to the body maintaining the business register for registration purposes.

(3) The amounts obtained from the reversal of the capital reserve and the retained earnings, as well as from the capital reduction, may not be distributed as profits, also not pursuant to these provisions.

#### **Section 234**

##### **Retroactive effect of the capital reduction**

(1) The subscribed capital as well as the capital reserve and the retained earnings may be recognised in that amount, in the annual financial statements drawn up for the most recent

financial year expired prior to the resolution as to the capital reduction having been adopted, that they are intended to have after the capital reduction.

(2) In such event, the general meeting will resolve as to the approval and establishment of the annual financial statements. The resolution as a rule is to be adopted concurrently with the resolution as to the capital reduction.

(3) The resolutions are null and void unless the resolution as to the capital reduction has been entered in the Commercial Register within three months of its having been adopted. The period is 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 capital stock is resolved upon concurrently with the capital reduction, then the capital increase as well may be itemised in the annual financial statements as having been completed. It is permissible to adopt the resolution only 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 registered the fact 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 capital stock.

(2) The entirety of all resolutions will be null and void 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 months of their having been adopted. The period is tolled for as long as an action for avoidance or an action for annulment is pending. As a rule, the resolutions and the increase of the capital stock are to be entered in the Commercial Register only jointly.

### **Section 236**

#### **Disclosure**

The annual financial statements may be disclosed pursuant to section 325 of the Commercial Code, in the case governed by section 234, only after the resolution as to the capital reduction has been registered, and in the case governed by section 235, only after the resolutions as to the capital reduction and the capital increase, as well as the fact of the implementation of the increase, have been entered in the Commercial Register.

### **Subdivision 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 is 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 provisions 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) applies accordingly 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 said stockholders from the obligation to make contributions.

(3) The provisions 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 capital stock 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 suffices 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 chairperson 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 reserve that is equal to the amount of the capital stock 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 takes the stead of the resolution adopted by the general meeting in applying the provisions as to the ordinary capital reduction.

#### **Section 238**

##### **Entry into force of the capital reduction**

Upon the resolution having been registered or, if the redemption is subsequent to same, upon the redemption, the capital stock will 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 capital stock will have been reduced upon the mandatory redemption having been performed unless the general meeting adopts a resolution as to the capital reduction. The redemption requires 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 registration 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 capital stock has been implemented. This applies also in the case of a mandatory redemption stipulated in the by-laws.

(2) The application for registration of the implementation of the reduction and the entry of this fact in the register may be joined to the application for registration of the resolution as to the reduction and its entry in the register.

#### **Subdivision 4**

##### **Reporting the capital reduction**

#### **Section 240**

The amount obtained from the capital reduction is to be recognised separately in the profit and loss account as “revenue from capital reduction,” following the item “withdrawals from retained earnings.” An allocation to the capital reserve pursuant to section 229 (1) and section 232 is to be recognised separately as an “allocation to the capital reserve according to the provisions 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 earnings will be used:

1. to offset impairments in value,
2. to cover other losses or

3. as allocations to the capital reserve.

Where the company is a small share capital company (section 267 (1) of the Commercial Code), it need not apply sentence 3.

## **Part 7**

### **Nullity of resolutions adopted by the general meeting and of the annual financial statements as approved and established. Special audit for impermissible understatement**

#### **Division 1**

#### **Nullity of resolutions adopted by the general meeting**

##### **Subdivision 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 will be null and void only if

1. it was adopted at a general meeting that had been convened in violation of section 121 (2) and (3) sentence 1 or (4) and (4b) sentence 1,
2. it has not been recorded by a notary pursuant to section 130 (1) to (2) sentence 1 and (4),
3. it is not to be reconciled with the nature of the stock corporation or violates, by its content, provisions 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 binding 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 on the basis of a final and binding court decision.

##### **Section 242**

##### **Remedy of nullity**

- (1) The nullity of a resolution adopted by a general meeting that, contrary to section 130 (1) to (2) sentence 1 and (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 years have lapsed since its entry. Where, at the time the time limit expires, an action for a declaratory judgment as to the nullity of the resolution adopted by the general meeting is pending, the time limit is extended until that point in time at which the final and binding 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. 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) sentence 2, 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) sentence 3 no longer may be registered 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 does not apply.

(3) Subsection (2) applies accordingly 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 can be challenged on grounds of its violating the law or the by-laws by bringing an action for avoidance.

(2) The action for avoidance also can be based on the fact that a stockholder, by exercising the voting right, sought to obtain special benefits for themselves 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 does not apply if the resolution grants appropriate compensation to the other stockholders for their damage.

(3) The action for avoidance cannot 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) sentence 2 and (2) sentence 1 as well as pursuant to section 134 (3),
2. the violation, caused by a technical disruption, of rights that have been exercised using electronic means pursuant to section 118a (1) sentence 2 nos. 2, 3, 4 read in conjunction with section 131, pursuant to section 118a (1) sentence 2 no. 6 read in conjunction with section 130a (1) to (4), pursuant to section 118a (1) sentence 2 no. 7 read in conjunction with section 130a (5) and (6) as well as pursuant to section 118a (1) sentence 2 no. 8,
3. the violation, caused by a technical disruption, of section 118a subsection (1) sentence 2 nos. 1 and 5 as well as subsection (6),
4. a violation of sections 67a, 67b, 118 (1) sentences 3 to 5 and (2) sentence 2, of section 118a (1) sentence 4, of section 121 (4a) or of section 124a,
5. grounds justifying proceedings pursuant to section 318 (3) of the Commercial Code.

An action for avoidance may be based on the violation caused by a technical disruption of rights under sentence 1 no. 1 and 2 as well as of provisions under sentence 1 no. 3 only if the company is to be charged with having acted grossly negligently or intentionally; the by-laws may stipulate a stricter measure of culpability,

(4) Where inaccurate or incomplete information has been provided, or the information sought has been denied, an action for avoidance may be brought only if a stockholder objectively assessing the situation would have regarded the provision of the information to be a key prerequisite for the appropriate exercise of their participatory rights and membership rights. 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 binding 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 they 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 have authority to bring an action for avoidance:

1. any stockholder present in person at the general meeting, provided they have purchased the shares of stock already prior to notice of the agenda having been given by publication and provided they raised an objection concerning the resolution and had it recorded in the minutes;
2. any stockholder not present in person at the general meeting if they were not admitted to said general meeting without justification 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 notice of the agenda having been given by publication;
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.

In the case of the virtual general meeting, all stockholders participating in the meeting by electronic means are considered to have been present in person within the meaning of sentence 1 no. 1.

#### **Section 246**

##### **Action for avoidance**

- (1) The action must be brought within one month of the resolution having been adopted.
- (2) The action is to be brought against the company. The company is 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 is represented by the supervisory board, where a member of the supervisory board is bringing the action, the company is represented by the management board.
- (3) Exclusively that regional court has 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 will take the decision instead of the civil division. Section 148 (2) sentences 3 and 4 applies accordingly. The hearing for oral argument will not take place prior to expiry of the period of one month stipulated in subsection (1). The company may inspect a complaint filed, immediately upon the period of one 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 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 an amendment of the by-laws in accordance with section 118a (1) sentence 1, 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 conflict with 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 stipulated otherwise, section 247, section 82, section 83 (1) and section 84 of the Code of Civil Procedure are to be applied accordingly to the proceedings, as are the provisions of the Code of Civil Procedure applying at the first level of jurisdiction to the proceedings before the regional courts. A senate of the higher regional court in the judicial district of which the company has its seat decides regarding the petition.

(2) A court order pursuant to subsection (1) will 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 or by submitting the proof defined in section 67c (3), within one week of having served the petition, that they have been holding a stake of no less than 1,000 euros since the notice convening the assembly was published, or
3. the prompt entry 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 substantial disadvantages for the company and its stockholders as presented by the petitioner outweigh the disadvantages the respondent stands to suffer; this does 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 is no right of appeal against the court order. The order is binding upon the court of registration; the establishment by the court that the entry is final and non-appealable will take effect for and against any entity or individual. The court order as a rule is to be delivered not later than three months after the petition has been filed; the reasons for any delays to the decision are to be provided in a court order against which there is no right of appeal.

(4) If the action is found to be well-founded, then the company that has obtained the court order will 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 registered based on the court order. Once it has been registered, any deficiencies of the resolution will 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 determines 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 capital stock 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) If 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 obligation to pay court fees will be assessed based on a part of the value of the matter in dispute defined in keeping with its economic situation. This order has as its consequence that the beneficiary of same also will need to pay the fees charged by its lawyers 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 their 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 will 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 binding judgment, the judgment will 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. Notice of the entry in the register of the judgment is to be given by publication 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 listed company is to give notice without undue delay in the company's publications of record of the termination of the proceedings. Section 149 (2) and (3) is to be applied accordingly.

#### **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 (2), (3) sentences 1 to 5, (4), sections 246a, 247, 248 and 248a will apply accordingly. 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 and the resolution as to the transformation has been registered, section 20 (2) of the Transformation Act applies accordingly 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.

## **Subdivision 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 is 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) sentence 1 or section 98 (4) is violated;
2. the general meeting elects a person not nominated in spite of its being bound to nominations (sections 6 and 8 of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry);
3. the election results in the statutory maximum number of members of the supervisory board being exceeded (section 95);
4. at the commencement of their term of office, the person elected is prohibited, pursuant to section 100 (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

(2), (3) sentences 1 to 4, (4), section 247, section 248 (1) sentence 2 as well as sections 248a and 249 (2) apply accordingly. 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 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 apply.

(2) Section 245 sentence 1 nos. 1, 2 and 4 as well as sentence 2 applies 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 upon having been nominated by the works councils. Any member of the supervisory board may also bring an action to set aside 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 Supplementary Co-determination Act upon having been nominated by the remaining members of the supervisory board.

(3) Sections 246, 247, 248 (1) sentence 2 and section 248a 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 will 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 binding judgment, the judgment will 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) sentence 2, the judgment also will take effect for and against the works councils, unions and umbrella organisations having authority pursuant to the present provision 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 is 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 financial statements on which it is based is null and void. Asserting the nullity of the resolution based on these grounds no longer will be possible once it is no longer possible to assert the nullity of the approval and establishment of the annual financial statements.

(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 earnings or carrying amounts forward as profits that are not, according to the law or the by-laws, precluded from being distributed among the stockholders, and this having been done 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 per cent of the capital stock reduced by the contributions not yet called in.

(2) Sections 244 to 246 and sections 247 to 248a apply to the action for avoidance. The period for avoidance commences running on the date on which the resolution is adopted also in those cases in which the annual financial statements are to be audited anew pursuant to section 316 (3) of the Commercial Code. Stockholders 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 capital stock 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 pursuant to section 243 against the resolution as to a capital increase in return for contributions unless subsections (4) to (7) lead to a different conclusion.

(2) The action for avoidance may not be based on section 243 (2) or on the fact that the value of the contribution allocated to the share of stock is unreasonably low.

(3) Sections 244 to 248a apply to the action for avoidance.

(4) If the pre-emptive right to newly issued shares of stock is precluded in its entirety or in part in some other manner than that set out in section 186 (3) sentence 4, and if the value of the contribution allocated to the share of stock is unreasonably low, then any stockholder whose right to bring an action for avoidance regarding the effectiveness of the resolution as to a capital increase is precluded in accordance with subsection (2) may demand, the provisions of sections 255a and 255b notwithstanding, that the company provide compensation by way of a payment of compensation in cash insofar as their pre-emptive right to newly issued shares of stock is precluded.

(5) In the case of listed companies, the value of the shares of stock allotted corresponds to their trading price. Where the issue price is insignificantly lower than the trading price, the claim to payment of compensation in accordance with subsection (4) sentence 2 lapses. The trading price is not the sole governing factor if

1. the stock corporation, contrary to Article 17 (1) of Regulation (EU) No 596/2014 or a corresponding provision of applicable foreign law, fails to disclose as soon as possible any inside information that directly concerns that stock corporation, or if it publishes, in a disclosure in accordance with Article 17 (1) of Regulation (EU) No 596/2014 or with a corresponding provision of applicable foreign law, untrue inside information that directly concerns that stock corporation, or if

2. a violation of the prohibition of market manipulation stipulated in Article 15 of Regulation (EU) No 596/2014 has been committed that influenced the trading price or was likely to so influence it, or if

3. trading prices for the stock corporation's shares of stock were quoted, in the course of the last three months prior to expiry of the day preceding the day on which the decision to issue new shares was taken, on fewer than a third of the trading days and several trading prices quoted consecutively deviated from each other by more than five per cent.

For the calculation of the trading price, section 5 (1) to (3) of the Regulation on Offers under the Securities Acquisition and Takeover Act (*WpÜG-Angebotsverordnung*) is to be applied accordingly, subject to the proviso that the expiry of the day preceding the day on which the decision was taken to issue new shares takes the stead of the disclosure stipulated in section 10 (1) sentence 1 or section 35 (1) sentence 1 of the Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz – WpÜG*). If the trading price is lower on that day, then that trading price will govern. Sentence 3 nos. 1 and 2 is not to be applied if the violation or manipulation had no effects, or merely insignificant effects, on the price calculated in accordance with sentence 4.

(6) The compensation payment is to accrue interest, from the expiry of that day onwards on which the implementation of the capital increase was entered in the register, at five percentage points *per annum* above the respectively applicable basic rate of interest pursuant to section 247 of the Civil Code. The assertion of further-reaching damages is not precluded.

(7) Upon a corresponding petition having been filed, the compensation payment is determined by the court in accordance with the stipulations of the Act on Valuation Proceedings under Corporate Law (*Spruchverfahrensgesetz – SpruchG*).

#### **Section 255a**

##### **Allotment of additional shares of stock**

(1) It may be determined in the resolution as to the increase of the capital that instead of a compensation payment being made in cash (section 255 (4)), additional shares in the company may be allotted. Section 72a (1) sentence 2 of the Transformation Act (*Umwandlungsgesetz – UmwG*) applies accordingly.

(2) Regarding the claim to having additional shares of stock allotted, new shares of stock that were not allotted following the registration of the capital increase in the context of a further capital increase using company funds due to the contribution having an unreasonable value are to be taken into account, as are capital reductions implemented following the registration of the capital increase without parts of the capital stock being repaid. Pre-emptive rights to newly issued shares of stock to which the entitled stockholders did not have a claim in the context of a further capital increase in return for contributions implemented following the registration of the capital increase due to the contribution being unreasonably low are to be allotted to the entitled stockholders retroactively. The entitled stockholders must exercise their pre-emptive right to newly issued shares of stock under sentence 2 vis-à-vis the company within one month of the decision by the court having become final and binding (section 11 (1) of the Act on Valuation Proceedings under Corporate Law).

(3) Instead of additional shares of stock, compensation is to be provided to entitled stockholders by an additional payment in cash as provided for in section 255 (4) to (7)

1. in order to provide compensation for indivisible residual amounts or

2. if it has become impossible to allot additional shares of stock.

(4) Instead of additional shares of stock, those stockholders who have left the company on the occasion of a measure altering the structure of the company taken after the registration of the capital increase are to be provided indemnification in money, taking account of the settlement payment to be granted by the company.

(5) In addition to allotting additional shares of stock, the entitled stockholders are to be provided indemnification in money for profits or for the appropriate compensation defined in section 304 of the present Act, insofar as these profits have not been distributed or the

appropriate compensation has not been provided due to the contribution being unreasonably low.

(6) Section 255 (5) to (7), to the exception of subsection (6) sentence 1, is to be applied accordingly. Claims to an indemnification in money in accordance with subsections (3) and (4) are to accrue interest in accordance with section 255 (6) sentence 1 from that point in time onwards at which the settlement payment or the claim to distribution of profits or the recurrent performance would have fallen due. In the cases governed by section 255b, the interest payment period ends as soon as the trustee has received the shares of stock, the additional payment in cash or the indemnification in money as provided for in section 255b (3).

(7) The company bears the risk of procuring the shares of stock to be allotted additionally.

#### **Section 255b**

##### **Capital increase for purposes of allotting additional shares of stock**

(1) The shares of stock to be allotted additionally in accordance with section 255a (1) and subsection (2) sentence 1 may be created, under the terms of the present subsection and of subsections (2) to (4), by a further capital increase in return for a contribution in kind. The object of the contribution in kind is the claim of the entitled stockholders to having additional shares of stock allotted as has been established by a court decision (section 11 (1) of the Act on Valuation Proceedings under Corporate Law) or a court settlement (section 11 (2) to (4) of the Act on Valuation Proceedings under Corporate Law); the claim expires upon the implementation of the further capital increase being entered in the register (section 189 of this Act). Where the claim is established by a court decision (section 11 (1) of the Act on Valuation Proceedings under Corporate Law), it is not possible to make the contribution in kind before the court ruling has become final and binding.

(2) Instead of the specifications in accordance with section 183 (1) sentence 1 and section 205 (2) sentence 1, the following suffices:

1. the determination that the claims of the entitled stockholders to being allotted additional shares of stock, as established by the court decision or by the settlement recorded by the court, which is to be designated in either case, are being contributed, as well as
2. the statement of the nominal amount to be granted on the basis of the court decision or of the court settlement, in the case of no-par-value shares the number of shares of stock to be allotted.

Section 182 (4) as well as sections 186, 187 and 203 (3) are not to be applied.

(3) The company is to appoint a trustee. The trustee has authority to take the following actions in their own name:

1. to assign to the company the claims to allotment of additional shares of stock,
2. to subscribe to the additional shares of stock to be allotted,
3. to take receipt of the shares of stock to be allotted additionally, of additional payments in cash and indemnifications in money as provided for in each case in section 255a, as well as
4. to make all of the declarations to be made by the entitled stockholders inasmuch as they are required for the acquisition of the shares of stock.

Section 35 (3) is to be applied accordingly.

(4) The following are to be attached to the applications for registration in accordance with sections 184 and 188: the court decision or the settlement recorded by the court, as an execution or as a public certified copy, from which the nominal amount to be additionally granted or, in the case of no-par-value shares, the number of shares of stock to be allotted additionally can be ascertained. Section 188 (3) no. 2 is not to be applied.

(5) Section 182 (4) as well as sections 186, 187 and 203 (3) are not to be applied to capital increases that are implemented in order to allot additional shares of stock on the basis of pre-emptive rights to newly issued shares of stock exercised in accordance with section 255a (2) sentence 3.

(6) Section 255 (2) applies accordingly to the resolution as to the capital increase in accordance with subsection (1).

## **Division 2**

### **Nullity of the annual financial statements as approved and established**

#### **Section 256**

##### **Nullity**

(1) Besides being null and void in the cases governed by section 173 (3), section 234 (3) and section 235 (2), annual financial statements as approved and established will be null and void if:

1. they violate, by their content, provisions that exclusively or primarily were instituted for the protection of the company's creditors,
2. in the case of a statutory duty to have an audit performed, they have not been audited pursuant to section 316 (1) and (3) of the Commercial Code;
3. in the case of a statutory duty to have an audit performed, they have been audited by persons who, pursuant to section 319 (1) of the Commercial Code or pursuant to Article 25 of the Introductory Act of the Commercial Code (EGHGB), are not statutory auditors or who have not been appointed as statutory auditors for other reasons than the following:
  - a) violation of section 319 (2), (3) or (4) of the Commercial Code,
  - b) violation of section 319b (1) of the Commercial Code,
  - c) 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 the capital reserve or the retained earnings or regarding the withdrawal of amounts from the capital reserve or the retained earnings have been violated.

(2) Besides being null and void in the cases set out in subsection (1), annual financial statements approved and established by the management board and the supervisory board will 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) Besides being null and void in the cases set out in subsection (1), annual financial statements approved and established by the general meeting will be null and void only if the approval

1. was resolved upon at a general meeting that was convened such that section 121 (2) and (3) sentence 1 or (4) was violated,
2. was not recorded by a notary pursuant to section 130 (1) and (2) sentence 1 and (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 financial statements will be null and void for a violation of the provisions governing the layout of the annual financial statements as well as for the non-compliance with forms according to which the annual financial statements are to be laid out only if this has substantially impaired their clarity and structure.

(5) The annual financial statements will 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, 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, 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, financial services providers or securities institutions, well as in the case of capital management companies within the meaning of section 17 of the Investment Code, no violation of the valuation rules will be given insofar as the deviation is permissible in accordance with the provisions applying to them, in particular pursuant to sections 340e to 340g of the Commercial Code; this applies accordingly to insurance companies subject to the provisions applying to them, particularly sections 341b to 341h of the Commercial Code.

(6) Asserting nullity under subsection (1) nos. 1, 3 and 4, (2), (3) nos. 1 and 2, (4) and (5) is no longer possible once six months have lapsed since entry of the annual financial statements in the business register in the cases governed by subsection (1) nos. 3 and 4, (2) and (3) nos. 1 and 2, in the other cases, once three years have lapsed. Where, at the time the time limit expires, an action for a declaratory judgment as to the nullity of the annual financial statements is pending, the time limit is extended until that point in time at which the final and binding decision has been taken regarding that action or it has been conclusively dealt with and terminated in some other way.

(7) Section 249 applies accordingly to the action brought against the company for a declaratory judgment as to nullity. Where the Federal Republic of Germany is the home country (section 2 (13) of the Securities Trading Act) for the company as issuer of securities within the meaning of section 2 (1) of the Securities Trading Act that are admitted to official listing, to the exception of shares and shares of stock in open investment funds within the meaning of section 1 (4) of the Investment Code, 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 likewise is to inform BAFin of any final and binding decision handed down with regard to such action.

### **Section 257**

#### **Action for avoidance of the approval of the annual financial statements by the general meeting**

(1) The approval of the annual financial statements 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 financial statements 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 commences running on the date on which the resolution is adopted also in those cases in which the annual financial statements are to be audited anew pursuant to section 316 (3) of the Commercial Code.

### **Division 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 financial statements that have been approved and established (section 256 (5) sentence 3) 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 a question having been asked 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 a question having been asked in its regard, and a demand has been made to include the question in the minutes.

(1a) In the case of credit institutions, financial services providers or securities institutions, as well as in the case of capital management companies within the meaning of section 17 of the Investment Code, 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 having been applied.

(2) The petition must be filed within one month following the general meeting as to the annual financial statements. This applies also if the annual financial statements are to be audited anew pursuant to section 316 (3) of the Commercial Code. 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 are to deposit the shares of stock until a decision is taken on their petition or they are to submit an assurance from the institute maintaining the securities account that until such decision, the shares of stock will not be disposed of, and they are to demonstrate to the satisfaction of the court that they have been the holders of the shares of stock for at least three months prior to the date of the general meeting. A statutory declaration in lieu of an oath made to a notary suffices as satisfactory demonstration.

(3) Prior to the appointment, the court is to hear the management board, the supervisory board and the statutory auditor. A complaint may be lodged against the decision taken. That regional court will 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 (2) to (4) and section 319b (1) of the Commercial Code apply accordingly to their selection and, in the case of companies that are public-interest entities as defined in section 316a sentence 2 of the Commercial Code, also Article 5 (1) of Regulation (EU) No. 537/2014. The auditor of the company's annual financial statements and persons who served as the auditor of the company's annual financial statements in the past three 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 (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 governing the liability and responsibilities of the statutory auditor apply accordingly. The special auditors pursuant to subsection (1) have the rights pursuant to section 145 (2) also in relation to the auditor of the company's annual financial statements.

## **Section 259**

### **Report on the audit. Conclusive determinations**

(1) The special auditors are to submit a written report on their audit. If the special auditors become aware, in the performance of their duties, that items have been overstated (section 256 (5) sentence 2) or that the provisions governing the organisational structure of the annual financial statements have been violated or forms have not been complied with, then they are to report on this fact as well. Section 145 (4) to (6) applies accordingly.

(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) sentence 3), 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 financial statements. 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) sentence 3), 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 a question having been asked 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 sentence 1, 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 capital stock 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 in accordance with section 259 (2) and (3), provided they do so within one month of such determinations having been published in the Federal Gazette. Section 258 (2) sentences 4 and 5 applies accordingly. The petition must be directed at obtaining a declaratory judgment regarding the minimum amount at which the assets items designated in the petition ought to have been stated or the maximum amount at which the liabilities items designated in the petition ought to have been stated. The petition of the company may also be directed at obtaining a

declaratory judgment that the annual financial statements did not set out the understatements established in the special auditors' conclusive determinations.

(2) The court will take the final decision on the petition at its equitably exercised discretion, taking account of all circumstances. Section 259 (2) sentences 2 and 3 is to be applied. 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 (1), (2) sentence 1, (3) and (5) applies accordingly. The court is to serve its decision on the company and, if stockholders have filed the petition pursuant to subsection (1), also on the stockholders. Further, it is to give notice of same, without providing the reasons on which it is based, 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 capital stock or to a stake of 500,000 euros, is entitled to lodge a complaint. Section 258 (2) sentences 4 and 5 applies accordingly. The period within which a complaint must be lodged commences running upon notice of the decision being given in the Federal Gazette; however, it will not commence running for the company prior to the decision having been served to it, nor will it commence running, if stockholders have filed the petition pursuant to subsection (1), for the stockholders prior to the decision having been served on 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 applies accordingly.

### **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 time limit specified in section 260 (1), the items are to be stated in the first annual financial statements drawn up following expiry of said time limit at the values or amounts established by the special auditors. This does 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 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 sentence 2 is to be presented in a separate statement. Where the objects no longer exist, this fact 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 sentences 1 and 2. The sum total of the differences in amount is to be recognised separately on the "Liabilities" side of the balance sheet, and in the profit and loss account 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), it is to apply sentences 3 and 4 only if the pre-requisites of section 264 (2) sentence 2 of the Commercial Code are met, taking account of the special audit performed pursuant to this division.

(2) Where the court seised with the matter pursuant to section 260 has established that items have been understated, subsection (1) applies accordingly to the statement of the items in the first annual financial statements drawn up after the decision by the court has become final and binding. 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) will not be counted, in applying section 58, as part of the surplus for the year. The general meeting decides on the appropriation of the revenue reduced by the taxes to be remitted therefor,

unless a net loss is recognised in the annual financial statements that is not covered by capital reserve or retained earnings.

#### **Section 261a**

##### **Notifications to be made to the Federal Financial Supervisory Authority (BAFin)**

Where the Federal Republic of Germany is the home country (section 2 (13) of the Securities Trading Act) for the company as issuer of securities within the meaning of section 2 (1) of the Securities Trading Act that are admitted to official listing, to the exception of shares and shares of stock in open investment funds within the meaning of section 1 (4) of the Investment Code, the court is to notify 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 binding, the report on the audit, as well as a final and binding 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**

##### **Division 1**

##### **Dissolution**

##### **Subdivision 1**

##### **Reasons for dissolving the company and application for registration**

#### **Section 262**

##### **Reasons for dissolving the company**

(1) The stock corporation is dissolved

1. by expiry of the time determined in the by-laws;
2. by resolution adopted by the general meeting; this requires a majority of at least three quarters of the capital stock 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 binding 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 binding 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;
6. by striking the company from the register for lack of assets pursuant to section 394 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction.

(2) This Division applies also if the stock corporation is dissolved on other grounds.

#### **Section 263**

##### **Application for registration of the dissolution and its entry in the register**

The management board is to file an application for entry of the dissolution of the company in the Commercial Register. This does 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 company being struck from the register (section 262 (1) no. 6), the dissolution is not registered.

## **Subdivision 2 Winding up**

### **Section 264 Need to wind up**

- (1) After the company has been dissolved, it is to be wound up unless insolvency proceedings have been opened for the assets of the company.
- (2) Where the company has been dissolved by being struck from the register for lack of assets, it is to be wound up only if it becomes apparent after it has been struck out 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 the present subdivision leads to a different conclusion or unless something else results from the purpose pursued in winding up the company, those provisions are to be applied to the company as before, until the completion of the winding-up, that apply to companies that have not been dissolved.

### **Section 265 Liquidators**

- (1) The members of the management board 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) sentences 2 to 4 applies accordingly 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 capital stock or to a stake of 500,000 euros, and where grave cause is given, the court is to appoint the liquidators and to 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 months. A statutory declaration in lieu of an oath made to a court or a notary suffices as satisfactory demonstration. A complaint may 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. If the court-appointed liquidator and the company do not come to an agreement, then the court will establish the expenditures and the remuneration. A complaint may be lodged against the decision taken; filing a complaint on points of law is precluded. Based on the decision taken, compulsory enforcement can be pursued in accordance with the Code of Civil Procedure.
- (5) The general meeting at any point in time may remove liquidators from office who have not been appointed by the court. The general provisions 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 their appointment and removal from office are governed by the provisions of the Act on Employee Co-Determination in the Iron- and Steel-Producing Industry.

### **Section 266 Application for registration 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 registration, as are the records and documents concerning the power of representation.
- (3) In the application for registration, the liquidators are to give an assurance that no circumstances exist that would disqualify them from being appointed pursuant to section 265

- (2) sentence 2 and that they have been instructed concerning their unrestricted duty to provide information to the court. Section 37 (2) sentence 2 is to be applied.
- (4) The court is to register, ex officio, any appointment or removal from office of liquidators it has performed.
- (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 also may enter into new business transactions.
- (2) In all other cases, the liquidators 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 chairperson 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 capital stock 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 sentence 1 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 required for the individual case. Order forms are considered business letters within the meaning of sentence 1; sentence 3 is not to be applied to them.

#### **Section 269**

##### **Representation by the liquidators**

- (1) The liquidators represent the company in court and outside of court.
- (2) Where several liquidators have been appointed, then, unless otherwise determined in the by-laws or by the authority otherwise competent, any and all liquidators have authority to represent the company solely jointly. Where a declaration of intent is to be made to the company, it suffices for it to be made to one liquidator.
- (3) It may also be determined in the by-laws or by the authority otherwise competent that individual liquidators 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) sentence 2 applies accordingly to these cases.
- (4) Liquidators having the authority to represent the company jointly may authorise individual liquidators from among their midst to enter into certain business transactions or certain types of business transactions. This applies accordingly 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 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 financial statements 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 financial statements and a management report.

(2) The general meeting resolves on the approval of the opening balance sheet and of the annual financial statements 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 provisions governing the annual financial statements are to be applied accordingly 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 also applies to the annual financial statements.

(3) The court may grant a release from the obligation to have the annual financial statements and the management report audited by a statutory auditor if the circumstances of the company are so easily surveyed that, in the interests of the creditors and stockholders, an audit does not appear to be required. A complaint may 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 will be distributed among the stockholders.

(2) The assets are to be distributed in accordance with the shares held in the capital stock unless shares of stock exist that grant different rights in the distribution of the company's assets.

(3) Where the contributions towards the capital stock have not been made for all shares of stock in the same ratio, the contributions made are reimbursed and any surplus will be distributed in accordance with the shares held in the capital stock. Where the assets do not suffice to reimburse the contributions, the stockholders are to bear the loss in accordance with their shares in the capital stock; 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 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 their 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 struck from the register.

(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 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) applies.

(5) A complaint may be lodged against the decisions set out in subsections (2), (3) and (4) sentence 1.

## **Section 274**

### **Continuation of a dissolved company**

(1) If 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 requires a majority of at least three quarters of the capital stock represented at the time of its adoption. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements.

(2) The same applies 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 registration, 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 will 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 will 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 as a rule are to be entered in the Commercial Register only jointly.

## **Division 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 capital stock 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 months.

(3) The action must be brought within three years following entry in the register of the company. Striking the company from the register ex officio pursuant to section 397 (1) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction is not precluded by the lapse of time.

(4) Section 246 (2) to (4), sections 247 and 248 (1) sentence 1 and sections 248a and 249 (2) apply accordingly 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 binding judgment. An entry is to be made of the company's nullity by reason of a final and binding 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 binding judgment or of a decision taken by the court of registration has been entered in the Commercial Register, the company is to be wound up according to the provisions governing the winding up in the case of dissolution.

(2) The nullity does not affect the effectiveness 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 capital stock 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 in relation to the entirety of the limited liability shareholders of a public partly limited partnership as well as in relation to third parties, namely the authority of the general partners to manage the affairs of the company and to represent it, is governed by the provisions of the Commercial Code relating to the limited partnership.

(3) In all other cases, the provisions of Book 1 relating to the stock corporation apply accordingly to the public partly limited partnership unless the provisions set out below lead to a different conclusion or unless something else 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 in accordance with section 22 of the Commercial Code or with other statutory provisions.

(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 in accordance with section 22 of the Commercial Code or with other statutory provisions.

## **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 specifications made according to section 23 (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 capital stock.

(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, the type of power of representation that has been conferred upon the general partners is to be registered as well.

## **Section 283**

### **General partners**

The provisions governing the management board of the stock corporation apply accordingly to the general partners regarding

1. the applications for entry, filings, declarations and proof submitted to the Commercial Register, as well as regarding notices by publication;
2. the formation audit;
3. the duty to exercise skill and care as well as the liability and responsibilities;
4. the duties in relation to 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 financial statements 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 standalone financial statements pursuant to section 325 (2a) of the Commercial Code;
- 11a. the submission of a report on income tax information (sections 342b, 342c, 342d (2) no. 2 of the Commercial Code) and of a declaration in accordance with section 342d (2) no. 1 of the Commercial Code;
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 their 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 they allow the transactions they have entered into for their own account to be considered transactions entered into for the account of the company, and that they surrender the remuneration obtained for the transactions entered into for the account of some other party or that they assign their claim to the remuneration.
- (3) The company's claims will become statute-barred following the expiry of three 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 ought to become aware of same unless they are grossly negligent. Such claims will become statute-barred, irrespective of this awareness or grossly negligent lack of awareness, following the expiry of five years from the date on which they have arisen.

#### **Section 285**

##### **General meeting**

- (1) At the general meeting, the general partners have voting rights only for their shares of stock. They may not exercise this voting right, either for themselves or 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 statutory auditors.

In adopting these resolutions, 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 does 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 recorded by a notary in the minutes of the deliberations or in an annex to said minutes.

### **Section 286**

#### **Annual financial statements. Management report**

(1) The general meeting adopts a resolution as to the approval of the annual financial statements. The resolution requires 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. Loans governed by section 89 that the company has granted to general partners, to 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 profit and loss account.

(4) Section 285 no. 9 (a) and (b) of the Commercial Code applies 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 implements 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 represents the limited liability shareholders of a public partly limited partnership unless the general meeting has elected special representatives. The company is 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 their equity share, the general partner may not withdraw any profits allocated to their equity share. Furthermore, they may not withdraw any such participation in the profits and may not withdraw any money from their 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 reserve, the retained earnings as well as the equity shares of the general partners.

(2) As long as the pre-requisite set out in subsection (1) sentence 2 is given, the company may not grant any loan governed by section 286 (2) sentence 4. 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, are not affected by the present provisions. Section 87 (2) sentences 1 and 2 applies accordingly to 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 are governed by the provisions of the Commercial Code regarding the limited partnership.

(2) The public partly limited partnership also is dissolved:

1. upon the court order becoming final and binding 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 binding 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;
3. by striking the company from the register for lack of assets pursuant to section 394 of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction.

(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 applies to a petition filed for dissolution of the company by a decision by the court. The resolution requires a majority of at least three quarters of the capital stock represented at the time of its adoption. 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 141 (2) of the Commercial Code applies accordingly. 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 dissolution is not registered.

### **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 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 being struck from the register for lack of assets, it is to be wound up only if it should become apparent following its having been

struck from the register 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**

**Division 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 is considered 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 is not considered 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 will not be null and void by reason of the agreement violating sections 57, 58 and 60. Sentence 1 does not preclude an action for avoidance of the resolution being brought for such violation.

**Division 2**  
**Conclusion, amendment and termination of inter-company agreements**

**Section 293**  
**Consent of the general meeting**

- (1) An inter-company agreement will enter into force only with the consent of the general meeting. The resolution requires a majority of at least three quarters of the capital stock represented at the time of its adoption. 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 to the resolution.
- (2) A control agreement or a profit and loss absorption agreement will 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) sentences 2 to 4 applies accordingly 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 is not 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) is to be applied accordingly.

#### **Section 293c**

##### **Appointment of the contract auditors**

- (1) The contract auditors are 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 will 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 presiding judge of said division will take the decision instead of the civil division. Section 318 (5) of the Commercial Code applies to the reimbursement of the auditors appointed by the court and their remuneration.
- (2) Section 10 (3) to (5) of the Transformation Act applies accordingly.

#### **Section 293d**

##### **Selection, position, as well as liability and responsibilities of the contract auditors**

- (1) Section 319 (1) to (4), section 319b (1), section 320 (1) sentence 2 and (2) sentences 1 and 2 of the Commercial Code apply accordingly to the selection of the contract auditors and their right to seek information. In the case of a company that is a public-interest entity as

defined in section 316a sentence 2 of the Commercial Code, Article 5 (1) of Regulation (EU) No. 537/2014 also applies accordingly, in addition to sentence 1, to the selection of the contract auditor, subject to the proviso that the periods stipulated in Article 5 (1) sub-paragraph 2 (a) and (b) of Regulation (EU) No. 537/2014 are replaced by the period lying between the commencement of the financial year preceding the financial year in which the inter-company agreement was concluded and the point in time at which the contract auditor has given the report on the audit provided for under section 293e. The right to seek information exists in relation to the contracting enterprises and in relation to a group member company as well as in relation to a controlled and a controlling enterprise.

(2) Section 323 of the Commercial Code applies accordingly 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 are given in relation to the contracting enterprises and their shareholders.

### **Section 293e**

#### **Report on the audit**

(1) The contract auditors are to report in writing on the results of their audit. The report on the audit 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 (2) and (3) is to be applied accordingly.

### **Section 293f**

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

(1) From the time onwards at which the general meeting is convened at which it is intended 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 financial statements and the management reports of the contracting enterprises for the last three 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 obligations pursuant to subsections (1) and (2) will cease to exist 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) Upon their making a corresponding demand, each stockholder is to be provided with information at the general meeting about any and all matters of the other contracting party that are key 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 registered instead of the name of the other contracting party that specifies in exact terms each of the agreements 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 registration in the original version, as an execution or as a public certified copy.
- (2) The agreement will 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 apply accordingly.
- (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) sentences 2 and 3 applies to the separate resolution. Upon their making a corresponding demand, each external stockholder is to be provided with information, at the general meeting adopting a resolution as to the consent, also about any and all matters of the other contracting party that are key 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 is 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) sentences 2 and 3 and section 295 (2) sentence 3 apply accordingly 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 will be given in particular if the respective other contracting party foreseeably will not be in a position to fulfil the obligations 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) sentences 2 and 3 and section 295 (2) sentence 3 apply accordingly to the separate resolution.

(3) The termination must be made in writing.

#### **Section 298**

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

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 is to do so without undue delay.

#### **Section 299**

##### **Prohibition of instructions**

It is not possible to instruct the company, based on an inter-company agreement, to amend, uphold or terminate the agreement.

#### **Division 3**

##### **Securitisation of the company and the creditors**

#### **Section 300**

##### **Legal reserve**

The following are to be allocated to the legal reserve 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 legal reserve, while adding capital reserve within the first five 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 capital stock or whichever greater part of the capital stock 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 legal reserve 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 legal reserve 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 legal reserve pursuant to section 300 and by the amount barred from distribution pursuant to section 268 (8) of the Commercial Code. Where, during the term of the agreement, amounts have been allocated to other retained earnings, these amounts may be withdrawn from the other retained earnings 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 retained earnings 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 years have lapsed after the day on which notice of the entry of the agreement's termination in the Commercial Register pursuant to section 10 of the Commercial Code has been given by publication. This will not apply if the party obligated to provide compensation is unable to pay their debts as they become due and concludes a compromise with their creditors in order to avert insolvency proceedings or if the duty to provide compensation is provided for by an insolvency plan or restructuring plan. The waiver or compromise enters 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 capital stock represented at the time such resolution is adopted, raises an objection and has it recorded in the minutes.

(4) The claims under the present provisions will become statute-barred 10 years following the day on which notice of the entry of the agreement's termination in the Commercial Register pursuant to section 10 of the Commercial Code has been given by publication.

### **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 notice by publication having been made as to the agreement's termination having been entered in the Commercial Register pursuant to section 10 of the Commercial Code, provided they come forward to the other contracting party for this purpose within six months of the notice by publication of the entry. This right is to be indicated to the creditors in a notice by publication regarding the entry.

(2) Those creditors are not 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 regarding the exclusion of the defence of failure to pursue remedies is not to be applied.

### **Division 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 capital stock (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 forgone 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 retained earnings. 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), is 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 (*Spruchverfahrensgesetz* – 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) sentence 2, then the court is to determine the compensation pursuant to this provision.

(4) Where the court determines the compensation, the other contracting party may terminate the agreement within two months of the decision having become final and binding without observing any period of notice.

### **Section 305** **Settlement payment**

(1) Except for the obligation to provide compensation pursuant to section 304, a control agreement or a profit and loss absorption agreement must include the obligation 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, which is not controlled by another company, in which no majority ownership interest is held and which has its seat in a Member State of the European Union or in another state party to 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 another state party to 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, compensation for indivisible residual amounts may be provided 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 the expiry of that day onwards on which the control agreement or the profit and loss absorption agreement entered into force at five percentage points *per annum* above the

respectively applicable basic rate of interest pursuant to section 247 of the Civil Code; the assertion of further-reaching damages is not precluded.

(4) The obligation to purchase the shares of stock may be limited in time. At the earliest, the time limit ends two months following the date on which notice of the entry of the agreement's existence in the Commercial Register pursuant to section 10 of the Commercial Code has been given by publication. Where a petition has been filed to have the court specified in section 2 of the Act on Valuation Proceedings under Corporate Law determine the compensation or the settlement payment, the time limit will end at the earliest two months following the day on which notice of the decision as to the last petition ruled on has been given by publication in the Federal Gazette.

(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 will 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) applies accordingly.

#### **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 will 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**

#### **Division 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 is 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 time limit, 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 no longer will 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, in relation to the company, the due care of a prudent manager faithfully complying with the relevant duties in issuing directions to same.

(2) Where they violate their duties, they are 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 the relevant duties, the onus of proof is upon them.

(3) The company may waive its claims to compensation, or conclude a compromise regarding these claims, only once three years have lapsed since the arising of the claim, and may do so 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 capital stock represented at the time such resolution is adopted, raises an objection and has it recorded in the minutes. The limitation in time does not apply where the party obligated to provide compensation is unable to pay their debts as they become due and concludes a compromise with their creditors in order to avert insolvency proceedings or if the duty 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 duty to provide compensation will not be cancelled in relation to 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 will 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 provisions will become statute-barred after five 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 are 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 the relevant duties, the onus of proof is upon them.

(2) The fact that the supervisory board has endorsed the action does not preclude the duty to provide compensation.

(3) No duty to provide compensation will 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 (3) to (5) is to be applied.

### **Division 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 disadvantageous to it or to take or refrain from taking 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 it is intended to compensate for the disadvantage. The controlled company is to be granted a legal claim to the advantages determined to serve as compensation.
- (3) Sections 111 to 111c remain unaffected.

### **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 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 taking 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 are to be stated. 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 comply with 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 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 also is to be included in the management report.

### **Section 313**

#### **Audit by the statutory auditor**

- (1) Where the annual financial statements are to be audited by a statutory auditor, the report on the relations of the company with affiliated enterprises is to be submitted to the statutory auditor concurrently with the annual financial statements and the management report. The statutory auditor 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 substantially different from that of the management board.

Section 320 (1) sentence 2 and (2) sentences 1 and 2 of the Commercial Code applies accordingly. The statutory auditor has the rights governed by this provision also in relation to a group member company as well as in relation to a controlled or controlling enterprise.

(2) The statutory auditor is to report in writing on the results of the audit. Should the statutory auditor establish, in auditing the annual financial statements, the management report and the report on the relations of the company with affiliated enterprises, that this report is incomplete, they are to report on this fact as well. The statutory auditor is to sign their 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 statutory auditor is to confirm this fact by adding the following audit report 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 by the company under 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 substantially 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; where the report does not list any measure, then no. 3 is to be left out. Where the statutory auditor 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 audit report is to be limited to that confirmation.

(4) Where exception is to be taken, or where the statutory auditor has established that the report on the relations of the company with affiliated enterprises is incomplete, the statutory auditor is to qualify the audit report or is to refuse to issue 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 report and the audit report is to be limited to the remaining legal transactions or measures.

(5) The statutory auditor is to sign the audit report providing the place and date. The audit report also is to be included in the report on the audit.

### **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 financial statements are to be audited by a statutory auditor, the statutory auditor's additional report 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 financial statements are to be audited by a statutory auditor, the supervisory board is to furthermore state its position in its report regarding the results obtained by the statutory auditor in auditing the report on the relations of the company with affiliated enterprises. An audit report issued by the statutory auditor is to be included in the report, and any refusal to issue such an audit report is to be expressly stated.

(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 financial statements are to be audited by a statutory auditor, 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 key results obtained in the audit.

### **Section 315 Special audit**

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 statutory auditor has issued the audit report 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 since a minimum of three months prior to the date on which they have filed the petition. That regional court in the judicial district of which the company has its seat will decide on the petition. Section 142 (8) applies accordingly. A complaint may 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 do 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 that is disadvantageous to the controlled company, 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 the controlled company 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, the controlling enterprise is under obligation to compensate the company for the damage resulting therefrom. The controlling enterprise also will 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 loss resulting for them by the damage caused to the company.
- (2) The duty to provide compensation will not arise where even a conscientious manager faithfully complying with the relevant duties of an independent company also would have 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 are 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 (3) to (5) applies accordingly.

### **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 are 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 the relevant duties, the onus of proof is 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 are liable as joint and several debtors besides the parties obligated to provide compensation pursuant to section 317; subsection (1) sentence 2 applies accordingly.
- (3) The duty to provide compensation will not arise in relation to the company, nor will it arise in relation to the stockholders, where the action taken is based on a lawful resolution adopted by the general meeting.
- (4) Section 309 (3) to (5) applies accordingly.

### **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 are not to be applied to the resolution.
- (2) The resolution adopted as to the integration will enter into force only if the general meeting of the future principal company has consented thereto. The resolution adopted as to the consent requires a majority of at least three quarters of the capital stock represented at the time of its adoption. The by-laws may stipulate a greater majority ratio of capital and may impose further requirements. Subsection (1) sentence 2 is to be applied.
- (3) From the time onwards at which the general meeting of the future principal company is convened at which it is intended 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 financial statements and the management reports of the companies involved for the last three 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 sentence 1. The obligations pursuant to sentences 1 and 2 will not apply if the documents designated in sentence 1 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. Upon a corresponding demand being made, each stockholder is to be provided with information at the general meeting also about any and all matters of the company to be integrated that are key 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 registration.

(5) In filing the application for registration 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 binding, 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 registration. Where no such declaration is available, the integration may not be registered unless the stockholders entitled to bring an action declare, by a notarially recorded declaration of waiver, that they waive bringing an action against the entry into force of the resolution adopted by the general meeting.

(6) It is equivalent to the declaration stipulated by subsection (5) sentence 1 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 conflict with the entry in the register. Unless stipulated otherwise, section 247, sections 82, 83 (1) and section 84 of the Code of Civil Procedure as well as the provisions of the Code of Civil Procedure applicable to proceedings of first instance before the regional courts are to be applied accordingly to the proceedings. A court order pursuant to sentence 1 is 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 week of having served the petition, that they have 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 substantial disadvantages for the company and its stockholders as presented by the petitioner outweigh the disadvantages the respondent stands to suffer; this does 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 as a rule is to be delivered no later than three months after the petition has been filed; the reasons for any delays to the decision are to be provided in a court order against which there is no right of appeal. The facts and circumstances brought before the court, by reason of which the court order pursuant to sentence 3 may be delivered, are to be demonstrated to the satisfaction of the court. A senate of the higher regional court in the judicial district of which the company has its seat will decide regarding the petition.

Transferring the matter to a judge sitting alone is precluded; no conciliation hearing is required. There is no right of appeal against the court order. If the action is found to be well-founded, then the company that has obtained the court order will be under obligation to compensate the respondent for the damages that the latter has suffered as a result of the integration based on the resolution adopted by the general meeting having been registered. Once it has been registered, any deficiencies of the resolution will 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.

(7) Upon entry of the integration in the Commercial Register kept at the seat of the company, the company will 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, 95 per cent of the capital stock, 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 capital stock. Besides section 319 (1) sentence 2 and (2) to (7), subsections (2) to (4) apply to the integration.

(2) The notice as to the integration will 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) sentence 3, to pay a cash settlement.

No. 2 of sentence 1 also applies 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 will select and appoint them upon a corresponding petition having been filed by the management board of the future principal company. Section 293a (3) and sections 293c to 293e are to be applied accordingly.

(4) From the time onwards at which the general meeting is convened at which it is intended to adopt a resolution as to the consent to the integration, the documents designated in section 319 (3) sentence 1 as well as the report on the audit under subsection (3) each are 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 also is to 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) sentences 2 to 5 applies accordingly to the stockholders of both companies.

(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 will devolve to same. Where share certificates have been issued regarding these shares of stock, they will 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. If 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 considered 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, compensation for indivisible residual amounts may be provided 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 notice of the entry is given by publication, at five (5) percentage points per annum above the respectively applicable basic rate of interest pursuant to section 247 of the Civil Code; 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 is to establish, upon a corresponding petition having been filed, the appropriate settlement payment. The same applies 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 binding 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 notice by publication having been made as to the integration's having been entered in the Commercial Register, provided they come forward for this purpose within six months of the notice by publication, unless they are able to demand satisfaction of their claims. This right is to be indicated to the creditors in a notice by publication regarding the entry.

(2) Those creditors are not 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 is 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 is liable in the same manner for all liabilities of the integrated company arising after the integration. Any agreement to the contrary will not be effective in relation to 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 has the same authority for as long as the creditor is able to obtain satisfaction by offsetting their claims against an amount receivable due to the integrated company.

(4) No compulsory enforcement can 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 (2) sentence 1 and (3), sections 309 and 310 apply accordingly. Sections 311 to 318 are not to be applied.

(2) Performance by the integrated company to the principal company is not considered a violation of sections 57, 58 and 60.

#### **Section 324**

##### **Legal reserve. Profit transfer. Loss absorption**

- (1) The statutory provisions regarding the formation of legal reserve, regarding their appropriation and regarding the allocation of amounts to the legal reserve are not to be applied to integrated companies.
- (2) Sections 293 to 296 and sections 298 to 303 are not to be applied 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 ends 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 reserve and of the retained earnings.

#### **Section 325**

**(repealed)**

#### **Section 326**

##### **Right of the stockholders of the principal company to seek information**

Information regarding matters of the integrated company is to be provided to any stockholder of the principal company just as information regarding matters of the principal company is to be provided to them.

#### **Section 327**

##### **End of the integration**

(1) The integration ends:

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 fact that the integration has ended, of the grounds therefor and the time at which the integration ended.

(4) Where the integration comes to an end, the former principal company is liable for the obligations of the formerly integrated company that have arisen up to that time, if they are due prior to five 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 set out in section 197 (1) nos. 3 to 5 of the Civil Code 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 suffices for an administrative decision to be issued. The time limit commences on the day on which notice of the entry of the end of the integration in the Commercial Register has been given by publication pursuant to section 10 of the Commercial Code. Sections 204, 206, 210, 211 and 212 (2) and (3) of the Civil Code

applying to prescription are to be applied accordingly. The establishment of claims in a manner as set out in section 197 (1) nos. 3 to 5 of the Civil Code will 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 95 per cent of the capital stock (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) sentence 1 does not apply.
- (2) Section 16 (2) and (4) applies to determining whether the principal stockholder owns 95 per cent 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 notice of the entry of the resolution as to the transfer in the Commercial Register has been given by publication, the cash settlement is to accrue interest at five percentage points per annum above the respectively applicable basic rate of interest pursuant to section 247 of the Civil Code; 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 registered, 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 will select and appoint them upon a corresponding petition having been filed by the principal stockholder. Section 293a (2) and (3), section 293c (1) sentences 3 to 5 and (2) as well as sections 293d and 293e are to be applied accordingly.
- (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 financial statements and the management reports for the last three financial years;
3. the report submitted by the principal stockholder pursuant to subsection (2) sentence 1;
4. the report on the audit submitted in accordance with subsection (2) sentences 2 to 4.

(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 obligations pursuant to subsections (3) and (4) are not 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 provide the principal stockholder with 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 registration.

(2) Section 319 (5) and (6) applies accordingly.

(3) Upon the resolution as to the transfer having been entered in the Commercial Register, all shares of stock owned by the minority stockholders will devolve to the principal stockholder. Where share certificates have been issued regarding these shares of stock, they will 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 will establish, upon a corresponding petition having been filed, the appropriate cash settlement. The same applies 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 binding 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 does not apply to the right to new shares of stock in the event of a capital increase using company funds. Section 16 (4) is to be applied.

(2) The limitation set out in subsection (1) does 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 listed company, 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 shareholding 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 393a**

#### **Appointment to organs of stock corporations in which the Federation holds a majority interest**

(1) Stock corporations in which the Federation holds a majority interest are stock corporations having their seat in Germany,

1. the majority of the shares in which is held by the Federation, or
2. which are large share capital companies (section 267 (3) of the Commercial Code) and in which the majority of shares is held by companies, in which in turn the majority of shares is held by the Federation, or
3. which as a rule have more than 500 employees and in which the majority of shares is held by companies, the majority of shares in which in turn
  - a) is held by the Federation, or
  - b) is held by companies in which the ownership of the shares continues in this manner up to companies in which the majority of shares is held by the Federation.

Shares held via a special fund of the Federation are not to be taken into account. Bodies under public law that are active in an entrepreneurial capacity are equivalent to the Federation.

(2) The following apply to stock corporations in which the Federation holds a majority interest:

1. Section 76 (3a), independently of a listing on a stock exchange and of whether the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry or the Supplementary Co-determination Act apply, if the management board consists of more than two members, as well as

2. section 96 (2) independently of a listing on a stock exchange and of whether the Employee Co-Determination Act, the Act on Co-determination in the Coal, Iron and Steel Industry or the Supplementary Co-determination Act apply.

(3) The *Länder* may, by enacting a corresponding *Land* law, have the requirements of subsection (2) extend to stock corporations in which a *Land* holds a majority interest in accordance with subsection (1). In this case, the statutory provisions and election regulations pertaining to co-determination in enterprises in which the Federation holds a majority interest apply accordingly to companies in which a *Land* holds a majority interest and which are subject to co-determination rights.

#### **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 are not under any duty of secrecy regarding the reports they are to submit to the local authority. This does 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 sentence 1 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**

##### **Duty 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, 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 from reports pursuant to section 394; this does not apply to notifications made in an official capacity.

(2) Where audit results are published, no confidential information or 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 will have jurisdiction for the complaint in the judicial district of which the company has its seat.

(2) Following its dissolution, the company will be wound up pursuant to sections 264 to 273. The authority specified in subsection (1) sentence 1 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) sentence 1 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 will enter them in the Commercial Register.

### **Part 3**

#### **Provisions regarding punitive fines and administrative fines. Final provisions**

### **Section 399**

#### **False information**

(1) Anyone is liable to a term of imprisonment not exceeding three 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) sentence 1 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 as per section 37a (2), also read in conjunction with section 52 (6) sentence 3
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 report on the audit,
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 capital stock (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) sentence 1 read in conjunction with section 37a (2) or in the assurance to be given as per section 184 (1) sentence 3
5. as a liquidator, for purposes of entering in the register the continuation of the company, in the proof to be provided under the terms of 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 as per section 37 (2) sentence 1 or section 81 (3) sentence 1 or as a liquidator in the assurance to be given as per section 266 (3) sentence 1.

(2) Likewise, anyone is 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) sentence 2 for purposes of entering an increase of the capital stock in the register.

### **Section 400**

#### **False representation of facts**

(1) Anyone is liable to a term of imprisonment not exceeding three 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 the remuneration report drawn up under section 162 (1) or (2), in depictions or summaries of the company's net asset position or 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; 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 provisions 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.

(2) Likewise, anyone is 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 in accordance with the provisions 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 is liable to a term of imprisonment not exceeding three 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 capital stock.

(2) Where the perpetrator has acted negligently, the punishment will be a term of imprisonment not exceeding one year or payment of a fine.

#### **Section 402**

##### **False issuance of proof of entitlement**

(1) Anyone is liable to a term of imprisonment not exceeding three 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 provisions governing criminal offences involving records and documents subject the deed to stricter punishment.

(2) Likewise, anyone is 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 is liable to a term of imprisonment not exceeding three years or to payment of a fine.

(2) Where the perpetrator has acted in return for remuneration or with the intention of enriching themselves or some other party or of causing damage to some other party, the punishment will consist of a term of imprisonment not exceeding five years or of the payment of a fine.

#### **Section 404**

##### **Violation of the duty 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 they have become aware in their 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

is liable to a term of imprisonment not exceeding one year, in the case of listed companies to a term of imprisonment not exceeding two years or to payment of a fine; in the case of no. 2, however, they will be so liable only if the deed is not punishable pursuant to section 333 of the Commercial Code.

(2) Where the perpetrator is acting in return for remuneration or with the intention of enriching themselves or some other party or of causing damage to some other party, they are liable to a term of imprisonment not exceeding two years, in the case of listed companies to a term of imprisonment not exceeding three years or to payment of a fine. Likewise, anyone is 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 they have become aware subject to the pre-requisites set out in subsection (1).

(3) The offence will 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 is 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 is entitled to file the corresponding petition.

#### **Section 404a**

##### **Violation of the duties entailed by the auditing of accounts**

(1) Anyone is liable to a term of imprisonment not exceeding one year or to payment of a fine who, as a member of the audit committee of a company that is a public-interest entity as defined in section 316a sentence of the Commercial Code,

1. commits an act designated in section 405 (3b), thus obtaining a material benefit or having such a material benefit promised to them or who
2. persistently commits an act designated in section 405 (3b).

(2) Likewise, anyone is liable to punishment who, as a member of the supervisory board of a company that is a public-interest entity as defined in section 316a sentence 2 of the Commercial Code,

1. commits an act designated in section 405 subsection (3c), thus obtaining a material benefit or having such a material benefit promised to them or who
2. persistently commits an act designated in section 405 subsection (3c).

#### **Section 405**

##### **Administrative offences**

(1) Anyone will 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 registered or, in the case of a capital increase, prior to the implementation of such increase of the capital stock 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) sentence 1 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 capital stock is allocated than the minimum amount permissible pursuant to section 8 (3) sentence 3

4.

- a) purchases treasury shares of stock in the company in contravention of section 71 (1) nos. 1 to 4 or (2) or, read 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 (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. in contravention of section 120a (2), fails to make a disclosure, fails to make it accurately or completely or fails to make it in due time, or

6. in contravention of section 162 (4), fails to make available a report or opinion set out therein or fails to make it publicly available for a minimum of 10 years

(2) Anyone likewise will be committing an administrative offence 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 will be committing an administrative offence who,

- 1. in contravention of section 67 (4) sentence 2 first half-sentence, and also read in conjunction with sentence 3, fails to submit a notification set out therein or fails to submit it accurately, completely or in due time,
- 2. in contravention of section 67a (3) sentence 1, also read in conjunction with sentence 2, and in each case also read in conjunction with section 125 (5) sentence 3, or in contravention of section 67c (1) sentence 2 or section 67d (4) sentence 2 second half-sentence, fails to forward an item of information set out therein or fails to forward it accurately, completely or in due time,
- 3. in contravention of section 67b (1) sentence 1, also read in conjunction with subsection (2), in each case also read in conjunction with section 125 (5) sentence 3, or in contravention of section 67c (1) sentence 1 or section 67d (4) sentence 1 or 3, fails to transmit an item of information set out therein or fails to transmit it accurately, completely or in due time,
- 4. in contravention of section 67c (3), fails to issue the confirmation set out therein or fails to issue it accurately, completely or in due time,
- 5. in contravention of section 67d (3), fails to forward a request for information set out therein or fails to do so accurately, completely or in due time,
- 6. in contravention of section 111c (1) sentence 1, fails to make a disclosure or fails to do so accurately, completely or in due time,
- 7. in contravention of section 118 (1) sentence 3 or 4, in each case also read in conjunction with subsection (2) sentence 2, or in contravention of section 129 (5) sentence 2 or 3, fails to issue a confirmation set out therein or fails to do so accurately, completely, in the manner prescribed or in due time, or fails to transmit such confirmation or fails to do so accurately, completely or in due time,

8. in contravention of section 134b (5) sentence 1, fails to make publicly accessible an item of information as stipulated by section 134b (1), (2) or (4) or fails to do so for a minimum of three years,
9. in contravention of section 134c (3) sentence 1, fails to make publicly accessible an item of information as stipulated by section 134c (1) or (2) sentence 1 or 3 or fails to do so for a minimum of three years,
10. in contravention of section 134d (3), fails to make publicly accessible an item of information set out therein or fails to do so for a minimum of three years,
11. in contravention of section 134d (4), fails to provide an item of information or fails to do so accurately, completely or in due time, or,
12. in contravention of section 135 (9), precludes or limits an obligation set out therein.

(3) Furthermore, anyone will be committing an administrative offence who

1. uses shares of stock belonging to some other party that they do 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 them,
4. uses shares of stock belonging to some other party, regarding which they or the party they are 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 they or the party they are representing may not exercise the voting right pursuant to section 20 (7), section 21 (4), sections 71b, 71d sentence 4, section 134 (1), sections 135, 136, 142 (1) sentence 2 or section 285 (1), for purposes of exercising the voting right, or uses such shares of stock surrendered to them to exercise the voting right,
6. demands special benefits as counter-performance or has such special benefits promised to them, or accepts such special benefits, 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 will 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) sentence 1 also read in conjunction with section 124 (1) sentence 3 or fails to forward it accurately, completely or in due time or
2. who, in contravention of section 124a, fails to make publicly accessible information or fails to do so accurately or completely.

(3b) Anyone will be committing an administrative offence who, as a member of the audit committee of a company that is a public-interest entity as defined in section 316a sentence of the Commercial Code,

1. fails to monitor the independence of the statutory auditor or audit firm subject to the stipulations of Article 4 (3) subparagraph 2, of Article 5 (4) subparagraph 1 sentence 1 or of Article 6 (2) of Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (OJ L 158 of 27 May 2014, p. 77, L 170 of 11 June 2014, p. 66) or

2. submits to the supervisory board a recommendation for the appointment of a statutory auditor or an audit firm that fails to meet the requirements set out in Article 16 (2) subparagraph 2 or 3 of Regulation (EU) No 537/2014 or that has not been preceded by a selection procedure pursuant to Article 16 (3) subparagraph 1 of Regulation (EU) No 537/2014.

(3c) Anyone will be committing an administrative offence who, as a member of the supervisory board of a company that is a public-interest entity as defined in section 316a sentence 2 of the Commercial Code, submits a suggestion to the general meeting for the appointment of an auditor or an audit firm who fails to meet the requirements set out in Article 16 (5) subparagraph 1 or 2 sentence 1 or 2, of Regulation (EU) No 537/2014.

(4) In the cases governed by subsection (2a) no. 6 as well as of subsections (3b) and (3c), the administrative offence may be punished by a fine of up to 500,000 euros, in the other cases by a fine not exceeding 25,000 euros.

(5) The administrative authority within the meaning of section 36 (1) sentence 1 of the Act on Regulatory Offences (OWiG) is

1. the Federal Financial Supervisory Authority (BAFin)

a) in the cases governed by subsection (2a) no. 6, insofar as the action concerns a transaction provided for by section 111c (1) sentence 1 read in conjunction with subsection (3) sentence 1, and

b) in the cases governed by subsections (3b) and (3c) where companies are concerned that are public-interest entities as defined in section 316a sentence 2 nos. 2 and 3 of the Commercial Code,

2. in the cases governed by subsections (3b) and (3c), in which BAFin is not the administrative authority in accordance with no. 1 (b), the Federal Office of Justice (*Bundesamt für Justiz* – 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) sentences 2 to 4, section 71c, section 73 (3) sentence 2, sections 80, 90, 104 (1), section 111 (2), section 145, sections 170, 171 (3) or (4) sentence 1 read in conjunction with subsection (3), sections 175, 179a (2) sentences 1 to 3, 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) or section 314 (1), or where members of the supervisory board fail to comply with section 107 (4) sentence 1, the court of registration maintaining the register is to compel them to comply with said provisions by levying a coercive penalty payment against them; section 14 of the Commercial Code remains 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) and section 319 (3) are not 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) transmits to the auditing oversight body with the Federal Office for Economic Affairs and Export Control all decisions as to fines pursuant to section 405 (3b) and (3c).
- (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 will 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 apply accordingly to the public partly limited partnership. To the extent they concern members of the management board, they apply, in the case of a public partly limited partnership, to the general partners.

#### **Section 409**

##### **Application in Berlin**

The present Act applies, subject to the stipulations made in section 13 (1) of the Third Transition Law (*Drittes Überleitungsgesetz – 3. ÜblG*) of 4 January 1952 (Federal Law Gazette I p. 1) also in the *Land* of Berlin. Any statutory instruments enacted by reason of the present Act apply in the *Land* of Berlin pursuant to section 14 of the Third Transition Law.

#### **Section 410**

##### **Entry into force**

This Act enters into force on 1 January 1966.