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# German Stock Corporation Act (*Aktiengesetz*)

English translation as at May 10, 2016



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# German Stock Corporation Act (*Aktiengesetz*)

English translation as at May 10, 2016



# Stock Corporation Act

as of September 6, 1965

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

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

Book One. Stock Corporation  
Division One. General Provisions

## § 1 Nature of the Stock Corporation

- (1) <sup>1</sup>The stock corporation is a company that constitutes a separate legal entity. <sup>2</sup>Liability to creditors with respect to obligations of the company shall be limited to the company's assets.
  - (2) The company shall have a capital divided into shares.
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## § 2 Number of Founders

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

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## § 3 Commercial Enterprise; Listing

- (1) The company shall constitute a commercial enterprise even if the purpose of the enterprise does not comprise commercial activity.
  - (2) Stock exchange listed within the meaning of this law are those corporations whose shares have been admitted to a market that is regulated and supervised by state recognized authorities and that takes place regularly and is directly or indirectly accessible to the public.
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## § 4 Business Name

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

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## § 5 Domicile

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

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## § 6 Share Capital

The share capital shall be denominated in Euro.

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## § 7 Minimum Par Value of the Share Capital

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

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## § 8 Form and Minimum Par Value of Shares

- (1) Shares may be established either as par or as non-par.
  - (2) <sup>1</sup>Par shares shall have a par value of at least one euro. <sup>2</sup>Shares set at lower par value shall be null and void. <sup>3</sup>The issuers shall be jointly and severally liable to the holders thereof for any damage resulting from such issue. <sup>4</sup>Higher share par values shall be stated in multiples of one euro.
  - (3) <sup>1</sup>Non-par shares have no par value. <sup>2</sup>Non-par shares of a company participate equally in its share capital. <sup>3</sup>The portion of the share capital corresponding to one non-par share may not fall below one euro. <sup>4</sup>(2) sentence 2 and 3 shall apply accordingly.
  - (4) The proportion of the share capital is determined in the case of par shares according to the relationship of the par value to the share capital in the case of non-par shares according to the number of shares.
  - (5) Shares shall not be divisible.
  - (6) The foregoing provisions shall also apply to certificates (interim certificates) issued to shareholders prior to the issue of share certificates.
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## § 9 Issue Price of Shares

- (1) Shares may not be issued at a price lower than par value or the proportionate amount of the share capital relating to the non par share (minimum issue price).
  - (2) Shares may be issued at a price higher than par value.
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## § 10 Share Certificates and Interim Certificates

- (1) <sup>1</sup>Share certificates are in registered form. <sup>2</sup>They may be in bearer form if
  1. the company is listed on the stock exchange or
  2. the right to demand individual certificates is excluded and the global certificate is deposited with one of the following:
    - a) a securities clearing and depository bank within the meaning of § 1 (3) of the Deposit Act;
    - b) an authorised central securities depository (CSD) or an authorised third-country CSD pursuant to Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 236/2012 (Official Journal of the European Union L 257 of 28 August 2014, p. 1); or

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

<sup>3</sup>In the case of sentence 2 No. 2, § 67 shall apply accordingly as long as the global certificate has not been deposited.

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

(3) Interim certificates shall be in registered form.

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

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

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## **§ 11 Classes of Shares**

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

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## **§ 12 Voting Rights. No Multiple Voting Rights**

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

(2) Multiple voting rights shall be prohibited.

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## **§ 13 Signatures on Share Certificates**

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

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## **§ 14 Jurisdiction**

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

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## **§ 15 Affiliated Enterprises**

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

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## § 16 Subsidiaries and Parent Enterprises

- (1) If the majority of shares in a legally separate enterprise are held by another enterprise or if another enterprise is entitled to the majority of the voting rights (majority holding), such enterprise shall constitute a subsidiary and the other enterprise shall constitute its parent enterprise.
- (2) <sup>1</sup>The portion of shares that is held by an enterprise shall be determined, in the case of corporations, by the ratio of the aggregate par value of shares held to the nominal capital, and, in the case of companies with non-par shares, by the number of shares. <sup>2</sup>In the case of corporations, own shares held by it shall be deducted from the nominal capital; in the case of companies with non-par shares, own shares held by it shall be deducted from the number of shares. <sup>3</sup>Shares held by another person on behalf of the enterprise shall be deemed equivalent to own shares.
- (3) <sup>1</sup>The portion of the voting rights to which an enterprise is entitled shall be determined by the ratio of the number of voting rights exercisable in respect to the shares held by such enterprise to the aggregate number of all voting rights. <sup>2</sup>Voting rights arising from own shares held by the enterprise and shares deemed equivalent to such company shares pursuant to (2) sentence 3, shall be deducted from the aggregate number of all voting rights.
- (4) Shares held by a controlled enterprise or held by another person on behalf of the enterprise or an enterprise controlled by it and, if the owner of the enterprise is a sole proprietor, shares that constitute private property of the owner, shall be deemed to constitute shares held by the enterprise.

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## § 17 Controlled and Controlling Enterprise

- (1) Legally separate enterprises over which another enterprise (controlling enterprise) is able to exert, directly or indirectly, a controlling influence, shall constitute controlled enterprises.
- (2) A majority owned enterprise shall be presumed to be controlled by the enterprise with a majority shareholding in it.

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## § 18 Groups and Members of Groups

- (1) <sup>1</sup>If a controlling and one or more controlled enterprises are subject to the common direction of the controlling enterprise, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group. <sup>2</sup>If enterprises are parties to a control agreement (§ 291) or if one enterprise has been integrated into the other (§ 319), such enterprises shall be deemed to be subject to common management. <sup>3</sup>A controlled enterprise and its controlling enterprise shall be presumed to constitute a group.
- (2) If legally separate enterprises are subject to common direction, although none of such enterprises controls the other, such enterprises shall constitute a group and the individual enterprises shall constitute members of such group.

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## § 19 Enterprises with Cross-Shareholdings

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



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

- (2) If one of the enterprises with cross-shareholdings has a majority holding in the other enterprise or if one of such enterprises is able to exert, directly or indirectly, a controlling influence over the other, one such enterprise shall constitute the controlling and the other the controlled enterprise.
- (3) If each of the enterprises with cross-shareholdings has a majority holding in the other enterprise, or if each is able to exert, directly or indirectly, a controlling influence over the other, each enterprise shall constitute a controlling and a controlled enterprise.
- (4) § 328 shall not apply to enterprises that constitute controlling or controlled enterprises pursuant to (2) or (3).

## § 20 Disclosure Obligations

- (1) <sup>1</sup>As soon as an enterprise holds more than one fourth of the shares of a company with domestic domicile, it shall promptly inform such company thereof in writing. <sup>2</sup>§ 16 (2) sentence 1 and (4) shall apply in determining whether the enterprise holds more than one fourth of the shares.
- (2) For purposes of the disclosure requirement pursuant to (1), shares held by an enterprise shall be deemed to include:
  1. shares whose transfer may be required by such enterprise, or an enterprise controlled by it, or any other person on behalf of such enterprise or an enterprise controlled by it;
  2. shares that such enterprise, or an enterprise controlled by it, or any other person on behalf of such enterprise or an enterprise controlled by it, is obligated to acquire.
- (3) If such enterprise is organized as a corporation, it shall, as soon as it holds more than one fourth of the shares of a company, not including any shares attributable to it pursuant to (2), promptly inform such company thereof in writing.
- (4) As soon as any enterprise acquires a majority holding (§ 16 (1)), it shall promptly inform such company thereof in writing.
- (5) If the holding falls below the level requiring disclosure pursuant to (1), (3) or (4), the company shall be promptly informed thereof in writing.
- (6) <sup>1</sup>The company shall promptly announce in the company's journals the existence of a shareholding of which it has been informed pursuant to (1) to (4) disclosing the enterprise holding such shares. <sup>2</sup>If the company has been informed that such shareholding has fallen below the level requiring disclosure pursuant to (1) or (4), such fact shall also be announced promptly in the company's journals.
- (7) <sup>1</sup>Rights arising from shares that are held by an enterprise that is required to make disclosure pursuant to (1) or (4) may not, for as long as such enterprise has not made such disclosure, be exercised by such enterprise, by an enterprise controlled by it or by any other person on behalf of such enterprise or an enterprise controlled by it. <sup>2</sup>This shall not apply to claims according to § 58 (4) and § 271 if the notification was not intentionally

omitted and has subsequently been made.

- (8) (1) to (7) shall not apply to shares of an issuer within the meaning of § 21 (2) of the Securities Trade Act.
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## **§ 21 Disclosure Obligations of the Company**

- (1) <sup>1</sup>As soon as the company holds more than one fourth of the shares of another corporation with domestic domicile, it shall promptly inform such enterprise thereof in writing. <sup>2</sup>§ 16 (2) sentence 1 and (4) shall apply accordingly in determining whether the company holds more than one fourth of the shares.
- (2) As soon as the company acquires a majority holding (§ 16 (1)) in another enterprise, it shall promptly inform such enterprise thereof in writing.
- (3) If the holding falls below the level requiring disclosure pursuant to (1) or (2), the company shall promptly inform the other enterprise thereof in writing.
- (4) <sup>1</sup>Rights arising from shares that are held by a company required to make disclosure pursuant to (1) or (2) may not be exercised for as long as the company has not made such disclosure. <sup>2</sup>§ 20 (7) sentence 2 shall apply accordingly.
- (5) (1) to (4) shall not apply to shares of an issuer within the meaning of § 21 (2) of the Securities Trade Act.
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## **§ 22 Proof of Disclosed Holdings**

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

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### **Division Two. Formation of the Company**

## **§ 23 Establishment of the Articles**

- (1) <sup>1</sup>The articles shall be established in the form of a notarial deed. <sup>2</sup>Attorneys-in-fact shall require a power of attorney certified by a notary.
- (2) The deed shall specify:
1. the founders;
  2. the par value of par-value shares, the issue price of non-par shares and, if more than one class of shares exists, the class of shares subscribed by each founder;
  3. the paid-in amount of the share capital.
- (3) The articles shall determine:
1. the company's business name and domicile;
  2. the purpose of the enterprise; in particular in the case of enterprises engaged in industry and trade, the articles shall specify the kind of products and goods to be

produced and traded;

3. the amount of the share capital;
  4. the segmentation of the share capital either in par-value shares or in non-par shares; the par value of par-value shares and the number of shares of each par value; the number of non-par shares and, if more than one class of shares exists, the classes of shares and the number of shares in each class;
  5. whether shares are to be issued in bearer or registered form;
  6. the number of members of the management board or the rules for determining such number.
- (4) In addition, the articles shall contain provisions regarding the form of announcements by the company.
- (5) <sup>1</sup>The articles may contain different provisions from the provisions of this Act only if this Act explicitly so permits. <sup>2</sup>The articles may contain additional provisions, except as to matters that are conclusively dealt with in this Act.

## § 24 [repealed]

## § 25 Announcements by the Company

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

## § 26 Special Benefits. Formation Expenses

- (1) Any special benefit granted to a particular shareholder or a third party shall be stipulated in the articles and the beneficiary shall be identified.
- (2) The aggregate amount of expenditures to be paid at the expense of the company to shareholders or other persons as compensation or remuneration for the formation or preparation thereof shall be separately stipulated in the articles.
- (3) <sup>1</sup>Absent such stipulation, any relevant agreements and any transaction in execution thereof shall be unenforceable with respect to the company. <sup>2</sup>Such unenforceability shall be incapable of being cured by amendment of the articles once the company has been registered in the commercial register.
- (4) Such stipulations may only be amended after the company has been registered in the commercial register for five years.
- (5) The provisions in the articles regarding such stipulations may only be deleted by means of amendment of the articles after the company has been registered in the commercial register for thirty years and all legal relationships that constituted the basis for such stipulations have been settled for not less than five years.

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

- (1) <sup>1</sup>If shareholders are required to make contributions other than by cash payments of the issue price of the shares (Contributions in kind), or if the company is required to acquire existing or future facilities or other assets (acquisitions of assets), the articles shall stipulate the purpose of the contribution in kind or acquisition of assets, the person from whom the company is to acquire such object, and the par value or, in case of non-par shares, the number of shares to be issued for the contribution in kind or the consideration to be granted for the acquisition of assets. <sup>2</sup>If the company is required to acquire an asset for which a consideration is to be granted which is to be applied towards the contribution payable by a shareholder, such acquisition shall be deemed a contribution in kind.
- (2) Contributions in kind or acquisitions of assets may only comprise assets that have an ascertainable economic value; obligations to provide services may not be made the object of Contributions in kind or acquisitions of assets.
- (3) <sup>1</sup>If a shareholder's cash contribution is to be evaluated as a contribution in kind in full or in part (disguised contribution in kind) from an economic point of view and due to an arrangement made in connection with the acquisition of the cash contribution, this does not release the shareholder from his obligation to make a contribution. <sup>2</sup>However, any agreement regarding the contribution in kind and any transaction in execution thereof shall not be unenforceable. <sup>3</sup>The value of the asset at the point in time of the filing of the company for registration with the commercial register or at the point in time of the surrender of the asset to the company, if this is done at a later point in time, shall be offset against the shareholder's continuing obligation to make a capital contribution. <sup>4</sup>The set-off shall not be effected prior to the registration of the company in the commercial register. <sup>5</sup>The burden of proof for the value of the asset lies with the shareholder.
- (4) <sup>1</sup>If before the contribution a payment to the shareholder was agreed which, from an economic point of view, corresponds to the repayment of the contribution and which is not to be evaluated as a disguised contribution in kind within the meaning of (3), this only releases the shareholder from his obligation to make a capital contribution if the payment is covered by entitlement to full restitution which may fall due at any time or may become due by termination without notice by the company. <sup>2</sup>Such payment or the agreement on such payment shall be stated in the filing pursuant to § 37.
- (5) § 26 (4) shall apply to the amendment of lawfully made stipulations, § 26 (5) shall apply to the deletion of the relevant provisions in the articles.

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## **§ 28 Founders**

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

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## **§ 29 Establishment of the Company**

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

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

- (1) <sup>1</sup>The founders shall appoint the first supervisory board of the company and the external

auditors for the first full or partial fiscal year. <sup>2</sup>Such appointments shall be made in the form of a notarial deed.

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

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

- (1) <sup>1</sup>If the articles provide for a contribution in kind or an acquisition of assets to be made by contribution or acquisition of an enterprise in whole or in part, the founders shall appoint only as many members of the supervisory board as the shareholders' meeting is to elect, without being bound by nominations pursuant to the statutory provisions that, in the opinion of the founders, govern the composition of the supervisory board following such contribution or acquisition. <sup>2</sup>If, however, such procedure would result in only two members of the supervisory board being appointed, the founders shall appoint three members to the supervisory board.
- (2) A quorum for the supervisory board appointed pursuant to (1) sentence 1 shall exist if one half, but in no event less than three, of its members participate in the passing of resolutions, unless the articles provide otherwise.
- (3) <sup>1</sup>The management board shall promptly, upon such contribution or acquisition of an enterprise in whole or in part, announce which statutory provisions in its opinion govern the composition of the supervisory board. <sup>2</sup>§§ 97 to 99 shall apply accordingly.  
<sup>3</sup>The term of office of the previous members of the supervisory board shall expire only if the supervisory board is required to be composed in accordance with statutory provisions other than those which the founders considered to be governing, or if the founders appointed three members of the supervisory board despite the fact that the supervisory board also is to include employee representatives.
- (4) (3) shall not apply if the enterprise or part thereof is contributed or acquired after the announcement by the management board pursuant to § 30 (3) sentence 2.
- (5) § 30 (3) sentence 1 shall not apply with respect to members of the supervisory board appointed by the employees pursuant to (3).

### **§ 32 Formation Report**

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

- (2) <sup>1</sup>The formation report shall set forth the material facts in connection with the adequacy of Contributions in kind or acquisitions of assets. <sup>2</sup>The following shall be stated
1. any preceding transactions entered into with a view to such contribution or acquisition;
  2. the costs of acquisition and production during the preceding two years;
  3. in case of the transfer of an enterprise to the company, the earnings for the last two fiscal years.
- (3) In addition, the formation report shall specify whether and to what extent shares have been subscribed at formation on behalf of a member of the management board or the supervisory board and whether and in which manner a member of the management board or the supervisory board has obtained a promise of any special benefit or any compensation or remuneration for the formation or preparation thereof.
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### **§ 33 Formation Audit. General**

- (1) The members of the management board and the supervisory board shall audit the transactions in connection with the formation of the company.
- (2) In addition, an audit by one or more auditors (formation auditors) shall be made if:
1. a member of the management board or the supervisory board is one of the founders; or
  2. shares have been subscribed at formation on behalf of a member of the management board or the supervisory board; or
  3. a member of the management board or the supervisory board has obtained a promise of any special benefits or compensation or remuneration for the formation or preparation thereof; or
  4. the formation involves Contributions in kind or acquisitions of assets.
- (3) <sup>1</sup>In the cases of (2) numbers 1 and 2, the certifying notary (§ 23(1) sentence 1) may conduct the audit instead of a foundation auditor on behalf of the founders; the provisions on the formation audit shall apply accordingly. <sup>2</sup>If the notary does not conduct the audit, the court shall appoint the formation auditors. <sup>3</sup>An appeal may be made against such decision.
- (4) Unless the audit requires additional expertise, formation auditors shall be:
1. persons who are sufficiently trained and experienced in accounting;
  2. auditing firms at least one of whose legal representatives is sufficiently trained and experienced in accounting.
- (5) <sup>1</sup>No formation auditor may be appointed who does not qualify to serve as special auditor pursuant to § 143 (2). <sup>2</sup>The foregoing shall apply with respect to persons and auditing firms over whose management the founders, or persons on whose behalf the founders have subscribed to shares, exert a substantial influence.
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### **§ 33a Formation on the Basis of Contributions in kind or Acquisition of Assets without External Formation Audit**

- (1) An audit by a formation auditor is not necessary in case of formation on the basis of Contributions in kind or acquisition of assets (§ 33 (2) No. 4) as far as the contribution consists of:
1. transferable securities or financial market instruments within the meaning of § 2 (1) and (1a) of the Securities Trade Act if they are evaluated with the weighted average price at which they were traded within the three months prior to their actual contribution on one or more organised markets within the meaning of § 2 (5) of the Securities Trade Act;
  2. assets other than those listed in No. 1 if an evaluation is applied that was established by an independent, sufficiently skilled and experienced authorised expert taking into account the generally accepted valuation principles and the fair value and if the valuation date was not more than six months before the date of the actual contribution.
- (2) (1) does not apply if the weighted average price of the securities or the financial market instruments ((1) No. 1) was materially influenced by extraordinary circumstances or if it has to be assumed that the fair value of the other assets ((1) No. 2) on the date of their actual contribution is considerably lower than the value assumed by the authorised expert due to circumstances that are new or that have newly emerged.

### **§ 34 Scope of the Formation Audit**

- (1) The audit by the members of the management board and the supervisory board and the audit by the formation auditors shall extend in particular to:
1. whether the statements of the founders concerning the subscription of shares, the contributions to the share capital and the stipulations pursuant to §§ 26 and 27 are accurate and complete;
  2. whether the value of the assets contributed or acquired equals or exceeds the minimum issue price of the shares to be issued or the value of the consideration to be given for these.
- (2) <sup>1</sup>A written report concerning such matters shall be rendered in respect of each audit. <sup>2</sup>Such report shall describe each asset which has been contributed or acquired and shall set out the valuation methods applied in ascertaining the value thereof. This and the statement pursuant to (1) No. 2 is not required for the audit report by the members of the management board and the supervisory board as far as an external formation audit is not required pursuant to § 33a.
- (3) <sup>1</sup>One copy each of the report of the formation auditors shall be submitted to the court and the management board. <sup>2</sup>The report shall be available for public inspection at the court.

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

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

- (2) <sup>1</sup>The court shall decide any differences of opinion between the founders and the formation auditors regarding the scope of information and documentation to be furnished by the founders. <sup>2</sup>Such decision is not subject to a contesting action. <sup>3</sup>The audit report shall not be rendered for so long as the founders refuse to comply with such decision.
- (3) <sup>1</sup>The formation auditors shall be entitled to reimbursement of reasonable cash expenses and remuneration for their services. <sup>2</sup>The court shall set such expenses and remuneration. <sup>3</sup>An appeal may be made against such decision; appeals on points of law are not permitted. <sup>4</sup>A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.
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### **§ 36 Registration of the Company**

- (1) All founders and all members of the management board and the supervisory board shall file the company to the court for registration in the commercial register.
- (2) Except in the case of Contributions in kind, such filing may be made only after the amount called on each share has been duly paid in (§ 54 (3)), and, to the extent not already utilised for the payment of taxes and fees arising in connection with the formation, is at the free disposal of the management board.
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### **§ 36a Shareholders' Contributions**

- (1) In case of contributions in cash, the amount called (§ 36 (2)) must amount to at least one fourth of the minimum issue price and, in case shares were issued for a higher price, also include the surplus amount.
- (2) <sup>1</sup>Contributions in kind shall be made in full. <sup>2</sup>If the contribution in kind consists of an obligation to transfer an asset to the company, such obligation shall be fulfilled within five years after the registration of the company in the commercial register. <sup>3</sup>The value of the contribution in kind shall amount to the minimum issue price and, in case shares were issued for a higher price, also include the surplus amount.
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### **§ 37 Contents of the Filing for Registration**

- (1) <sup>1</sup>The filing shall state that the requirements of § 36 (2) and § 36a have been met and shall specify the price at which shares have been issued and the amount paid in. <sup>2</sup>Proof shall be furnished that the amount paid in is definitely at the free disposal of the management board. <sup>3</sup>If the amount has been paid in by crediting an account pursuant to § 54 (3), such proof shall consist of a written confirmation issued by the bank the account is kept with. <sup>4</sup>Such bank shall be liable to the company for the accuracy of such confirmation. <sup>5</sup>If taxes and fees have been defrayed from the amount paid in, evidence as to the nature and amount of such payments shall be furnished.
- (2) <sup>1</sup>The members of the management board shall certify in the filing that no circumstances prevail which preclude their appointment pursuant to § 76 (3) sentence 2 No. 2 and 3 as well as sentence 3 and that they have been advised of their obligation to make full disclosure to the court. <sup>2</sup>The instruction pursuant to § 53 (2) of the Federal Central Registry Act may be given in writing; it may also be given by a notary or a notary appointed abroad, by a representative of a similar profession in the field of giving legal advice or a consular officer.



(3) The filing shall furthermore specify:

1. a business address in Germany;
2. the manner and extent of the management board members' authority to represent.

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

1. the articles and the deeds establishing the articles and concerning the subscription to the shares by the founders;
2. in case of §§ 26 and 27, the agreements on which the stipulations are based or which were entered into in execution thereof, and an account of the formation expenses which are to be borne by the company; such account shall list the kind and amount of remuneration and the recipients thereof;
3. the documents relating to the appointment of the management board and the supervisory board;
- 3a. a list of members of the supervisory board stating each member's last name, first name, occupation, and place of residence;
4. the formation report and the audit reports of the members of the management board and the supervisory board and of the formation auditors, together with underlying documentation.

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

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

- (1) <sup>1</sup>If an external formation audit is omitted pursuant to § 33a, this fact has to be declared upon filing for registration. <sup>2</sup>Each asset which has been contributed or acquired shall be described. <sup>3</sup>The filing must include a declaration stating that the value of the assets contributed or acquired equals or exceeds the par value of the shares to be issued or the value of the consideration to be given for these. <sup>4</sup>The value, the source of valuation and the valuation method applied shall be stated.
- (2) The persons making the filing shall additionally confirm in the filing that they have not gained knowledge about any extraordinary circumstances which might have considerably influenced the weighted average price of the securities or financial market instruments to be contributed within the sense of § 33a (1) No. 1 during the last three months preceding the day of their actual contribution and that they have not gained knowledge of any circumstances indicating that the fair value of the assets in the sense of § 33a (1) No. 2 is considerably lower on the day of their actual contribution due to new or newly discovered circumstances than the value determined by the expert.

- (3) The following shall be attached to the filing for registration:
1. documentation on the determination of the weighted average price at which the securities or financial market instruments to be contributed have been traded on an organised market during the last three months preceding the day of their actual contribution;
  2. each expert opinion based on the assessment in the cases of § 33a (1) No. 2.
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### **§ 38 Examination by the Court**

- (1) <sup>1</sup>The court shall examine whether or not the company has been duly established and duly filed for registration. <sup>2</sup>If the company has not been duly established and duly filed for registration, the court shall deny registration.
- (2) <sup>1</sup>The court may also deny registration if the formation auditors state, or if it is manifest, that the formation report or the audit report of the members of the management board and the supervisory board is inaccurate or incomplete or does not comply with statutory provisions. <sup>2</sup>The foregoing shall also apply if the formation auditors state, or if the court is of the opinion, that the value of assets contributed or acquired is materially less than the minimum issue price of the shares to be issued or the value of the consideration to be given for these.
- (3) <sup>1</sup>If the filing contains the declaration pursuant to § 37a (1) sentence 1, the court shall, with regard to the value of the assets contributed or acquired, examine exclusively whether the conditions of § 37a have been met. <sup>2</sup>The court may only refuse registration in case of an apparent and considerable overvaluation.
- (4) On the grounds of a deficient, missing or null provision of the articles, the court may only refuse registration according to (1), to the extent that such provision, its absence or invalidity:
1. relates to facts or legal relationships that according to § 23 (3) or other mandatory legal provisions must be determined in the articles or that must be registered in the commercial register or that must be published by the court;
  2. violates provisions that predominantly serve the protection of the company's creditors or are otherwise in the public interest; or
  3. results in the invalidity of the articles.
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### **§ 39 Contents of the Registration**

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

- (2) If the articles contain any provisions regarding the duration of the company or regarding the authorised capital, such provisions shall also be registered.
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## **§ 40 [repealed]**

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

- (1) <sup>1</sup>The stock corporation shall not exist as such prior to its registration in the commercial register. <sup>2</sup>Any person who acts on behalf of the company prior to registration shall be personally liable; if more than one person so acts, such persons shall be jointly and severally liable.
- (2) If the company assumes obligations entered into in its name prior to its registration by agreement with the debtor by substituting itself for such debtor, the validity of such assumption of obligations shall not require the consent of the creditor, provided that such assumption has been agreed upon, and communicated to the creditor by the company or the debtor, within three months from the date of registration of the company.
- (3) In no event may the company assume obligations arising under agreements regarding special benefits, formation expenses, or Contributions in kind and acquisitions of assets that have not been stipulated in the articles.
- (4) <sup>1</sup>Shares may not be transferred and share certificates and interim certificates may not be issued prior to registration of the company in the commercial register. <sup>2</sup>Share certificates and interim certificates issued prior to such registration shall be null and void. <sup>3</sup>The issuers shall be jointly and severally liable to the shareholders for any damage resulting from such issue.
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## **§ 42 One Person Companies**

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

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## **§ 43, 44 [repealed]**

§ 43 [repealed]

§ 44 [repealed]

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## **§ 43 [repealed]**

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## **§ 44 [repealed]**

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## § 45 Transfer of Domicile

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

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## § 46 Liability of Founders

- (1) <sup>1</sup>The founders shall be jointly and severally liable to the company for the accuracy and completeness of the statements made for purposes of formation and relating to subscription to shares, payments on the shares, appropriation of amounts paid-in, special benefits, formation expenses, Contributions in kind and acquisitions of assets. <sup>2</sup>The founders shall further be liable for ascertaining that the agency designated to receive subscription payments on share capital (§ 54 (3)) is qualified and that any amounts paid-in are at the free disposal of the management board. <sup>3</sup>Without prejudice to their liability for compensation of other damages, they shall be required to make up any deficiencies in subscription payments and to reimburse any remuneration that was not included in the formation expenses.
- (2) If the founders intentionally or by gross negligence cause damage to the company through contributions, acquisitions of assets or formation expenses, all founders shall be jointly and severally liable to the company for damages.
- (3) A founder shall be relieved of such liability if the facts giving rise to liability were not known to him and could not have been known to him even if he had employed the diligence of a prudent businessman.
- (4) If the company shall suffer a loss as a result of a shareholder being insolvent or unable to make a contribution in kind, the founders who accepted the participation of such shareholder with knowledge of his insolvency or inability to make contributions shall be jointly and severally liable to the company for damages.
- (5) <sup>1</sup>Persons on whose behalf the founders have subscribed to shares shall have the same

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

## § 47 Liability of Persons other than the Founders

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

1. whoever receives remuneration which was not included in the formation expenses despite the fact that such remuneration is required to be so included by the applicable provisions and who knew or under the circumstances should have known that such receipt of remuneration was concealed or intended to be concealed or who knowingly participated in such concealment;
2. whoever knowingly participates in causing damage to the company intentionally or by gross negligence by means of contributions or acquisitions of assets;
3. whoever, prior to registration of the company in the commercial register or within two years from the date of the registration publicly advertises the shares for distribution and knew or, if he had employed the diligence of a prudent businessman, should have known of the inaccuracy or incompleteness of the statements rendered for purposes of formation (§ 46 (1)) or of damage to the company through contributions or acquisitions of assets.

## § 48 Liability of the Management Board and the Supervisory Board

<sup>1</sup>Members of the management board and of the supervisory board who violate their obligations in connection with the formation of the company shall be jointly and severally liable to the company for any resulting damage; in particular, they shall be liable for ascertaining that the agency designated to receive payments on the shares (§ 54 (3)) is qualified and that any amounts paid in are at the free disposal of the management board.

<sup>2</sup>With respect to the duty of care and the liability of the members of the management board and the supervisory board in connection with the company's formation, §§ 93 and 116 shall also apply, with the exception of § 93 (4) sentences 3 and 4 and (6).

## § 49 Liability of Formation Auditors

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

## § 50 Waiver and Settlement

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

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

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## § 51 Limitation Period of Damage Claims

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

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## § 52 Post-Formation Acquisition

- (1) <sup>1</sup>Agreements entered into by the company which require it to acquire existing or future facilities or other assets for a consideration exceeding one-tenth of the share capital and which are entered into within two years from the date of registration of the company in the commercial register, shall become effective only upon the consent of the shareholders' meeting and registration of such agreements in the commercial register. <sup>2</sup>Absent such consent and registration, any transaction in execution of such agreements shall be unenforceable.
- (2) <sup>1</sup>An agreement pursuant to (1) shall be made in writing and duly signed unless any other form is prescribed. <sup>2</sup>Such agreement shall be displayed for inspection by shareholders at the offices of the company as from the date of notice of the shareholders' meeting resolving on such consent. <sup>3</sup>On request, every shareholder is to be given a copy. <sup>4</sup>The obligations pursuant to sentences 2 and 3 shall not arise if the agreement has been made accessible on the company's Internet page during the same period of time. <sup>5</sup>The agreement shall be made accessible at the shareholders' meeting. <sup>6</sup>The management board shall explain it at the beginning of the proceedings. <sup>7</sup>The agreement shall be appended to the minutes.
- (3) <sup>1</sup>Prior to the passing of the resolution by the shareholders' meeting, the supervisory board shall examine the agreement and render a written report (report on post-formation acquisition). <sup>2</sup>§ 32 (2) and (3) regarding the formation report shall apply accordingly to the report on post-formation acquisition.
- (4) <sup>1</sup>In addition, prior to the passing of such resolution, an audit shall be made by one or more formation auditors. <sup>2</sup>§ 33 (3) to (5), §§ 34 and 35 regarding the formation audit shall apply accordingly. <sup>3</sup>Under the conditions of § 33a an audit by the formation auditors may be omitted.
- (5) <sup>1</sup>The resolution of the shareholders' meeting shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>2</sup>If the agreement has been entered into within the first year from the date of registration of the company in the commercial register, the shares of the consenting majority shall amount to not less than one fourth of the total share capital. <sup>3</sup>The articles may provide for larger capital majorities and additional requirements.
- (6) <sup>1</sup>Upon consent of the shareholder's meeting, the management board shall file the agreement for registration in the commercial register. <sup>2</sup>The agreement together with the report on post-formation acquisition and the report of the formation auditors shall be appended to the registration and all underlying documentation. <sup>3</sup>If an external formation audit is omitted pursuant to (4) sentence 3, § 37a shall apply accordingly.

- (7) <sup>1</sup>The court may deny registration if registration would be objectionable because the formation auditors state or it is manifest that the report on post-formation acquisition is inaccurate or incomplete or does not comply with statutory provisions, or that the consideration given for the assets to be acquired is unreasonably high. <sup>2</sup>If the filing for registration contains the declaration pursuant to § 37a (1) sentence 1, § 38 (3) shall apply accordingly.
- (8) The date when the agreement was concluded, the date of consent of the shareholders' meeting and the party or parties to the agreement entered into with the company shall be entered in the register.
- (9) The foregoing provisions shall not apply if it is the purpose of the enterprise to acquire such assets or if such assets are acquired in the course of judicial execution.

### **§ 53 Damage Claims in Case of Post-Formation Acquisition**

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

## **Division Three. Legal Relationships of the Company and the Shareholders**

### **§ 53a Equal Treatment of Shareholders**

Shareholders shall be treated equally under equivalent circumstances.

### **§ 54 Principal Obligation of Shareholders**

- (1) The obligation of the shareholders to make contributions shall be limited to the share issue price.
- (2) Unless the articles provide for Contributions in kind, the shareholders shall pay in the share issue price.
- (3) <sup>1</sup>Any amount called prior to the company having been filed for registration in the commercial register may be put at the free disposal of the management board only in legal tender credit to an account maintained with a credit institution or an enterprise operating under § 53 (1) sentence 1 or § 53b (1) sentence 1 or (7) of the Banking Act in the name of the company or of the management board. <sup>2</sup>Claims of the management board arising from such payments shall be deemed to constitute claims of the company.
- (4) <sup>1</sup>The statute of limitation for claims of the company to receive capital contributions shall be ten years from the time such claims arose. <sup>2</sup>Insolvency proceedings have been instituted over the company's assets, the statute of limitation shall not begin running prior to the expiration of six months from the date on which the insolvency proceedings were instituted.

## **§ 55 Ancillary Obligations of Shareholders**

- (1) <sup>1</sup>If the transfer of shares requires the consent of the company, the articles may impose upon shareholders, in addition to the obligation to make contributions to share capital, recurring obligations other than the payment of money. <sup>2</sup>The articles shall specify whether such obligations are to be performed for consideration or without consideration. <sup>3</sup>The share certificates and interim certificates shall specify the existence and scope of such obligations.
  - (2) The articles may provide for penalties in the event such obligation has not been performed or has been improperly performed.
- 

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

- (1) The company may not subscribe own shares.
  - (2) <sup>1</sup>A controlled enterprise may not acquire shares of the controlling enterprise, and a subsidiary may not acquire shares of its parent company, either as founder or subscriber or by exercising a conversion or subscription right granted in connection with a conditional capital increase. <sup>2</sup>A violation of this provision shall not make such acquisition unenforceable.
  - (3) <sup>1</sup>Any person who acquires a share, whether as founder or subscriber or by exercising a conversion or subscription right granted in connection with a conditional capital increase, on behalf of the company or a controlled enterprise or subsidiary, shall not be exempt from liability by virtue of the fact that he did not acquire such share on his own behalf. <sup>2</sup>He shall be liable for the full contribution irrespective of any agreement with the company or the controlled enterprise or subsidiary. <sup>3</sup>Such person shall have not rights arising from the share before he acquires the share on his own behalf.
  - (4) <sup>1</sup>If, in the case of a capital increase, shares are subscribed in violation of (1) or (2), each member of the management board shall be liable to the company for the full contribution. <sup>2</sup>The foregoing shall not apply if the member of the management board proves that he has not been at fault.
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## **§ 57 No Repayment of Capital, no Payment of Interest on Contributions**

- (1) <sup>1</sup>Contributions may not be repaid to shareholders. <sup>2</sup>The payment of the purchase price in case of a permitted acquisition of own shares shall not be deemed to constitute a repayment of contributions. <sup>3</sup>Sentence 1 shall not apply to contribution payments made in case of existing control agreements or profit transfer agreements (§ 291) or covered by entitlement to full consideration or restitution towards the shareholder. <sup>4</sup>Sentence 1 shall also not apply to the restitution of a shareholder loan and payments for claims from legal acts corresponding to a shareholder loan from an economic point of view.
  - (2) Interest may be neither promised nor paid to shareholders.
  - (3) Prior to the dissolution of the company, only distributable profits may be distributed to the shareholders.
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## § 58 Appropriation of Annual Net Profit

- (1) <sup>1</sup>The articles may provide, in respect of those cases where the shareholders' meeting is to approve the annual financial statements, that amounts of the annual net profit are to be transferred to other profit reserves. <sup>2</sup>On the basis of such a provision of the articles, amounts not exceeding one half of the annual net profit may be transferred to other profit reserves. <sup>3</sup>Amounts which are to be transferred to the legal reserve and losses carried forward shall first be deducted from the annual net profit.
- (2) <sup>1</sup>If the management board and the supervisory board approve the annual financial statements, they may transfer amounts not exceeding one half of the annual net profit to other reserves. <sup>2</sup>The articles may provide that the management board and the supervisory board are authorised to transfer larger or smaller amounts, in the case of companies whose shares are traded on a public exchange, only a larger amount. <sup>3</sup>On the basis of such authorisation the management board and the supervisory board may not transfer amounts to other profit reserves if the other profit reserves exceed, or upon such transfer would exceed, one half of the share capital. <sup>4</sup>(1) sentence 3 shall apply accordingly.
- (2a) <sup>1</sup>(1) and (2) notwithstanding, the management board and the supervisory board may transfer to other profit reserves the capitalized portion of the increase in value of fixed and current assets. The amount of such reserves shall be shown separately in the balance sheet; it may also be stated in the notes to the financial statements.
- (3) <sup>1</sup>In its resolution on the appropriation of distributable profit, the shareholders' meeting may transfer additional amounts to profit reserves or carry such amounts forward as profit. <sup>2</sup>If the articles contain appropriate authorisation, the shareholders' meeting may also resolve on appropriation of distributable profit other than as provided by sentence 1 or other than by distribution to shareholders.
- (4) <sup>1</sup>The shareholders shall be entitled to receive distributable profit to the extent such profit is not excluded from distribution to shareholders by law, the articles, a resolution of the shareholders' meeting pursuant to (3) or because such profit constitutes an additional expense pursuant to the resolution on the appropriation of profits. <sup>2</sup>The entitlement shall fall due on the third business day following the resolution of the shareholders' meeting. <sup>3</sup>A later due date may be determined in the resolution of the shareholders' meeting or in the articles.<sup>1</sup>
- (5) To the extent provided by the articles, the shareholders meeting may also resolve a distribution in kind.

## § 59 Advance Payment of Distributable Profit

- (1) The articles may authorise the management board to make an advance payment on account of the estimated distributable profit to shareholders after the close of the fiscal year.
- (2) <sup>1</sup>The management board may make such advance payment only if preliminary financial statements for the past fiscal year show an annual net profit. <sup>2</sup>The advance payment may not in any event exceed one half of the annual net profit after deducting amounts that are to be transferred to profit reserves pursuant to law or the articles.

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

<sup>3</sup>Moreover, the advance payment may not exceed one half of the distributable profit of the preceding year.

- (3) The payment of an advance shall require the consent of the supervisory board.
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## **§ 60 Distribution of Profit**

- (1) The shareholder shall have a share in the profits of the company in proportion to their share in the share capital.
- (2) <sup>1</sup>If contributions to share capital have not been made in the same proportion for all shares, shareholders shall first be paid from the distributable profit an amount of four per cent of the contributions made. <sup>2</sup>If the profit is insufficient to make such payment, the amount to be paid shall be determined on the basis of an appropriately lower per centage. <sup>3</sup>Contributions which have been made during the course of the fiscal year, shall be taken into account in proportion to the time which has elapsed since the date of such contributions.
- (3) The articles may provide for another method of distributing profit.
- 

## **§ 61 Compensation of Ancillary Obligations**

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

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## **§ 62 Liability of Shareholders for Receipt of Prohibited Benefits**

- (1) <sup>1</sup>Shareholders shall make restitution to the company for benefits received from the company contrary to the provisions of this Act. <sup>2</sup>If they have received such benefits in the form of dividends, the obligation to make restitution shall exist only if they knew, or as a result of negligence did not know, that they were not entitled to such receipt.
- (2) <sup>1</sup>The claim of the company may also be asserted by the company's creditors if they are unable to obtain satisfaction from the company. <sup>2</sup>If insolvency proceedings have been instituted over the company's assets, the receiver in insolvency shall exercise the rights of the company's creditors against the shareholders during the course of the insolvency proceedings.
- (3) <sup>1</sup>The statute of limitation for any claims pursuant to the foregoing provisions shall be ten years and begins running from the receipt of the benefit. <sup>2</sup>§ 54 (4) sentence 2 shall apply accordingly.
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## **§ 63 Consequences of Delayed Subscription Payments**

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

- (2) <sup>1</sup>Shareholders who fail to make payment of the amount called within the requisite period of time shall be required to pay interest thereon from the due date at the rate of five per cent per annum. <sup>2</sup>The right to claim further damages shall not be precluded.
- (3) The articles may stipulate penalties for late payment.

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## § 64 Expulsion of Defaulting Shareholders

- (1) Shareholders who fail to make payment of amounts called within the requisite period of time may be granted a period of grace with the warning that upon the expiration of such period their shares and subscription payments will be declared forfeited.
- (2) <sup>1</sup>Such grace period shall be announced three times in the company's journals. <sup>2</sup>The first announcement shall be made no later than three months, the last no later than one month prior to expiration of such period. <sup>3</sup>Not less than three weeks shall elapse between each announcement. <sup>4</sup>If the transfer of shares requires the consent of the company, it shall suffice if a single notice is made to each defaulting shareholder in lieu of such announcements; provided that in such case a grace period shall be set which is not less than one month from the date of receipt of such notice.
- (3) <sup>1</sup>Shareholders who nevertheless fail to pay amounts called shall be declared to have forfeited their shares and subscription payments in favour of the company by announcement in the company's journals. <sup>2</sup>Such announcement shall specify the shares declared to have been forfeited by serial number and any other distinguishing features.
- (4) <sup>1</sup>New certificates shall be issued in replacement of old certificates; such new certificates shall state the amount in default and all partial payments made. <sup>2</sup>The expelled shareholder shall be liable to the company for any loss arising from such amount in default or amounts called subsequently.

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## § 65 Payment Obligation of Preceding Shareholders

- (1) <sup>1</sup>Each predecessor of the expelled shareholder entered in the share register shall be liable to the company for payment of the amount in default to the extent that such amount cannot be obtained from his successors. <sup>2</sup>The company shall notify the immediate predecessor of any call for payment made to his successor. <sup>3</sup>It shall be presumed that payment cannot be obtained if such payment has not been received within one month from the date of call for payment and notification of the predecessor. <sup>4</sup>A new certificate shall be issued against payment of the amount in default.
- (2) <sup>1</sup>Each predecessor shall be liable only for payment of amounts that have been called within a period of two years. <sup>2</sup>Such period shall commence on the date on which the transfer of the share has been filed for registration in the company's share register.
- (3) <sup>1</sup>If payment of the amount in default cannot be obtained from the predecessors, the company shall promptly sell the share at the official stock exchange quotation through a stockbroker and, in the absence of a stock exchange quotation, by means of public

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

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## **§ 66 No Release of Shareholders from their Obligations**

- (1) <sup>1</sup>The shareholders and their predecessors may not be released from their payment obligations pursuant to §§ 54 and 65. <sup>2</sup>A set-off against a claim of the company pursuant to §§ 54 and 65 shall not be permitted.
  - (2) (1) shall apply accordingly to the obligation to make restitution for benefits received contrary to the provisions of this Act, the liability of expelled shareholders for losses and the liability of shareholders for damages resulting from not making a contribution in kind duly.
  - (3) Shareholders may be released from the obligation to make contributions by an ordinary capital reduction or by a capital reduction through redemption of shares, provided, however, that in the case of an ordinary capital reduction the amount of such release may not exceed the amount by which the share capital is reduced.
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## **§ 67 Registration in the Share Register**

- (1) <sup>1</sup>Regardless of a securitization, registered shares shall be entered in the company's share register stating the name, date of birth and address of the shareholder, as well as the number of shares or share number and in the case of par-value shares the amount. <sup>2</sup>The shareholder shall be obligated to provide the information required pursuant to sentence 1 to the company. <sup>3</sup>The articles may provide for further details regarding the conditions under which registrations of shares in one's own name, belonging to another person, is admissible. <sup>4</sup>Shares belonging to domestic, EU or foreign investment portfolios pursuant to the Capital Investment Act, the shares or stocks of which are not exclusively kept by professional or semi-professional investors, shall be considered shares of the domestic, EU or foreign investment portfolio even if they are jointly owned by the investors; if the investment portfolio is not a separate legal entity, the shares shall be deemed shares of the management company of the investment portfolio.
- (2) <sup>1</sup>In relation to the company, only a person who has been registered as such in the share register shall be deemed a shareholder. <sup>2</sup>There are however, no voting rights resulting from registrations exceeding a limit set out in the articles pursuant to (1) sentence 3 or with regard to the duty to disclose that the shares belong to another person set out in the articles is not fulfilled. <sup>3</sup>Furthermore, there are no voting rights for shares as long as a disclosure request pursuant to (4) sentence 2 or sentence 3 has not been fulfilled after the expiration of the limitation period.
- (3) If the registered share is transferred to another person, deletion and the new entry shall occur upon notification and proof.
- (4) <sup>1</sup>Credit institutions participating in the transfer or custodianship of registered shares must provide the company with the necessary information to maintain the share register against repayment of the necessary costs. <sup>2</sup>The registered person shall notify the company upon request within a reasonable time period to what extent he owns the shares for which he is registered as holder in the share register; as far as this is not applicable, the person shall

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

- (5) <sup>1</sup>If, in the opinion of the company, a person has been wrongly registered as shareholder in the share register, the company may cancel the registration only if it has previously notified the persons concerned of the intended cancellation and has granted them a reasonable period of time to make an objection. <sup>2</sup>The cancellation may not be made if a person concerned objects thereto within such period.
- (6) <sup>1</sup>Each shareholder may demand from the company information about the data relating to him entered in the share register. <sup>2</sup>In the case of unlisted companies, the articles may further provide for this. <sup>3</sup>The company may utilise the register data as well as the data provided pursuant to (4) sentence 2 and 3 for its tasks in relationship to the shareholders. <sup>4</sup>It may only use the data to advertise for the company to the extent that the shareholder does not object. <sup>5</sup>The shareholders shall be appropriately informed of their right to object.
- (7) The foregoing provisions shall apply accordingly to interim certificates.

## § 68 Transfer of Registered Shares. Restriction on Transferability

- (1) <sup>1</sup>Registered shares shall also be transferable by endorsement. <sup>2</sup>§§ 12, 13 and 16 of the Bills of Exchange Act shall apply accordingly to the form of the endorsement, legitimation of the holder and his obligation to surrender.
- (2) <sup>1</sup>The articles may make the transfer subject to the consent of the company. <sup>2</sup>Such consent shall be granted by the management board. <sup>3</sup>The articles may, however, provide that the supervisory board or the shareholders' meeting shall resolve on the granting of consent. <sup>4</sup>The articles may specify the reasons for which consent may be refused.
- (3) The company shall be obligated to verify the accuracy of the chain of endorsements and the declarations of assignment, but shall not be required to examine the signatures.
- (4) The foregoing provisions shall apply accordingly to interim certificates.

## § 69 Common Title to a Share

- (1) If more than one person is entitled to a share, they may exercise the rights arising from the share only through a common representative.
- (2) Such persons shall be jointly and severally liable for the obligations in respect of the share.
- (3) <sup>1</sup>If the company is required to make a statement with legal effect to shareholders and the persons sharing common title have failed to designate a common representative to the company, it shall suffice if such statement is made to any of the persons sharing common title. <sup>2</sup>In the case of more than one heir of a shareholder, the foregoing shall only

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

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## § 70 Computation of the Period of Shareholding

<sup>1</sup>If the exercise of rights arising from a share requires that the shareholder has been the holder of such share for a certain period of time, the right to demand transfer of title from a credit institution, a financial services institute, or an enterprise operating under § 53 (1) sentence 1 or § 53b (1) sentence 1 or (7) of the Banking Act shall be deemed equivalent to ownership.

<sup>2</sup>The period during which the share was owned by a predecessor shall be attributed to the shareholder, provided that he has acquired the share without consideration from his fiduciary, as a successor in legal interest by operation of law, in connection with the liquidation of a community of interest, or as a result of a transfer of assets pursuant to § 14 of the Insurance Supervision Act or § 14 of the Building Loan Associations Act.

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## § 71 Acquisition of Own Shares

(1) A company may only acquire own shares:

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

(2) <sup>1</sup>The shares acquired for the purposes under (1) Nos. 3, 7 and 8 together with other

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

- (3) <sup>1</sup>In the cases of (1) Nos. 1 and 8, the management board shall inform the shareholders' meeting about the purpose of the acquisition, the number of shares acquired, the amount of the share capital that they represent, the proportion of the share capital, and the price for the shares. <sup>2</sup>In the case of (1) No. 2, the shares must be given to the employees within one year of their acquisition.
- (4) <sup>1</sup>A violation of (1) or (2) shall not make the acquisition of own shares ineffective. <sup>2</sup>However, an obligation to acquire own shares is null and void to the extent that it violates (1) or (2).

### § 71a Evasive Transactions

- (1) <sup>1</sup>Any transaction providing for the grant of an advance or loan or the provisions of security by the company to another person for the purpose of acquiring shares in the company shall be null and void. <sup>2</sup>The foregoing shall not apply to transactions in the ordinary course of business of credit institutions or financial services institutions nor to the grant of an advance or loan or the provision of security for the purpose of the purchase of shares by employees of the company or an affiliated enterprise; provided, however, that such transactions shall also be null and void if the company at the point in time of the acquisition of the shares would not be in a position to create the reserve for the acquisition without reducing either the share capital or any reserve which is required to be created by law or the articles and which may not be used for payments to shareholders. <sup>3</sup>Sentence 1 shall also not apply to transactions in case of existing control agreements or profit transfer agreements (§ 291).
- (2) Any transaction between the company and another person which entitles or obligates such other person to acquire shares in the company on behalf of the company or a controlled enterprise or a subsidiary shall be null and void if the acquisition of the shares by the company would violate § 71 (1) or (2).

### § 71b Rights arising from Own Shares

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

### § 71c Sale or Redemption of Own Shares

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

- (3) If own shares have not been sold within the periods provided in (1) and (2), they shall be redeemed in accordance with § 237.
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### **§ 71d Acquisition of Own Shares through Third Parties**

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

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### **§ 71e Pledge of Own Shares**

- (1) If the company takes own shares as a pledge, this shall be considered an acquisition of own shares pursuant to § 71 (1) and (2), § 71d. <sup>2</sup>A credit institution or financial services institution, however, may take in the ordinary course of business a pledge of own shares in an amount not exceeding the portion of the share capital specified in § 71 (2) sentence 1. <sup>3</sup>§ 71a shall apply accordingly.
- (2) <sup>1</sup>A violation of (1) shall make unenforceable the pledge of own shares if the issue price of the pledged shares has not been paid in full. <sup>2</sup>A contract providing for the pledge of own shares shall be null and void if the acquisition of such shares would violate (1).
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### **§ 72 Cancellation of Share Certificates by Invalidation Proceedings**

- (1) <sup>1</sup>A share certificate or interim certificate that has been lost or destroyed may be cancelled by means of invalidation proceedings in accordance with the Act on Court Procedure for Family Matters and Non-litigious Matters. <sup>2</sup>§ 799 (2) and § 800 of the Civil Code shall apply accordingly.
- (2) The rights arising from dividend coupons issued to the bearer that are not yet due shall be cancelled on the date of the cancellation of the share certificate or interim certificate.
- (3) The cancellation of a share certificate pursuant to §§ 73 or 226 shall not preclude the cancellation of the certificate pursuant to (1).
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### **§ 73 Cancellation of Share Certificates by the Company**

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



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

- (2) <sup>1</sup>The request to surrender share certificates shall give warning of cancellation and make reference to the permission of the court. <sup>2</sup>Cancellation may be made only after such request has been announced in the manner prescribed for the period of grace pursuant to § 64 (2). <sup>3</sup>Cancellation shall become effective upon publication in the company's journals. <sup>4</sup>Such announcement shall designate the share certificates which have been cancelled in such a manner that it may be ascertained from the announcement itself whether a share certificate has been cancelled.
- (3) <sup>1</sup>In lieu of the cancelled share certificates, subject to provision in the articles according to § 10 (5), new share certificates shall be issued and delivered to the person entitled thereto or deposited with the court if the company is entitled to make such deposit. <sup>2</sup>The court of the company's domicile shall be notified of such delivery or deposit.
- (4) § 226 shall apply if shares are consolidated in connection with a reduction of share capital.

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

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

### **§ 75 New Dividend Coupons**

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

## **Division Four: Constitution of the Company**

### **Section One. Management Board**

### **§ 76 Leadership of the Stock Corporation**

- (1) The management board shall have direct responsibility for the management of the company;
- (2) <sup>1</sup>The management board may comprise one or more persons. <sup>2</sup>In the case of companies having a share capital of more than 3 million euros, the management board shall comprise not less than two persons, unless the articles provide that it shall comprise one person. <sup>3</sup>The provisions governing the appointment of a labour director to the management board shall remain unaffected.
- (3) <sup>1</sup>Only a natural person with full legal capacity may be a member of the management board. <sup>2</sup>A person may not be a member of the management board who:

1. is a person under guardianship who in managing his or her property is fully or partially subject to approval (§ 1903 of the Civil Code);
2. has been prohibited by judicial decision or an enforceable administrative order from engaging in any profession, line of occupation, trade or branch of industry, as far as the purpose of the enterprise encompasses in whole or in part such prohibited activity;
3. due to one or several wilfully committed crimes, has been convicted
  - a) of a failure to file for insolvency proceedings (delayed filing of insolvency);
  - b) of a criminal offence pursuant to §§ 283 to 283d of the Penal Code (insolvency offences);
  - c) of making false statements pursuant to § 399 of this Act or § 82 of the German Limited Liability Companies Act;
  - d) of any misrepresentation pursuant to § 400 of this Act, § 331 of the Commercial Code, § 313 of the Transformation Act or § 17 of the Transparency and Disclosure Act;
  - e) sentenced to a prison sentence of no less than one year pursuant to §§ 263 to 264a or §§ 265b to 266a of the Penal Code;

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

<sup>3</sup>Sentence 2 No. 3 shall apply accordingly to convictions abroad due to offences comparable to the offences set out in sentence 2 No. 3.

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

## § 77 Management

- (1) <sup>1</sup>If the management board comprises more than one person, the members of the management board shall manage the company jointly. <sup>2</sup>The articles or the bylaws for the management board may provide otherwise; however, the articles or by-laws may not provide that one or more members of the management board may resolve differences of opinion within the management board against the majority of its members.
- (2) <sup>1</sup>The management board may issue by-laws of the management board unless the articles confer the authority to issue such by-laws upon the supervisory board or the supervisory board issues by-laws for the management board. <sup>2</sup>The articles may make binding provisions in respect of specific matters relating to the by-laws. <sup>3</sup>Resolutions of the management board regarding the by-laws shall require a unanimous vote.
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## § 78 Representation

- (1) <sup>1</sup>The management board shall represent the company in and out of court. <sup>2</sup>If the company does not have a management board (rudderless management), the company shall be represented by the supervisory board in case declarations of intent are made towards the company or documents are sent to the company.
- (2) <sup>1</sup>If the management board comprises more than one person, the members of the management board shall represent the company jointly, unless the articles provide otherwise. <sup>2</sup>If a statement with legal effect is to be given to the company, it shall suffice if such statement is made to one member of the management board or, in case of (1) sentence 2, to one member of the supervisory board. <sup>3</sup>Declarations of intent towards the company may be made and documents for the company may be sent to the representatives of the company pursuant to (1) using the business address entered in the commercial register. <sup>4</sup>Irrespective of the above, such declarations or documents may be made or sent, respectively, using the registered address of the person authorised to accept these pursuant to § 39 (1) sentence 2.
- (3) <sup>1</sup>The articles may also provide that particular members of the management board may represent the company by acting either solely or jointly with a registered authorised officer (*Prokurist*). <sup>2</sup>The supervisory board may also so provide if authorised to do so by the articles. <sup>3</sup>(2) sentence 2 shall apply accordingly in such cases.
- (4) <sup>1</sup>Members of the management board authorised to represent the company by acting jointly may authorise individual liquidators to engage in certain transactions or kinds of transactions. <sup>2</sup>The foregoing shall apply accordingly if an individual member of the management board is authorised to represent the company by acting jointly with a registered authorised officer (*Prokurist*).
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## § 79 [repealed]

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## § 80 Details on Business Letters

- (1) <sup>1</sup>All business letters which are directed to a specific recipient shall state the company's legal form and domicile, the court of registration of the company's domicile, the number under which the company has been registered in the commercial register as well as the surname and at least one forename in full of each member of the management board and of the chairman of the supervisory board. <sup>2</sup>The chairman of the management board shall be designated as such. <sup>3</sup>If information is provided regarding the company's capital, the amount of the share capital shall in any event be stated and, if the issue price has not been paid in full, the aggregate amount of the contributions outstanding.
- (2) The information pursuant to (1) sentences 1 and 2 need not be given in communications or reports which are made in the course of an existing business relationship and for which forms are customarily used in which only the particulars of the specific transaction need be inserted.
- (3) <sup>1</sup>Order forms shall be deemed to be business letters in the meaning of (1) sentence 1. (2) shall not apply thereto.
- (4) All letterheads and order forms used by a branch of a company with its seat abroad must indicate the register where the branch is registered and the registration number; for the

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

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

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

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

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

- (1) The authority of the management board to represent the company may not be restricted.
  - (2) The members of the management board shall be obligated in the relationship to comply with the restrictions in respect of the authority to manage the company which, in accordance with the provisions, governing the stock corporation, are imposed by the articles, the supervisory board, the shareholder's meeting and the bylaws for the management board and the supervisory board.
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### **§ 83 Preparation and Execution of Resolutions of Shareholders' Meeting**

- (1) <sup>1</sup>The management board shall, at the request of the shareholders' meeting, be obligated to prepare any matter that falls within the competence of the shareholders' meeting. <sup>2</sup>The foregoing shall apply to the preparation and execution of agreements that become effective only with the consent of the shareholders' meeting. <sup>3</sup>The resolution of the shareholders' meeting regarding such preparation and execution shall require the same majority as is required for the resolution on the respective matter or, as the case may be, the granting of consent to such agreements.
  - (2) The management board shall be obligated to execute any resolution adopted by the shareholders' meeting in respect of matters falling within the competence of the shareholders' meeting.
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### **§ 84 Appointment and Removal of the Management Board**

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

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

- (2) If more than one person is appointed as member of the management board, the supervisory board may appoint one member as chairman of the management board.
- (3) <sup>1</sup>The supervisory board may revoke the appointment of a member of the management board or the appointment of a member as chairman of the management board for cause. <sup>2</sup>Such cause shall include in particular a gross breach of duties, inability to manage the company properly, or a vote of no confidence by the shareholders' meeting, unless such vote of no confidence was made for manifestly arbitrary reasons. <sup>3</sup>The foregoing shall also apply to the management board appointed by the first supervisory board. <sup>4</sup>Such revocation shall be enforceable until rendered unenforceable by a judicial decision that has become final and may not be appealed. <sup>5</sup>Rights arising under the contract of employment shall be governed by general provisions of law.
- (4) The provisions of the Act on the Co-determination of Employees in the Supervisory Board and Management Boards in the Mining and Iron and Steel Producing Industries in the revised version published in the Federal Law Gazette Part III, Section 801-2 – the 'Coal and Steel Co-determination Act' – regarding the special majority requirements for resolutions of the supervisory board on the appointment of a labour director to the management board or the revocation of such appointment shall remain unaffected.

## § 85 Appointment by the Court

- (1) <sup>1</sup>If the management board does not have the required number of members, the court shall make, in urgent cases, the necessary appointments upon motion by a party concerned. <sup>2</sup>An appeal may be made against such decision.
- (2) The office of a member of the management board appointed by the court shall terminate as soon as the vacancy is filled.
- (3) <sup>1</sup>The member of the management board appointed by the court shall be entitled to reimbursement of reasonable cash expenses and remuneration for his services. <sup>2</sup>If the member of the management board appointed by the court and the company do not reach agreement, the court shall fix the amount of expenses and remuneration. <sup>3</sup>An appeal may be made against such decision; appeals on points of law are not permitted. <sup>4</sup>A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.

## § 86 [repealed]

## § 87 Principles Governing Remuneration of Members of the Management Board

- (1) <sup>1</sup>The supervisory board shall, in determining the aggregate remuneration of any member

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

- (2) <sup>1</sup>If the situation of the company deteriorates after the determination so that a continued payment of remuneration under (1) would be unreasonable for the company, the supervisory board or, in case of § 85 (3), the court upon petition of the supervisory board shall reduce remuneration to a reasonable level.<sup>2</sup>Pensions, payments to surviving dependents and similar payments may only be reduced pursuant to sentence 1 within the first three years after resignation from the company.<sup>3</sup>Such reduction shall not affect the other terms of the contract of employment.<sup>4</sup>The member of the management board may terminate, however, his contract of employment as of the end of the text calendar quarter upon giving six weeks' notice.
- (3) If insolvency proceedings have been instituted over the company's assets and the receiver in insolvency has given notice of termination of the contract of employment of a member of the management board, such member may claim compensation of damages arising as a result of such termination only for the period of two years following termination of such employment.

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## § 88 Prohibition of Competition

- (1) <sup>1</sup>Absent the consent of the supervisory board, members of the management board may neither engage in any trade nor enter into any transaction in the company's line of business on their own behalf or on behalf of others.<sup>2</sup>Absent such consent, they may be neither a member of the management board, nor a manager or general partner of another commercial enterprise.<sup>3</sup>The consent of the supervisory board may be granted only for a specific trade or business, a specific commercial enterprise, or for specific kinds of transactions.
  - (2) <sup>1</sup>If a member of the management board violates such prohibition, the company may claim damages.<sup>2</sup>In lieu thereof, the company may require that the member treat the transactions made for his own account as having been made on behalf of the company and remit any remuneration obtained for transactions made on behalf of another person or assign his claim to such remuneration.
  - (3) <sup>1</sup>The Partnership has three months from the date on which the other members of the management board and the members of the supervisory board obtained knowledge, or without gross negligence should have obtained knowledge of the act giving rise to the damage claim, to make any claims.<sup>2</sup>Irrespective of such knowledge or lack of knowledge as a result of gross negligence, the statute of limitation for such claims shall be five years from the time when they arose.
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## § 89 Grant of Credit to Members of the Management Board

- (1) <sup>1</sup>The company may grant credit to members of the management board only pursuant to a resolution of the supervisory board. <sup>2</sup>Such resolution may authorise only the grant of specific credit transactions or kinds of credit transactions, and for not more than three months an advance. <sup>3</sup>Such resolution shall make provision as to the payment of interest on, and repayment of, any loan. <sup>4</sup>Permission to make drawings in excess of the remuneration due to the member of the management board, in particular permission to draw advances of remuneration shall constitute a grant of credit. <sup>5</sup>The foregoing shall not apply to credits that do not exceed an amount equal to one month's salary.
- (2) <sup>1</sup>The company may grant credit to its registered authorised officers (*Prokuristen*) and general managers only with the consent of the supervisory board. <sup>2</sup>A controlling company may grant credit to legal representatives, registered authorised officers (*Prokuristen*) or general managers of a controlled enterprise only with the consent of its supervisory board; a controlled company may grant credit to legal representatives, registered authorised officers (*Prokuristen*) or general managers of the controlling enterprise only with the consent of the supervisory board of the controlling enterprise. <sup>3</sup>(1) sentences 2 to 5 shall apply accordingly.
- (3) <sup>1</sup>(2) shall also apply to credits to the spouse or a minor child of a member of the management board, or other legal representatives, registered authorised officers (*Prokuristen*) or general managers. <sup>2</sup>Moreover, such shall apply to credits granted to any third party acting on behalf of any such persons or on behalf of a member of the management board, other legal representative, registered authorised officers (*Prokuristen*) or general manager.
- (4) <sup>1</sup>If a member of the management board, registered authorised officer (*Prokurist*) or general manager is also a legal representative or member of the supervisory board of another legal entity or member of a commercial partnership, the company may grant credit to such legal entity or commercial partnership only with the consent of the supervisory board; (1) sentences 2 and 3 shall apply accordingly. <sup>2</sup>The foregoing shall not apply if such legal entity or commercial partnership is affiliated with the company or if the credit is granted to finance the payment of goods that the company supplies to such legal entity or commercial partnership.
- (5) Any credit granted in violation of the provisions of (1) to (4), shall be repaid immediately, irrespective of any agreement to the contrary, unless the supervisory board subsequently consents.
- (6) If the company is a credit institution or financial services institution to which § 15 of the Banking Act apply, the provisions of the Banking Act shall apply in lieu of (1) to (5).

## § 90 Reports to the Supervisory Board

- (1) <sup>1</sup>The management board shall report to the supervisory board on:
1. intended business policy and other fundamental matters regarding the future conduct of the company's business (in particular plans regarding financing, investment and personnel) responding to deviations of actual developments from objectives reported in the past and stating the reasons thereof;
  2. the profitability of the company, in particular the return on equity;

3. the state of business, in particular revenues, and the condition of the company;
4. transactions that may have a material impact upon the profitability or liquidity of the company.

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

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

1. reports pursuant to No. 1 not less than once a year, unless changes in circumstances or new matters necessitate an immediate report;
2. reports pursuant to No. 2 at the meeting of the supervisory board resolving an approval of the annual financial statements;
3. reports pursuant to No. 3 regularly, but not less than quarterly;
4. reports pursuant to No. 4 sufficiently early, if possible, to enable the supervisory board to express its opinion before such transactions entered into.

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

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

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

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## § 91 Organisation; Accounting

- (1) The management board shall ensure that the requisite books of account are maintained.
  - (2) The management board shall take suitable measures, in particular surveillance measures, to ensure that developments threatening the continuation of the company are detected early.
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## **§ 92 Duties of the Management in the Event of Losses, Overindebtedness or Insolvency**

- (1) If upon preparation of the annual balance sheet or an interim balance sheet it becomes apparent, or if in the exercise of proper judgment it must be assumed that the company has incurred a loss equal to one half of the share capital, the management board shall promptly call a shareholders' meeting and advise the meeting thereof.
- (2) <sup>1</sup>If the company becomes insolvent or overindebted, the management board may not make any payments. <sup>2</sup>The foregoing shall not apply to payments made after this time that are nonetheless compatible with the care of a diligent and conscientious manager. <sup>3</sup>The same obligation shall apply to the managing board for payments to shareholders as far as such payments were bound to lead to the stock corporation's insolvency, unless this was unforeseeable even when employing the care set out § 93 (1) sentence 1.

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

- (1) <sup>1</sup>In conducting business, the members of the management board shall employ the care of a diligent and conscientious manager. <sup>2</sup>They shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company. <sup>3</sup>They shall not disclose confidential information and secrets of the company, in particular trade and business secrets, which have become known to the members of the management board as a result of their service on the management board. <sup>4</sup>The duty referred to in sentence 3 shall not apply with regard to a recognized auditing agency pursuant to § 342b of the Commercial Code within the scope of the audit.
- (2) <sup>1</sup>Members of the management board who violate their duties shall be jointly and severally liable to the company for any resulting damage. <sup>2</sup>They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager. <sup>3</sup>If the company takes out an insurance covering the risks of a member of the managing board arising from his work for the company, such insurance should provide for a deductible of no less than 10 per cent of the damage up to at least an amount equal to 1.5 times the fixed annual compensation of the managing board member.
- (3) The members of the management board shall in particular be liable for damages if, contrary to this Act:
1. contributions are repaid to shareholders;
  2. shareholders are paid interest or dividends;
  3. own shares or shares of another company are subscribed, acquired, taken as a pledge or redeemed;
  4. share certificates are issued before the issue price has been paid in full;
  5. assets of the company are distributed;
  6. payments are made contrary to § 92 (2);

7. remuneration is paid to members of the supervisory board;
  8. credit is granted;
  9. in connection with a conditional capital increase, new shares are issued other than for the specified purpose or prior to full payment of the consideration.
- (4) <sup>1</sup>The members of the management board shall not be liable to the company for damages if they acted pursuant to a lawful resolution of the shareholders' meeting. <sup>2</sup>Liability for damages shall not be precluded by the fact that the supervisory board has consented to the act. <sup>3</sup>The company may waive or compromise a claim for damages not prior to the expiry of three years after the claim has arisen, provided that the shareholders' meeting consents thereto and no minority whose aggregate holding equals or exceeds one-tenth of the share capital records an objection in the minutes. <sup>4</sup>The foregoing period of time shall not apply if the person liable for damages is insolvent and enters into a settlement with his creditors to avoid or terminate insolvency proceedings.
- (5) <sup>1</sup>The claim for damages of the company may also be asserted by the company's creditors if they are unable to obtain satisfaction from the company. <sup>2</sup>However, in cases other than those set out in (3), the foregoing shall apply only if the members of the management board have manifestly violated the duty of care of a diligent and conscientious manager; (2) sentence 2 shall apply accordingly. <sup>3</sup>Liability for damages with respect to the creditors shall be extinguished neither by a waiver nor by a compromise of the company nor by the fact that the act that has caused the damage was based on a resolution of the shareholder's meeting. <sup>4</sup>If insolvency proceedings have been instituted over the company's assets, the receiver in insolvency shall exercise the rights of the creditors against the members of the management board during the course of such proceedings.
- (6) For companies that are listed on a stock exchange at the point in time of the violation of duty, claims under the foregoing provisions shall be time barred after the expiration of a period of ten years; for other companies, claims under the foregoing provisions shall be time barred after the expiration of a period of five years.

## § 94 Deputies of Members of the Management Board

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

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### Section Two. Supervisory Board

## § 95 Number of Members of the Supervisory Board

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

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

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

## § 96 Composition of the Supervisory Board

(1) The supervisory board is composed of

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

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

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

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

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

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

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

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

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

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

- (1) <sup>1</sup>If the management board is of the opinion that the composition of the supervisory board does not comply with applicable statutory provisions, it shall promptly announce such fact in the company's journals and at the same time by notices displayed in all designated offices of the company and the members of its group. <sup>2</sup>The statutory provisions that are applicable in the opinion of the management board shall be specified in such announcement. <sup>3</sup>Such announcement shall state that the supervisory board will be composed in accordance with such provisions, unless parties with standing pursuant to § 98 (2) make motion to the court having jurisdiction pursuant to § 98 (1) within one month from the date of the announcement in the Federal Gazette.
- (2) <sup>1</sup>If no motion has been made to the court having jurisdiction pursuant to § 98 (1) within one month from the date of the announcement in the Federal Gazette, the new supervisory board shall be composed in accordance with the statutory provisions specified in the announcement of the management board. <sup>2</sup>The provisions of the articles regarding the composition of the supervisory board, the number of members of the supervisory board and the election, removal and delegation of members of the supervisory board shall, in so far as they conflict with the applicable statutory provisions, cease to be effective as at the adjournment of the first shareholders' meeting called after the expiration of such one month period, but in any event no more than six months after the expiration of such period. <sup>3</sup>As at the same date the term of office of the previous members of the supervisory board shall expire. <sup>4</sup>A shareholder's meeting held within such six month period may, by simple majority, substitute new provisions for those provisions in the articles that cease to be effective.
- (3) No announcement concerning the composition of the supervisory board may be made while judicial proceedings pursuant to § 98 and 99 are pending.
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### **§ 98 Judicial Decision Concerning the Composition of the Supervisory Board**

- (1) If it is disputed or uncertain which statutory provisions shall apply to the composition of the supervisory board, the exclusive jurisdiction to decide such issue upon application shall lie with the regional court of the district in which the company is domiciled.
- (2) <sup>1</sup>The following shall have standing to make such motion
1. the management board;
  2. each member of the supervisory board;
  3. each shareholder;

4. the central labour council of the company or, if the company has only one labour council, such labour council;
5. the central managing employees council of the company or, if the company has only one managing employees council, such managing employees council;
6. the central labour council of another enterprise whose employees participate directly or through electors in the election of members of the supervisory board of the company pursuant to the statutory provisions whose application is disputed or uncertain, or, if only one labour council exists in such other enterprise, such labour council;
7. the central managing employees council of another enterprise whose employees participate directly or through electors in the election of members of the supervisory board of the company pursuant to the statutory provisions whose application is disputed or uncertain, or, if only one managing employees council exists in such other enterprise, such managing employees council;
8. not less than one-tenth or one hundred of the employees who participate directly or through electors in the election of members of the supervisory board of the company pursuant to the statutory provisions whose application is disputed or uncertain;
9. the central organisations of the labour unions which would, pursuant to the statutory provisions whose application is disputed or uncertain, have a right to nominate members;
10. labour unions that would, pursuant to the statutory provisions whose application is disputed or uncertain, have a right to nominate members.

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

- (3) (1) and (2) shall apply accordingly in the event of a dispute as to whether the external auditor has correctly determined the relevant revenue ratios pursuant to § 3 or § 16 of the Supplemental Co-Determination Act.
- (4) <sup>1</sup>If the composition of the supervisory board does not comply with the judicial decision, the new supervisory board shall be composed in accordance with the statutory provisions specified in such decision. <sup>2</sup>§ 97 (2) shall apply accordingly, except that the six-month period shall commence on the date on which such decision becomes final and may not be appealed.

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## § 99 Procedure

- (1) The procedure shall be governed by the provisions of the Act on Court Procedure in Family Matters and Non-litigious Matters, unless (2) to (5) provide otherwise.
- (2) <sup>1</sup>The regional court shall announce the motion in the company's journals. <sup>2</sup>The

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

- (3) <sup>1</sup>The decision of the regional court shall be made by decree setting out the grounds on which the decision is based. <sup>2</sup>Such decision of the regional court may be appealed. <sup>3</sup>Such appeal may be based only on a violation of the law; § 72 (1) sentence 2 and § 74 (2) and (3) of the Act on Court Procedure in Family Matters and Non-litigious Matters as well as § 547 of the Code of Civil Procedure shall apply accordingly. <sup>4</sup>Such appeal may only be made by filing a notice of appeal signed by an attorney at law. <sup>5</sup>The state government may by regulation transfer jurisdiction for several higher regional courts to one higher regional court if required to ensure uniformity of decisions. <sup>6</sup>The state government may transfer such power to the state ministry of justice.
- (4) <sup>1</sup>The court shall serve its decision on the party having made motion and on the company. <sup>2</sup>Furthermore, the court shall announce the decision in the company's journals without setting out the grounds on which the decision is based. <sup>3</sup>Appeal may be made by each party having standing to make motion pursuant to § 98 (2). <sup>4</sup>The period for filing the notice of appeal shall commence on the date on which the decision was announced in the Federal Gazette, but, in the case of the party having made motion and the company, not prior to service of the decision.
- (5) <sup>1</sup>The decision shall become binding only when it has become final and may not be appealed. <sup>2</sup>Such decision shall be binding for and against everyone. <sup>3</sup>The management board shall promptly submit the binding decision to the commercial register.
- (6) <sup>1</sup>The party having made motion shall be liable for the costs, in whole or in part, if equity so requires. <sup>2</sup>The parties' own costs shall not be reimbursed.

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## **§ 100 Personal Qualifications of Members of the Supervisory Board**

- (1) <sup>1</sup>Only a natural person with full legal capacity may be a member of the supervisory board. <sup>2</sup>A person under guardianship who in managing his or her property is fully or partially subject to approval (§ 1903 of the Civil Code) may not be a member of the supervisory board.
- (2) <sup>1</sup>A person may not be a member of the supervisory board who:
1. is already a member of the supervisory board in ten commercial enterprises which are required by law to form a supervisory board;
  2. is the legal representative of a controlled enterprise of the company;
  3. is the legal representative of another corporation whose supervisory board includes a member of the management board of the company; or
  4. was a member of the management board of the same listed company during the past two years, unless he is elected upon nomination by shareholders holding more than 25 per cent of the voting rights in the company.

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

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

- (3) The other personal qualifications of the supervisory board members of the employees and of the additional members shall be determined by the Co-determination Act, the Coal and Steel Co-determination Act, the Supplemental Co-determination Act, the One-Third Co-determination Act and the Act on Employee Co-determination within Cross-border Mergers
- (4) The articles may stipulate personal qualifications only for those members of the supervisory board who are elected by the shareholders' meeting without being bound by nominations, or who are appointed to the supervisory board pursuant to the articles.
- (5) In case of companies which are capital-market oriented within the meaning of § 264d of the Commercial Code, CRR credit institutions within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or insurance undertakings within the meaning of Article 2 (1) of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (Official Journal L 374, 31 December 1991, p. 7) as last amended by Directive 2006/46/EC (Official Journal L 224, 16 August 2006, p. 1), at least one member of the supervisory board shall have expertise knowledge in the fields of accounting or annual auditing; the members in their entirety shall be familiar with the sector in which the company operates.

## § 101 Appointment of the Members of the Supervisory Board

- (1) <sup>1</sup>The members of the supervisory board shall be elected by the shareholders' meeting, unless they are to be appointed to the supervisory board or elected as representatives of the employees pursuant to the Codetermination Act, the Supplemental Codetermination Act, the One-Third Co-determination Act or the Act on Employee Co-determination within Cross-border Mergers. <sup>2</sup>The shareholders' meeting shall be bound by nominations only pursuant to § 6 to 8 of the Coal and Steel Co-determination Act.
- (2) <sup>1</sup>The right to appoint members to the supervisory board may only be granted by the articles and only to specific shareholders or the holders of specific shares. <sup>2</sup>The right to appoint may be granted to holders of specific shares only if the shares are in registered form and if their transfer requires the consent of the company. <sup>3</sup>Shares of holders of the right to appoint shall not be deemed to constitute a separate class. <sup>4</sup>Rights to appoint may be granted only with respect to no more than one-third in aggregate of the shareholder representatives in the supervisory board as determined by law or the articles.
- (3) <sup>1</sup>It shall not be permitted to appoint deputies of members of the supervisory board. <sup>2</sup>However, for each member of the supervisory board a substitute member may be appointed who shall become a member of the supervisory board if the regular member ceases to hold office prior to the expiration of his term of office, except for the additional member to be elected pursuant to the Coal and Steel Co-determination Act or the Supplemental Co-determination Act upon nomination by the other members of the supervisory board. <sup>3</sup>Such substitute member may only be appointed at the same time as the respective regular member of the supervisory board. <sup>4</sup>The provisions governing members of the supervisory board shall govern his appointment, the invalidity of such appointment and actions to set it aside.

## § 102 Term of Office of Members of the Supervisory Board

- (1) <sup>1</sup>The members of the supervisory board may not be appointed for a period of time extending beyond the adjournment of the shareholders' meeting resolving on ratification of the acts of management for the fourth fiscal year following the commencement of their respective term of office. <sup>2</sup>The fiscal year in which such term of office commences shall not be taken into account.
  - (2) The term of office of a substitute member shall expire not later than the expiration of the term of office of the regular member of the supervisory board who has ceased to hold office.
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## § 103 Removal of Members of the Supervisory Board

- (1) <sup>1</sup>Members of the supervisory board who have been elected by the shareholders' meeting without being bound by nominations may be removed pursuant to resolution of the shareholders' meeting prior to the expiration of their term of office. <sup>2</sup>Such resolution shall require a majority of not less than three-fourths of the votes cast. <sup>3</sup>The articles may provide for another majority and additional requirements.
  - (2) <sup>1</sup>A member of the supervisory board who has been appointed to the supervisory board pursuant to the articles may at any time be removed and replaced by another person by the person who has the right to appoint. <sup>2</sup>If the requirements specified in the articles in respect of the right to appoint are no longer met, the shareholders' meeting may remove the appointed member by a simple majority of votes.
  - (3) <sup>1</sup>Upon motion by the supervisory board, the court shall remove a member of the supervisory board, for cause relating to the person of such member. <sup>2</sup>The supervisory board shall resolve on such motion by simple majority. <sup>3</sup>If such member of the supervisory board has been appointed to the supervisory board pursuant to the articles, shareholders whose aggregate holding amounts to one-tenth of the share capital or represents an amount of the share capital corresponding to one million euros may also make such motion. <sup>4</sup>An appeal may be made against such decision.
  - (4) The Co-determination Act, the Coal and Steel Co-determination Act, the Supplemental Co-determination Act, the One-Third Co-determination Act, the Act on the Participation of Employees in a European Company and the Act on Employee Co-determination within Cross-border Mergers shall apply, in addition to (3), to the removal of members of the supervisory board who were neither elected by the shareholders' meeting without being bound by nominations, nor appointed to the supervisory board pursuant to the articles.
  - (5) The provisions governing removal of a member of the supervisory board shall also apply to the removal of a substitute member.
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## § 104 Appointment by the Court

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



1. the company's central labour council or, if only one labour council exists in the company, such labour council, and, if the company is the controlling enterprise of a group, the group labour council,
2. the company's central managing employees labour council or, if only one managing employees council exists in the company, such managing employees council, and, if the company is the controlling enterprise of a group, the group managing employees council,
3. the central labour council of another enterprise whose employees participate directly or through electors in the election or, if such other enterprises has only one labour council, such labour council;
4. the central managing employees council of another enterprise whose employees participate directly or through electors in the election or, if such other enterprise has only one managing employees council, such managing employees council;
5. not less than one-tenth or one hundred of the employees who participate in the election directly or through electors;
6. the central organisations of labour unions which have the right to nominate representatives of the employees to the supervisory board;
7. labour unions which have the right to nominate the supervisory board representatives of the employees;

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

- (2) <sup>1</sup>If for a period of more than three months the number of members of the supervisory board has been less than the number required by law or the articles, the court shall upon motion restore it to the requisite number. <sup>2</sup>In urgent cases the court shall, upon motion, restore the supervisory board to such number even before such period has expired. <sup>3</sup>Standing to make a motion shall be governed by (1). <sup>4</sup>An appeal may be made against such decision.
- (3) (2) shall apply to a supervisory board in which the employees are entitled to co-determination pursuant to the provision of the Codetermination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act, provided, however, that:
1. the court may not restore the supervisory board to the requisite number by appointing the additional member who is to be elected pursuant to the Coal and Steel Co-determination Act or the Supplemental Codetermination Act upon nomination by the other members of the supervisory board;
  2. if the supervisory board does not have the full number of members that it is required to comprise pursuant to the law or the articles, except for the additional member referred to in No. 1, it shall always constitute an urgent case.

- (4) <sup>1</sup>If the supervisory board is required to also include representatives of the employees, the court shall appoint members in such a manner that the numerical ratio required for the composition of the supervisory board is maintained or re-established. <sup>2</sup>If appointments are to be made to the supervisory board to re-establish a quorum, the foregoing shall apply only if the number of members of the supervisory board required for a quorum permits such ratio to prevail. <sup>3</sup>If a member of the supervisory board is to be replaced who must fulfil special personal qualifications pursuant to the law or the articles, the member of the supervisory board appointed by the court shall also fulfil such qualifications. <sup>4</sup>If a member of the supervisory board is to be replaced whom a central organisation of labour unions, a labour union or the labour councils would have the right to nominate, the court shall take into account the nominations of such parties, unless appointment of the nominated person would contravene overriding interests of the company or the general public; in case the member of the supervisory board is to be elected by electors, the foregoing shall apply to joint nominations by the labour councils of the enterprises in which electors are to be elected.
- (5) In case of listed companies which are subject to the Co-determination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act, any additional appointment by the court shall be made in accordance with § 96 (2) sentences 1 to 5.
- (6) The term of office of the member of the supervisory board appointed by the court shall expire in any event as soon as the deficiency in the composition of the supervisory board has been rectified.
- (7) <sup>1</sup>The member of the supervisory board appointed by the court shall be entitled to reimbursement of reasonable cash expenses and, if remuneration is granted to regular members of the supervisory board of the company, to remuneration for his services. <sup>2</sup>Upon motion by such member of the supervisory board, the court shall stipulate the expenses and remuneration. <sup>3</sup>An appeal may be made against such decision; appeals on points of law are not permitted. <sup>4</sup>A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.

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### **§ 105 Incompatibility of Management and Supervisory Board Membership**

- (1) A member of the supervisory board may not also be a member of the management board, a permanent deputy member of the management board, a registered authorised officer (*Prokurist*) or general manager of the company.
- (2) <sup>1</sup>The supervisory board may appoint certain of its members as deputies for absent or incapacitated members of the management board for a predetermined period of time which may not in any event exceed one year. <sup>2</sup>Such appointment may be renewed or the term of office extended, provided, however, that the aggregate term of office may not exceed one year. <sup>3</sup>The members of the supervisory board may not exercise the functions of a member of the supervisory board during their term of office as deputy members of the management board. <sup>4</sup>The prohibition of competition pursuant to § 88 shall not apply to such deputy members.

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### **§ 106 Announcement of Changes in the Supervisory Board**

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

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

## § 107 Internal Organisation of the Supervisory Board

- (1) <sup>1</sup>The supervisory board shall elect from among its members a chairman and at least one deputy chairman in accordance with the applicable provisions of the articles. <sup>2</sup>The management board shall file the details of persons elected with the commercial register. <sup>3</sup>The deputy chairman shall have the rights and duties of the chairman only if the latter is incapacitated.
- (2) <sup>1</sup>Minutes shall be kept of the meetings of the supervisory board, which shall be signed by the chairman. <sup>2</sup>The minutes shall state the place and date of the meeting, the persons attending, the items on the agenda, the essential contents of the proceedings, and the resolutions of the supervisory board. <sup>3</sup>A violation of the provisions of sentence 1 or 2 shall not make unenforceable a resolution. <sup>4</sup>A copy of the minutes of the meeting shall be provided upon request to each member of the supervisory board.
- (3) <sup>1</sup>The supervisory board may appoint from among its members one or more committees, in particular for purposes of preparing its deliberations and resolutions or for supervising the execution of its resolutions. <sup>2</sup>It may in particular appoint an audit committee to deal with the supervision of the accounting process, the efficiency of the internal control system, the risk management system and the internal revision system as well as with the annual auditing, in particular with the selection and the independence of the external auditor and the additional services rendered by the external auditor. <sup>3</sup>The audit committee may make recommendations or proposals to ensure the integrity of the accounting process. <sup>4</sup>The duties pursuant to (1) sentence 1, § 59 (3), § 77 (2) sentence 1, § 84 (1) sentence 1 and 3, (2) and (3) sentence 1, § 87 (1) and (2) sentence 1 and 2, § 111 (3), §§ 171, 314 (2) and (3) as well as resolutions providing that specific types of transactions may be entered into only with the consent of the supervisory board, may not be referred to a committee to decide in lieu of the supervisory board. <sup>5</sup>The supervisory board shall regularly be provided with reports on the activities of the committees.
- (4) If the supervisory board of a company which is capital-market oriented within the meaning of § 264d of the Commercial Code, a CRR credit institution within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or an insurance undertaking within the meaning of Article 2 (1) of Council Directive 91/674/EEC establishes an audit committee within the meaning of (3) sentence 2, the conditions set forth in § 100 (5) shall be complied with.

## § 108 Resolutions of the Supervisory Board

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

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

- (3) <sup>1</sup>Members of the supervisory board who are not present may take part in the passing of a resolution of the supervisory board or of any committee thereof by causing votes in writing to be submitted to the meeting. <sup>2</sup>Such votes may be submitted by other members of the supervisory board. <sup>3</sup>They may also be submitted by persons who are not members of the supervisory board, provided that such persons are entitled to attend the meeting pursuant to § 109 (3).
- (4) Subject to more detailed regulation by the articles or the bylaws of the supervisory board, resolutions of the supervisory board or of any committee thereof may be adopted in writing, by telegraph or telephone if no member objects to such procedure.

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

- (1) <sup>1</sup>Persons who are not members of the supervisory board or the management board may not attend meetings of the supervisory board and its committees. <sup>2</sup>Experts and persons needed to give information may be invited for consultation on individual matters.
- (2) Members of the supervisory board who are not members of a committee may attend meetings of such committee, unless the chairman of the supervisory board determines otherwise.
- (3) The articles may permit persons who are not members of the supervisory board to attend meetings of the supervisory board and its committees in lieu of members of the supervisory board who are unable to attend, provided that such members have authorised such persons to attend in writing.
- (4) The foregoing shall not affect statutory provisions that provide otherwise.

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### **§ 110 Convening Supervisory Board Meetings**

- (1) <sup>1</sup>Each member of the supervisory board or the management board may, upon stating the grounds for this, request that the chairman of the supervisory board promptly call a meeting of the supervisory board. <sup>2</sup>The meeting shall be held within two weeks from the date on which notice thereof has been given.
- (2) If any such request made by two or more members of the supervisory board or by the management board should not be complied with, such members may themselves call a meeting of the supervisory board upon stating these facts.
- (3) <sup>1</sup>Meetings of the supervisory board should as a rule be called twice in every calendar half year. For unlisted companies, the supervisory board may determine that one meeting per calendar half year has to be held.

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### **§ 111 Duties and Rights of the Supervisory Board**

- (1) The supervisory board shall supervise the management of the company.
- (2) <sup>1</sup>The supervisory board may inspect and examine the books and records of the company

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

- (3) <sup>1</sup>The supervisory board shall call a shareholder's meeting whenever the interests of the company so require. <sup>2</sup>A simple majority shall suffice for such resolution.
- (4) <sup>1</sup>Management responsibilities may not be conferred on the supervisory board. <sup>2</sup>However, the articles or the supervisory board have to determine that specific types of transactions may be entered into only with the consent of the supervisory board. <sup>3</sup>If the supervisory board refuses to grant consent, the management board may request that a shareholders' meeting approve the grant. <sup>4</sup>The shareholders meeting by which the shareholders' approves shall require a majority of not less than three-fourths of the votes cast. <sup>5</sup>The articles may neither provide for any other majority nor prescribe any additional requirements.
- (5) <sup>1</sup>The supervisory board of a company which is listed on a stock exchange or subject to co-determination determines target ratios for the percentage of women in the supervisory board and in the management board. <sup>2</sup>If the percentage of women is below 30 per cent upon determination of the target ratios, the target ratios may not be lower than the rate already achieved. <sup>3</sup>Concurrently, time periods for attaining the target ratios shall be set. <sup>4</sup>The periods shall not exceed five years. <sup>5</sup>If there already is a ratio pursuant to § 96 (2) which applies to the supervisory board, the determination shall only be made for the management board.
- (6) Members of the supervisory board may not confer their responsibilities on other persons.

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

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

## **§ 113 Remuneration of the Members of the Supervisory Board**

- (1) <sup>1</sup>The members of the supervisory board may receive remuneration for their services. <sup>2</sup>Such remuneration may be determined in the articles or set by the shareholders' meeting. <sup>3</sup>Such remuneration shall bear a reasonable relationship to the duties of the members of the supervisory board and to the condition of the company. <sup>4</sup>If the remuneration is determined in the articles, the shareholders' meeting may, by simple majority, resolve on an amendment of the articles by which such remuneration is reduced.
- (2) <sup>1</sup>Remuneration of the members of the first supervisory board for their services may be granted only pursuant to resolution of the shareholders' meeting. <sup>2</sup>Such resolution may be adopted only in the shareholders' meeting resolving on ratification of the acts of the members of the first supervisory board.
- (3) <sup>1</sup>If the members of the supervisory board are granted a share of the annual profit of the company, such share shall be computed on the basis of distributable profit, reduced by an amount of not less than four per cent of the contributions made minimum issue price of

the shares. <sup>2</sup>Conflicting determinations are void.

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### **§ 114 Contracts with Members of the Supervisory Board**

- (1) If a member of the supervisory board in addition to his services as a member of the supervisory board, enters into a contract with the company for provision of professional services which does not establish an employment relationship, or into a contract with the company to undertake a special assignment, any such contract shall require the consent of the supervisory board in order to be valid.
  - (2) <sup>1</sup>If the company pursuant to any such contract grants remuneration to a member of the supervisory board without the consent of the supervisory board, such member of the supervisory board shall repay such remuneration, unless the supervisory board subsequently approves such contract. <sup>2</sup>A claim of the member of the supervisory board against the company for restitution of the enrichment obtained by the services performed shall remain unaffected; such claim may, however, not be set off against the company's entitlement to restitution.
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### **§ 115 Grant of Credit to Members of the Supervisory Board**

- (1) <sup>1</sup>The company may grant credit to members of the supervisory board only with the consent of the supervisory board. <sup>2</sup>A controlling company may grant credits to members of the supervisory board of a controlled enterprise only with the consent of its supervisory board; a controlled company may grant credits to members of the supervisory board of the controlling enterprise only with the consent of the supervisory board of the controlling enterprise. <sup>3</sup>Such consent may be granted only for specific credit transactions or kinds of credit transactions, and for not more than three months in advance. <sup>4</sup>The resolution on such consent shall make provision as to the payment of interest on, and repayment of, any loan. <sup>5</sup>If the member of the supervisory board carries on a business as a sole proprietor, such consent shall not be required if the credit is granted to finance the payment of goods which the company supplies to his business.
  - (2) (1) shall also apply to credits to the spouse or a minor child of a member of the supervisory board and to credits to any third party acting on behalf of any such person or on behalf of a member of the supervisory board.
  - (3) <sup>1</sup>If a member of the supervisory board is also a legal representative of another legal entity or member of a commercial partnership, the company may grant credit to such legal entity or commercial partnership only with the consent of the supervisory board; (1), sentences 3 and 4 shall apply accordingly. <sup>2</sup>The foregoing shall not apply if such legal entity or commercial partnership is affiliated with the company or if the credit is grant to finance the payment of goods that the company supplies to such legal entity or commercial partnership.
  - (4) Any credit granted in violation of the provisions of (1) to (3), shall be repaid immediately, irrespective of any agreement to the contrary, unless the supervisory board subsequently consents.
  - (5) If the company is a credit institution or financial services institution to which § 15 of the Banking Act apply, the provisions of the Banking Act shall apply in lieu of (1) to (4).
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## § 116 Duty of Care and Responsibility of Members of the Supervisory Board

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

### Section Three. Exertion of Influence on the Company

## § 117 Liability for Damages

- (1) <sup>1</sup>Any person who, by exerting his influence on the company, induces a member of the management board or the supervisory board, a registered authorised officer (*Prokurist*) or an authorised signatory to act to the disadvantage of the company or its shareholders shall be liable to the company for any resulting damage. <sup>2</sup>Such person shall also be liable to the shareholders for any resulting damage insofar as they have suffered damage in addition to any loss incurred as a result of the damage to the company.
- (2) <sup>1</sup>In addition to such person, the members of the management board and the supervisory board shall be jointly and severally liable if they have acted in violation of their duties. <sup>2</sup>They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager. <sup>3</sup>The members of the management board and the supervisory board shall not be liable to the company or the shareholders for damage if they acted pursuant to a lawful resolution of the shareholders' meeting. <sup>4</sup>Liability for damages shall not be precluded by the fact that the supervisory board has consented to the act.
- (3) In addition to such person, any person who has wilfully caused undue influence to be exerted shall also be jointly and severally liable to the extent that he has obtained an advantage from the detrimental act.
- (4) § 93 (4) sentences 3 and 4 shall apply accordingly to the extinguishment of liability for damages to the company.
- (5) <sup>1</sup>The claim for damages of the company may also be asserted by the company's creditors if they are unable to obtain satisfaction from the company. <sup>2</sup>Liability for damages with respect to the creditors shall be extinguished neither by a waiver nor by a compromise of the company nor by the fact that the act that has caused the damage was based on a resolution of the shareholder's meeting. <sup>3</sup>If insolvency proceedings have been instituted over the company's assets, the receiver in insolvency shall exercise the rights of the creditors during the course of such proceedings.
- (6) Claims under the foregoing provisions shall be time barred after expiration of a period of five years.
- (7) The foregoing provisions shall not apply if the member of the management board or the supervisory board, the registered authorised officer (*Prokurist*) or the authorised signatory was induced to engage in the act causing damage by the exercise of:
  1. the right to direct under a control agreement; or

2. the right to direct of an acquiring company (§ 319) into which the company has been integrated.

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## Section Four: Shareholders' Meeting

### Subsection One. Rights of the Shareholders' Meeting

#### § 118 General Provisions

- (1) <sup>1</sup>The shareholders shall exercise their rights with respect to the company at shareholders' meetings unless this Act provides otherwise. <sup>2</sup>The articles may provide, or may authorise the management board to provide, that the shareholders may participate in the shareholders' meeting without being present on site and without having a proxy holder and may exercise all or individual rights in whole or in part by way of electronic communication.
- (2) The articles may provide, or may authorise the management board to provide, that shareholders may vote, without participating in the shareholders' meeting, in writing or by way of electronic communication (postal vote).
- (3) <sup>1</sup>The members of the management board and the supervisory board shall attend the shareholders' meeting. <sup>2</sup>The articles may provide for certain cases where the attendance of supervisory board members may be by audio-visual transmission.
- (4) The articles or the bylaws of the shareholders' meeting according to § 129 (1) may provide, or may authorise the management board or the chairperson of the meeting to provide, that audio-visual transmission of the meeting is admitted.

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#### § 119 Rights of the Shareholders' Meeting

- (1) The shareholders' meeting shall resolve on all matters expressly stated in this Act or the articles, in particular with respect to:
  1. The appointment of members of the supervisory board, to the extent they are not to be appointed to the supervisory board or be elected as representatives of employees pursuant to the Codetermination Act, the Supplemental Co-determination act, the One-Third Co-determination Act or the Act on Employee Co-determination within Cross-border Mergers;
  2. the appropriation of distributable profits;
  3. the ratification of the acts of the members of the management board and the supervisory board;
  4. the appointment of the auditor;
  5. amendments to the articles;
  6. measures to increase or reduce the share capital;
  7. the appointment of auditors for the examination of matters in connection with the formation or the management of the company;
  8. the dissolution of the company.



- (2) The shareholders' meeting may decide on matters concerning the management of the company only if required by the management board.

## **§ 120 Ratification of the Acts of Management; Vote on the Compensation Scheme**

- (1) <sup>1</sup>The shareholders' meeting shall annually, during the first eight months of the fiscal year, resolve on ratification of the acts of the members of the management board and the supervisory board. <sup>2</sup>A separate vote shall be taken with regard to the ratification of the acts of an individual member if so resolved by the shareholders' meeting or so requested by a minority, whose aggregate holding equals or exceeds one-tenth of the share capital or represents an amount of the share capital corresponding to 1 million euros.
- (2) <sup>1</sup>Such ratification shall constitute approval by the shareholders' meeting of the company's administration by the members of the management board and the supervisory board. <sup>2</sup>Such ratification shall not constitute a waiver of claims for compensation of damage.
- (3) The deliberations on ratification shall be combined with the deliberations on the appropriation of distributable profits.
- (4) <sup>1</sup>The shareholders' meeting of a listed company may resolve on the approval of the compensation scheme. <sup>2</sup>The resolution shall not give rise to any rights or obligations; in particular, the obligations of the supervisory board pursuant to § 87 shall remain unaffected. <sup>3</sup>The resolution shall not be voidable pursuant to § 243.

### **Subsection Two. Notice of a Shareholders' Meeting**

## **§ 121 General Provisions**

- (1) A shareholders' meeting shall be called in all cases provided for in this Act or the articles or whenever required by the interests of the company.
- (2) <sup>1</sup>The shareholders' meeting shall be called by the management board, which shall resolve thereon by a simple majority of votes. <sup>2</sup>Persons who are registered in the commercial register as members of the management board shall be deemed to have the requisite authority to call such meeting. <sup>3</sup>The right of any other person based on law or the articles to call a shareholders' meeting shall remain unaffected.
- (3) <sup>1</sup>Notice of the shareholders' meeting shall contain the company's business name and domicile as well as the time and place of the shareholders' meeting. <sup>2</sup>Moreover the agenda shall be stated therein. <sup>3</sup>In case of public companies, the management board or, in case the supervisory board calls the meeting, the supervisory board shall state in the notice:
1. the preconditions for participating in the meeting and exercising voting rights as well as, if applicable, the deadline for proofs pursuant to § 123 (4) sentence 2 and its relevance;
  2. the procedure for casting votes
    - a) by a proxy holder, whereby reference is made to the forms which have to be used for granting a voting proxy and to the manner in which proof of the appointment of a proxy holder may be transmitted electronically to the company; as well as
    - b) by postal vote or by way of electronic communication pursuant to § 118 (1) sentence 2, as far as the articles provide for a corresponding form of casting votes;

3. the rights of the shareholders pursuant to § 122 (2), § 126 (1), §§ 127, 131 (1); the statements may be limited to the deadlines for exercising these rights if the notice refers to further explanations on the company's Internet page.
  4. the company's Internet page via which the information pursuant to § 124a can be accessed.
- (4) <sup>1</sup>The notice of the shareholders' meeting shall be published in the company's journals. <sup>2</sup>If the shareholders of the company are known by name, then the shareholders' meeting may be convened by registered letter; the day of dispatch shall be considered the day of publication.
- (4a) In case of listed companies which have not exclusively issued registered shares or such which do not send the notice directly to the shareholders pursuant to (4) sentences 2, the notice shall, at the latest on the date of announcement, be published through media capable of distributing it in the entire European Union.
- (5) <sup>1</sup>Unless the articles provide otherwise, the shareholders' meeting shall be held at the company's domicile. <sup>2</sup>If the company's shares are listed on a German stock exchange for trading in the regulated market, the shareholders' meeting may also be held at the domicile of such stock exchange, unless the articles provide otherwise.
- (6) If all shareholders have appeared or are represented, then the shareholders' meeting may make resolutions without adhering to the provisions of this subdivision provided no shareholder objects to the making of resolutions.
- (7) <sup>1</sup>In case of deadlines and dates which are calculated back from the date of the meeting, the day of the meeting itself shall not be included in the calculation. <sup>2</sup>Adjourning the meeting from a Sunday, Saturday or a holiday to a preceding or following working day shall not be an option. <sup>3</sup>§§ 187 to 193 of the German Civil Code shall not be applied accordingly. <sup>4</sup>In case of unlisted companies, the articles may provide for a different calculation of the deadline.

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## § 122 Calling of a Meeting at the Request of a Minority

- (1) <sup>1</sup>The shareholders' meeting shall be called if shareholders, whose holding in aggregate equals or exceeds one-twentieth of the share capital, demand such meeting in writing, stating the purpose and the reasons of such meeting; such demand shall be addressed to the management board. <sup>2</sup>The articles may provide that the right to demand a shareholders' meeting shall require another form or the holding of a lower proportion of the share capital. <sup>3</sup>The shareholders who have made the demand shall provide evidence to the effect that they have held the shares for at least 90 days prior to the receipt of the demand and that they will hold the shares until the management board decides upon the demand. <sup>4</sup>§ 121 (7) shall apply accordingly.
- (2) <sup>1</sup>In the same manner, shareholders whose shares amount in aggregate to not less than one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros, may demand that items are put on the agenda and published. <sup>2</sup>Each new item shall be accompanied by an explanation or a draft proposal. <sup>3</sup>The demand in the sense of sentence 1 shall be provided to the company at least 24 days, in case of listed companies at least 30 days, prior to the meeting; the day of receipt shall not be included in this calculation.

- (3) <sup>1</sup>If any such demand is not complied with, the court may authorise the shareholders, who have made the demand, to call a shareholders' meeting or publish such items. <sup>2</sup>At the same time, the court may appoint the chairman of the meeting. <sup>3</sup>The notice of the meeting or the publication shall refer to such authorisation. <sup>4</sup>An appeal may be made against such decision. <sup>5</sup>The shareholders who have made the demand shall provide evidence to the effect that they will hold the shares until the court has made a decision.
- (4) The company shall bear the costs of the shareholders' meeting and, in the case of (3), also the court costs if the court has granted such motion.

### **§ 123 Notice Period, Giving Notice of Attendance at the Shareholders' Meeting, Proof**

- (1) <sup>1</sup>Notice of the shareholders' meeting shall be given no later than thirty days prior to the date of the meeting. <sup>2</sup>The day the notice is given shall not be included in this calculation.
- (2) <sup>1</sup>The articles may provide that attendance at the meeting or the exercise of voting rights shall require the shareholders giving notice of their attendance prior to the meeting. <sup>2</sup>The notice of attendance must be delivered to the company at least six days prior to the shareholders' meeting at the address specified for this purpose in the notice calling the shareholders' meeting. <sup>3</sup>The articles or the notice if authorised by the articles may provide for a shorter time limit which is to be calculated in days. <sup>4</sup>The day of receipt shall not be included in this calculation. <sup>5</sup>The minimum deadline under (1) shall be prolonged by the number of days of the deadline for giving notice of attendance.
- (3) <sup>1</sup>The articles may provide how proof of the right to attend the meeting or of the right to vote is to be given; paragraph (2) sentence 5 shall apply accordingly in this case.
- (4) <sup>1</sup>In the case of share certificates in bearer form of companies whose shares are listed on a stock exchange, a certificate issued in textual form by the depository institution confirming the shareholder's share ownership shall constitute sufficient evidence. <sup>2</sup>In the case of companies whose shares are listed on a stock exchange, such certificate shall make reference to the 21st day prior to the shareholders' meeting and must be delivered to the company within, at least, six days prior to the shareholders' meeting at the address specified in the notice calling the shareholders' meeting. <sup>3</sup>The articles or the notice if authorised by the articles may provide for a shorter time limit which is to be calculated in days. <sup>4</sup>The day of receipt shall not be included in this calculation. <sup>5</sup>The only persons who will be treated as shareholders in relation to the company and may therefore attend the meeting or exercise voting rights are those shareholders who have presented a certificate in the manner described above.
- (5) In case of registered shares of listed companies, the right to participate in the meeting or exercise a voting right pursuant to § 67 (2) sentence 1 arises from the entry in the share register.

### **§ 124 Publication of Requests for Supplements; Proposals for Resolutions**

- (1) <sup>1</sup>If the minority has requested pursuant to § 122 (2) that items be added to the agenda,

these items shall be published either upon calling the meeting or immediately following receipt of the request. <sup>3</sup>§ 121 (4) shall apply accordingly; moreover, § 121 (4a) shall apply accordingly to listed companies. <sup>4</sup>Publication and submission shall be made in the same way as applicable for calling the meeting.

- (2) <sup>1</sup>If the agenda includes the election of members of the supervisory board, the publication shall designate the statutory provisions governing the composition of the supervisory board; if the shareholders' meeting is bound by nominations then such facts shall also be stated. <sup>2</sup>Moreover, in case of an election of supervisory board members of listed companies which are subject to the Co-determination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act, the publication shall contain:

1. an indication of whether an objection against overall compliance pursuant to § 96 (2) sentence 3 was raised; and
2. information about the number of seats in the supervisory board which have to be held by women and men, respectively, for the minimum participation requirement pursuant to § 96 (2) sentence 1 to be complied with.

<sup>3</sup>If the shareholders' meeting is required to resolve on an amendment of the articles or on an agreement which becomes effective only with the consent of the shareholders' meeting, the text of the proposed amendment of the articles or the essential contents of the agreement shall be published.

- (3) <sup>1</sup>With respect to each item on the agenda that is to be decided by the shareholders' meeting, the management board and the supervisory board, but in the case of the election of members of the supervisory board and auditors, only the supervisory board, shall in the publication make a proposal for the respective resolutions. <sup>2</sup>In case of companies which are capital-market oriented within the meaning of § 264d of the Commercial Code, CRR credit institutions within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or insurance undertakings within the meaning of Article 2 (1) of Council Directive 91/674/EEC, the supervisory board's proposal regarding the election of the auditor is to be based on the recommendation of the audit committee. <sup>3</sup>Sentence 1 shall not apply if the shareholders' meeting is bound by nominations for the election of members of the supervisory board pursuant to § 6 of the Coal and Steel Co-determination Act, or if the subject matter of the resolution has been put on the agenda upon request by a minority. <sup>4</sup>The proposal for the election of members of the supervisory board or auditors shall state their name, profession and place of residence. <sup>5</sup>If the supervisory board is to comprise representatives of employees, any resolution of the supervisory board regarding proposals for the election of members of the supervisory board shall require only the majority of the votes of the representatives of the shareholders in the supervisory board; § 8 of the Coal and Steel Co-determination Act shall remain unaffected.

- (4) <sup>1</sup>No resolution may be adopted in respect of items on the agenda that have not been duly published. <sup>2</sup>However, no such publication shall be required for the adoption of a resolution on a motion made to call a shareholders' meeting that is made in the meeting, for motions made in respect of items on the agenda, and for deliberations without resolution.
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## § 124a Publications on the Company's Internet page

<sup>1</sup>In the case of listed companies, the following shall be made available on the company's Internet page immediately after the convocation of the shareholders' meeting:

1. the content of the convocation;
2. an explanation if there is an item on the agenda which shall not be resolved upon;
3. the documents to be made available to the meeting;
4. the total amount of shares and of the voting rights at the point in time of the convocation, including separate information on the total amount with regard to each class of shares;
5. as the case may be, the forms to be used if the voting right is exercised by proxy or by postal vote unless such forms are provided to the shareholders directly.

<sup>2</sup>A demand of the shareholders within the meaning of § 122 (2) received by the company after the convocation of the meeting shall be made available in the same way immediately after it was received by the company.

## § 125 Communications to Shareholders and Members of the Supervisory Board

- (1) <sup>1</sup>The management board shall, at least 21 days before the meeting, communicate to those credit institutions and shareholders' associations which have exercised voting rights on behalf of shareholders in the preceding shareholders' meeting or which have requested such communication and the notice of the meeting. <sup>2</sup>The date of notice shall not be taken into account. <sup>3</sup>If the agenda is to be amended pursuant to § 122 (2), such amended agenda shall be communicated in the case of listed companies. <sup>4</sup>Such communication shall point out that voting right may be exercised by a proxy holder or a shareholders' association. <sup>5</sup>In case of listed companies details on the membership in other supervisory boards to be established pursuant to statutory provisions must be added to any nomination for the election of supervisory board members; details on their membership in comparable domestic and foreign controlling bodies of enterprises should be added.
- (2) <sup>1</sup>The management board shall provide the same information to shareholders who make such request or are registered as shareholders in the company's share register at the beginning of the 14th day before the meeting. <sup>2</sup>The articles may limit transmission to electronic communication.
- (3) Each member of the supervisory board may request that the management board send the same communication to him.
- (4) Each shareholder and each member of the supervisory board may request that the management board advise him in writing of the resolutions adopted at a shareholders' meeting.
- (5) Financial services institutions and enterprises operating under § 53 (1) sentence 1 or § 53b (1) sentence 1 or (7) of the Banking Act are to be treated as credit institutions.

## § 126 Motions by Shareholders

(1) <sup>1</sup>Motions by shareholders together with the shareholder's name, the grounds and any position taken by the management shall be made available to the persons entitled pursuant to § 125 (1)–(3) under the conditions stated therein if at least 14 days before the meeting the shareholder sends to the address indicated in the notice convening the meeting a motion counter to a proposal of the management board and supervisory board as to an item on the agenda. <sup>2</sup>The date of receipt shall not be taken into account. <sup>3</sup>In the case of listed companies, access shall be provided via the company's Internet page. <sup>4</sup>§ 125 (3) shall apply accordingly.

(2) <sup>1</sup>A counter-motion and the grounds for this need not be made available, if:

1. the management board would by reason of such communication become criminally liable;
2. the counter-motion would result in a resolution of the shareholders' meeting which would be illegal or would violate the articles;
3. the grounds contain statements which are manifestly false or misleading in material respects or which are libellous;
4. a counter-motion of such shareholder based on the same facts has already been communicated with respect to a shareholders' meeting of the company pursuant to § 125;
5. the same counter-motion of such shareholder on essentially identical grounds has already been communicated pursuant to § 125 to at least two shareholders' meetings of the company within the past five years and at such shareholders' meetings less than one-twentieth of the share capital represented has voted in favour of such counter-motion;
6. the shareholder indicates that he will neither attend nor be represented at the shareholders' meeting; or
7. within the past two years at two shareholders' meeting the shareholder has failed to make or cause to be made on his behalf a counter-motion communicated by him.

<sup>2</sup>The statement of the grounds need not be communicated if it exceeds one hundred words.

(3) If several shareholders make counter-motions for resolution in respect to the same subject matter, the management board may combine such counter-motions and the respective statements of the grounds.

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## § 127 Nominations by Shareholders

<sup>1</sup>§ 126 shall apply accordingly to a nomination by a shareholder for the election of a member of the supervisory board or external auditors. <sup>2</sup>Such nomination need not be supported by a statement of the grounds for this. <sup>3</sup>The management board also need not communicate such nomination if it fails to contain the particulars required by § 124 (3) sentence 4 and § 125 (1) sentence 5. <sup>4</sup>The management board shall supplement the proposal of a shareholder

for the election of supervisory board members of listed companies which are subject to the Co-determination Act, the Coal and Steel Co-determination Act or the Supplemental Co-determination Act by adding the following information:

1. reference to the requirements pursuant to § 96 (2);
2. an indication of whether an objection against overall compliance pursuant to § 96 (2) sentence 3 was raised; and
3. information about the number of seats in the supervisory board which have to be held by women and men, respectively, for the minimum participation requirement pursuant to § 96 (2) sentence 1 to be complied with.

### **§ 127a Shareholders' Forum**

(1) Shareholders or shareholders' associations may invite other shareholders in the shareholders' forum of the Federal Gazette to act jointly or by proxy for the purpose of filing a motion or request in accordance with the provisions of this Act or for the purpose of exercising their voting rights at a shareholders' meeting.

(2) Such invitation shall contain the following information:

1. the shareholder's name and address, or the name and address of the shareholders' association;
2. the company name;
3. the motion, request, or proposal for the exercise of voting rights concerning an item on the agenda;
4. the date of the shareholders' meeting concerned.

(3) The invitation may refer to a statement of reasons on the internet page of the person making the invitation, as well as that person's electronic address.

(4) In the Federal Gazette the company may refer to its internet page where comments on the invitation can be found.

(5) The Federal Ministry of Justice and Consumer Protection is authorised to prescribe by regulation the presentation of the shareholders' forum as well as further details concerning the invitation, the references mentioned in paragraphs (3) and (4), fees, cancellation periods, the right of cancellation, cases of abuse and the right of inspection.

### **§ 128 Transmission of Communications**

(1) <sup>1</sup>A credit institution that has custody of bearer shares on behalf of shareholders of the company at the beginning of the 21st day the meeting or that is entered in the share register for shares that it does not own shall promptly transmit to such shareholders any communications received pursuant to § 125 (1). <sup>2</sup>The company's articles may limit

transmission to electronic communication; in such case the credit institution shall not be obliged otherwise for other reasons.

- (2) The credit institution's liability for any damages resulting from a violation of (1) may neither be waived nor limited in advance.
- (3) <sup>1</sup>The Federal Ministry of Justice and Consumer Protection shall be authorised in agreement with the Federal Ministry of Economics and Energy and the Federal Ministry of Finance to prescribe by regulation that the company shall reimburse the credit institutions for:
1. the communication of the information according to § 67 (4); and
  2. copying communications and transmitting them to shareholders.

<sup>2</sup>A lump-sum amount may be set to cover the expenses. <sup>3</sup>The regulation does not require the approval of the Federal Council.

- (4) § 125 (5) shall apply accordingly.

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### Subsection Three. Minutes of the Meeting, Right to Information

#### § 129 Bylaws of Shareholders' Meeting, List of Participants

- (1) <sup>1</sup>The shareholders' meeting may resolve by a three quarters majority of the share capital represented at the meeting to establish bylaws for the shareholders' meeting with rules for the preparation and conduct of the shareholders' meeting. <sup>2</sup>At the shareholders' meeting a list of shareholders present or represented and of the representatives of shareholders shall be prepared stating their name and place of residence, in the case of par shares, the amount, in the case of non-par shares the number, and the class of shares represented by each person.
- (2) <sup>1</sup>If proxies to exercise voting rights have been granted to a credit institution or a person designated in § 135 (8) and if the holder of the proxy shall exercise voting rights on behalf of an undisclosed principal, the amount and class of the shares for which the proxies were granted shall be specified separately in the list. <sup>2</sup>The names of the shareholders who have granted the proxies need not be mentioned.
- (3) <sup>1</sup>A person who has been authorised by a shareholder to exercise voting rights in his own name in respect of shares that are not held by him, shall specify the amount and class of such shares separately for inclusion in the list. <sup>2</sup>The foregoing shall apply also in respect of registered shares for which such authorised person is registered in the share register as shareholder.
- (4) <sup>1</sup>The list shall be made available for inspection by all participants prior to the first vote. <sup>2</sup>Each shareholder shall, upon request, be granted access to the list for review until up to two years after the shareholders' meeting.

- (5) § 125 (5) shall apply accordingly.

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#### § 130 Minutes

- (1) <sup>1</sup>Each resolution of the shareholders' meeting shall be recorded in minutes of the



proceedings, which shall be in the form of a notarial deed.<sup>2</sup>The same shall apply to any request by a minority pursuant to § 120 (1) sentence 2, § 137.<sup>3</sup>If the shares are not admitted to trade on an exchange, the minutes signed by the chairman of the supervisory board will suffice provided no resolutions are passed where the law requires three-quarters are larger majorities.

- (2) <sup>1</sup>The minutes shall state the place and date of the meeting, the name of the notary, the form and result of the voting and any determinations of the chairman regarding resolutions.<sup>2</sup>In case of listed companies, the determinations regarding resolutions shall also include for each resolution:
1. the number of shares for which valid votes have been cast
  2. the proportion of the nominal capital represented by the valid votes in the registered capital;
  3. the number of votes cast for a resolution, the votes against such resolution and any abstentions.
- <sup>3</sup>Contrary to sentence 2, the chairman of the meeting may limit the determinations regarding resolutions for each resolution on stating that the necessary majority has been reached if no shareholder requests full determination pursuant to sentence 2.
- (3) The list of participants and the documents regarding notice of the meeting shall be appended to the minutes. The documents regarding notice of the meeting need not be appended if their contents are recorded in the minutes.
- (4) <sup>1</sup>The minutes shall be signed by a notary.<sup>2</sup>The presence of witnesses shall not be required.
- (5) The management board shall, promptly upon adjournment of the meeting, submit an officially certified copy of the minutes and the appendices, and in the case of (1) sentence 3 signed by the chairperson of the supervisory board, to the commercial register.
- (6) Listed companies shall, within seven days following the meeting, publish the determined results of the voting including the details pursuant to (2) sentence 2 on their Internet page.

## § 131 Right of Shareholders to Information

- (1) <sup>1</sup>Each shareholder shall upon request be provided with information at the shareholders' meeting by the management board regarding the company's affairs, to the extent that such information is necessary to permit a proper evaluation of the relevant item on the agenda.<sup>2</sup>The duty to provide information shall also extend to the company's legal and business relations with any affiliated enterprise.<sup>3</sup>If a company makes use of the simplified procedure pursuant to § 266 (1) sentence 3, § 276 or § 288 of the Commercial Code, each shareholder may request that the annual financial statements be presented to him at the shareholders' meeting on such annual financial statements in the form which would have been used if such simplifications were not applied.<sup>4</sup>A parent enterprise's (§ 290 (1) and (2) of the Commercial Code) management board's duty to inform in the shareholders' meeting that considers the consolidated financial statement and consolidated management report shall extend to the outlook of the group and the enterprises included in the consolidated financial statement.

(2) <sup>1</sup>The information provided shall comply with the principles of conscientious and accurate accounting. <sup>2</sup>The articles or the rules of procedure pursuant to § 129 may authorise the chairperson of the meeting to limit the number of questions and speaking time of shareholders as appropriate and to lay down general rules thereon.

(3) <sup>1</sup>The management board may refuse to provide information:

1. to the extent that providing such information is, according to sound business judgment, likely to cause material damage to the company or an affiliated enterprise;
2. to the extent that such information relates to tax valuations or the amount of certain taxes;
3. with regard to the difference between the value at which items are shown in the annual balance sheet and the higher market value of such items, unless the shareholders' meeting is to approve the annual financial statements;
4. with regard to the methods of classification and valuation, if disclosure of such methods in the notes suffices to provide a clear view of the actual condition of the company's assets, financial position and profitability within the meaning of § 264 (2) of the Commercial Code; the foregoing shall not apply if the shareholders' meeting is to approve the annual financial statements;
5. if provision thereof would render the management board criminally liable;
6. in the case of a credit institution or financial services institution information about the applied balance sheet and valuation methods or calculations made in the annual financial statements, the management report, the consolidated annual financial statement or the group's management report need not be given;
7. if the information is continuously available on the company's internet page seven or more days prior to the shareholders' meeting as well as during the meeting.

<sup>2</sup>The provision of information may not be denied for other reasons.

(4) <sup>1</sup>If information has been provided outside a shareholders' meeting to a shareholder by reason of his status as a shareholder, such information shall upon request be provided to any other shareholder at the shareholders' meeting, even if such information is not necessary to permit a proper evaluation of an item on the agenda. <sup>2</sup>The management board may not refuse to provide such information on the grounds of (3) sentence 1 Nos. 1 to 4. <sup>3</sup>Sentences 1 and 2 shall not apply if a subsidiary (§ 290 (1), (2) of the Commercial Code), a cooperative enterprise (§ 310 (1) of the Commercial Code) or an affiliate (§ 311 (1) of the Commercial Code) provides the information to a parent company (§ 290 (1), (2) of the Commercial Code) for the purpose of inclusion in the consolidated annual financial statement of the parent company and the information is required for this purpose.

(5) A shareholder who has been denied information may request that his question and the reason for which the information was denied be recorded in the minutes of the meeting.

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## **§ 132 Judicial Decision on the Right to Information**

(1) The regional court of the district of the company's domicile shall have exclusive jurisdiction to decide upon motion whether or not the management board is required to

provide information.

- (2) <sup>1</sup>Each shareholder who has been denied information requested and, if a resolution has been adopted on an item on the agenda for which information was requested, each shareholder who was present at the shareholders' meeting and who has recorded his objection in the minutes at the shareholders' meeting, shall have standing to make such motion. <sup>2</sup>Such motion may be made within two weeks from the date of the shareholders' meeting in which the information was refused.
- (3) <sup>1</sup>§ 99 (1), (3) sentences 1, 2 and 4 to 6 as well as (5) sentences 1 and 3 shall apply accordingly. <sup>2</sup>An appeal may be made against the decision only if the district court has granted leave to appeal in its decision. <sup>3</sup>§ 70 (2) of the Act on Court Procedure in Family Matters and Non-litigious Matters shall apply accordingly.
- (4) <sup>1</sup>If the motion is granted, the information shall be provided even outside a shareholders' meeting. <sup>2</sup>Such decision may be enforced in accordance with the provisions of the Code of Civil Procedure.
- (5) The court concerned with the proceedings shall determine at its reasonable discretion which party is to bear the costs of proceedings.

#### Subsection Four. Voting Rights

### § 133 Principle of Simple Majority of Votes

- (1) Resolutions of the shareholders' meeting shall require a majority of the votes cast (simple majority) unless the law or the articles provide for a larger majority or additional requirements.
- (2) The articles may provide for different rules in respect of elections.

### § 134 Voting Rights.

- (1) <sup>1</sup>Voting rights shall be exercised in proportion to the par value of shares. <sup>2</sup>In case of a company not listed at a stock exchange, the articles may limit voting rights with respect to shareholders holding more than one share by setting a maximum par value or a sliding scale. <sup>3</sup>The articles may also provide that shares held by any other person on behalf of a shareholder shall be deemed to be shares held by such shareholder. <sup>4</sup>If a shareholder constitutes a business enterprise, the articles may further provide that those shares which are held by an enterprise which is controlled or controlling or affiliated in a group or which are held by a third party on behalf of any such enterprises, shall also be deemed to be shares of such shareholder. <sup>5</sup>It may not be provided that any such limitation apply to specific shareholders only. <sup>6</sup>Any limitation shall not be taken into account in the computation of a capital majority required by law or the articles.
- (2) <sup>1</sup>Voting rights shall arise as from the date on which contributions have been made in full. <sup>2</sup>If the value of a contribution in kind does not correspond to the value stated in § 36a (2) sentence 3, this does not conflict the arising of the voting right; this does not apply if the difference in value is apparent. <sup>2</sup>The articles may provide, however, that voting rights shall arise as from the date on which the minimum contribution provided by law, or a higher minimum contribution provided in the articles, has been paid. <sup>3</sup>If the articles so provide, payment of the minimum contribution shall give rise to one vote, and, if payments exceed the minimum contribution, the voting rights shall be determined in accordance with the

amounts of contributions paid.<sup>5</sup>If the articles do not provide that voting rights arise prior to contributions having been paid in full and if contributions have not been paid in full in respect of any share, the voting rights shall be determined in relation to the amounts paid; in such event payment of the minimum contribution shall give rise to one vote.<sup>6</sup>In such cases, fractions of votes shall be taken into account only to the extent they result in full votes for the shareholder entitled to vote.<sup>7</sup>The articles may not make provisions pursuant to this that apply only to specific shareholders or to specific classes of shares.

- (3) <sup>1</sup>Voting rights may be exercised by a proxy holder. <sup>2</sup>If the shareholder authorises more than one person, the company may reject one or more of such persons. <sup>3</sup>The granting of proxy, its revocation and proof towards the company shall be made in written form and duly signed, unless the articles or the convocation notice based on an authorisation under the articles provides otherwise or, in the case of listed companies, facilitation is provided. <sup>4</sup>The listed company at least has to offer to transmit such proof by electronic communication. <sup>5</sup>If proxy holders are authorised by the company, the authorisations are to be kept by the company for review for three years; § 135 (5) shall apply accordingly.
- (4) The method of exercising the voting rights shall be determined by the articles.
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### **§ 135 Exercise of Voting Rights by Credit Institutions and Professional Agents**

- (1) <sup>1</sup>A credit institution may only exercise or cause to be exercised, voting rights arising under bearer shares that it does not hold if it has been authorised to exercise such voting rights by proxy. <sup>2</sup>A proxy may only be issued to a specified credit institution and shall be kept by such credit institution for review. <sup>3</sup>The form of proxy shall be completed in full at the time the proxy is issued and may only contain statements related to the exercise of voting rights. <sup>4</sup>If the shareholder does not give express instructions, a general proxy may only provide for the credit institution's entitlement to exercise the voting right

1. according to own proposals for voting ((2) and (3)) or
2. according to the proposals of the management board or the supervisory board or, in case such proposals deviate from each other, the proposals of the supervisory board (4).

<sup>5</sup>If the credit institution offers the exercise of the voting right pursuant to sentence 4 No. 1 or No. 2, it shall to a reasonable extent and until revoked also offer to provide the documents necessary for the exercise of the voting right to a shareholders' association or another representative to be chosen by the shareholder. <sup>6</sup>Annually, the credit institution must clearly stress to the shareholder the possibility of revocation and alternative representation. <sup>7</sup>The issue of instructions on individual items on the agenda, the issuance and revocation of a general proxy pursuant to sentence 4 and of an order pursuant to sentence 5 including any amendment shall be facilitated for the shareholder by using a form or online form.

- (2) <sup>1</sup>A credit institution which wishes to exercise the voting right on the basis of a proxy pursuant to (1) sentence 4 No. 1 shall provide the shareholder in time with its proposals for the execution of the voting right on the individual items of the agenda. <sup>2</sup>With respect to these proposals, the credit institution shall bear in mind the shareholder's interests and shall ensure, at an organisational level, that the interests of its own operations do not interfere; it shall appoint a member of the management who shall supervise the observance of these duties as well as the due execution of the voting right and its

documentation.<sup>3</sup>Together with its proposals, the credit institution shall point out that it will exercise the voting right in accordance with its own interests, if the shareholder does not issue instructions to the contrary in time.<sup>4</sup>If a member of the management board or an employee of the credit institution is a member of the supervisory board of the company or if a member of the management board or an employee of the company is a member of the supervisory board of the credit institution, the credit institution shall point out this circumstance.<sup>5</sup>The same shall apply if the credit institution holds a stake in the company which must be notified according to § 21 of the Securities Trade Act, or if it belongs to a consortium that has taken up within the last five years securities issued by the company.

- (3) <sup>1</sup>If the shareholder has not given the bank instructions on the exercise of voting rights, the bank shall, in case of (1) sentence 4 No. 1, be required to exercise such voting rights in accordance with its own proposals, unless the bank may assume in view of the circumstances prevailing that the shareholder would, if he had knowledge of the facts, approve a different exercise of the voting rights. <sup>2</sup>If the bank in exercising voting rights has not complied with the shareholders' instructions or, in case the shareholder has not given instructions, the bank has not complied with its own proposal, the bank shall inform the shareholder thereof and state the reasons for this. <sup>3</sup>A bank may exercise voting rights at its own shareholders' meeting by virtue of such proxy only to the extent that a shareholder has given express instructions in respect of the various items on the agenda. <sup>4</sup>The same shall apply in meetings of a company in which it holds a direct or indirect stake of more than 20 per cent of the nominal capital.
- (4) <sup>1</sup>A credit institution that wants to exercise the voting right in the shareholders' meeting based on a proxy pursuant to (1) sentence 4 No. 2, shall make available the management board's and the supervisory board's proposals to the shareholders, unless this is not done another way. <sup>2</sup>(2) sentence 3 as well as (3) sentence 1 to 3 shall apply accordingly.
- (5) <sup>1</sup>If the proxy permits it, the credit institution may grant delegated authority to persons who are not employees of the credit institution. <sup>2</sup>If the proxy does not provide otherwise, the credit institution exercises the voting rights on behalf of an undisclosed principal. <sup>3</sup>If postal votes are permitted at the company, the authorised credit institution may use postal votes. <sup>4</sup>In the case of listed companies, the presentation of a certificate pursuant to § 123 (3) shall suffice to prove the credit institution's right to vote to the company; for the rest, the requirements stipulated in the articles with regard to the exercise of voting rights shall be complied with.
- (6) <sup>1</sup>A credit institution may exercise voting rights arising under registered shares which it does not hold, but with respect to which the credit institution is registered in the share register as shareholder, only pursuant to a written authorisation. <sup>2</sup>(1) to (5) shall apply accordingly to such authorisation or proxy.
- (7) The validity of votes cast shall not be impaired by a violation of (1) sentence 2 to 7 and (2) to (5).
- (8) (1) to (7) shall apply accordingly for shareholders' associations and for persons who professionally offer shareholders their services in exercising voting rights at shareholders' meetings; the foregoing shall not apply if the person exercising the voting right is the legal representative or spouse of the shareholder or related by blood or marriage or in the fourth degree of kinship.
- (9) The liability of a credit institution for damages resulting from a violation of (1) to (6) may neither be waived nor limited in advance.
- (10) § 125 (5) shall apply accordingly.

## § 136 Exclusion of Voting Rights

- (1) <sup>1</sup>No person may exercise voting rights on his own behalf or on behalf of any other person in respect of a resolution concerning ratification of his acts, his discharge from a liability, or enforcement by the company of a claim against him. <sup>2</sup>Voting rights arising from shares that may not be exercised by the shareholder himself pursuant to sentence 1 may also not be exercised by any other person.
- (2) <sup>1</sup>An agreement whereby a shareholder undertakes to exercise voting rights in accordance with the instructions of the company, the management board or the supervisory board of the company or a controlled enterprise shall be null and void. <sup>2</sup>An agreement whereby a shareholder undertakes to vote for the respective proposals of the management board or supervisory board of the company shall likewise be null and void.
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## § 137 Voting on Nomination Made by Shareholders

If a shareholder has made a nomination for the election of members of the supervisory board pursuant to § 127 and moves at the shareholders' meeting for the election of the person nominated by him, such motions shall be resolved prior to acting on the proposal of the supervisory board, provided that a minority of shareholders whose holding in aggregate equals or exceeds one-tenth of the share capital represented at the meeting so requests.

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### Subsection Five. Separate Resolution

## § 138 Separate Meeting; Separate Voting

<sup>1</sup>Where this Act or the articles provide for separate resolutions of certain shareholders, such resolutions shall be adopted either at a separate meeting of such shareholders or by a separate vote, unless the law provides otherwise. <sup>2</sup>The provisions governing shareholders' meetings shall apply accordingly to the calling of a separate meeting, attendance of such meeting, and the right to information; the provisions governing resolutions of shareholders' meetings shall apply accordingly to such separate resolutions. <sup>3</sup>If shareholders who are entitled to take part in the voting on a separate resolution request a separate meeting or announcement of a proposal to be voted on separately, it shall suffice if the shares with which they may take part in the voting on the separate resolution in aggregate equal or exceed one-tenth of the shares entitled to vote on such separate resolutions.

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### Subsection Six. Non-Voting Preferred Shares

## § 139 Nature

- (1) <sup>1</sup>Shares that carry the benefit of a preference right with respect to the distribution of profits may be issued without voting rights (non-voting preferred shares). <sup>2</sup>The granted preference may, in particular, consist of a share in the profits allocated to the respective share in advance (advance dividend) or an increased share in the profits (additional dividend). <sup>3</sup>Unless otherwise provided for in the articles, an advance dividend shall be paid subsequently.
- (2) Non-voting preferred shares may be issued only up to an amount corresponding to half of the share capital.
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## § 140 Rights of Preferred Shareholders

- (1) Except for the right to vote, non-voting preferred shares shall convey the same rights as those enjoyed by the other shareholders.
- (2) <sup>1</sup>If the preference is payable subsequently and the preference amount is not paid or not paid in full in any given year and not paid subsequently in the following year together with the full preference for such year, the shareholders shall have voting rights until the amounts in arrear have been paid. <sup>2</sup>If the preference is not payable subsequently and if the preference amount in any given year is not paid or not paid in full, the holders of preferred shares shall have voting rights until the preference in any given year has been paid in full. <sup>3</sup>As long as the voting right exists, the preferred shares shall also be taken into account in computing any capital majority required by law or the articles.
- (3) The fact that the preference amount is payable subsequently and not paid or not paid in full in any given year shall not give rise to a claim for any preference amount in arrear which is subject to later resolutions on distribution of profits, unless the articles provide otherwise.

## § 141 Cancellation or Restriction of Preference Rights

- (1) Any resolution cancelling or restricting a preference right shall require the consent of the holders of preferred shares in order to be effective.
- (2) <sup>1</sup>Any resolution to issue preferred shares that are to enjoy priority over or the same rights as non-voting preferred shares in respect of the distribution of profits or assets, shall also require the consent of the holders of preferred shares. <sup>2</sup>Such consent shall not be required if such issue was expressly reserved when the preference right was granted or, if the voting rights were later excluded, when such exclusion was made, provided, in any such case, that the subscription rights of the holders of preferred shares are not excluded.
- (3) <sup>1</sup>The holders of preferred shares shall, at a separate meeting, resolve on whether or not to grant such consent by separate resolution. <sup>2</sup>Such resolution shall require a majority of not less than three-fourths of the votes cast. <sup>3</sup>The articles may neither provide for any other majority nor prescribe any additional requirements. <sup>4</sup>If the resolution to issue preferred shares which are to enjoy priority over or the same rights as non-voting preferred shares in respect of the distribution of profits or assets excludes the subscription rights of the holders of preferred shares to subscribe to such shares in whole or in part, § 186 (3) to (5) shall apply accordingly to such resolution.
- (4) The shares shall carry voting rights if the preference is cancelled.

### Subsection Seven. Special Audit; Damage Claims

## § 142 Appointment of Special Auditors

- (1) <sup>1</sup>The shareholders' meeting may, by simple majority, appoint auditors (special auditors) for the examination of matters relating to the formation of the company or the management of the company's business, and also, in particular, in connection with capital increases or capital reductions. <sup>2</sup>No member of the management board or the supervisory board may vote on any such resolution either on his own behalf or on behalf of another person, if the audit concerns matters related to ratification of the acts of a member of the management board or the supervisory board or to the initiation of

litigation proceedings between the company and a member of the management board or the supervisory board.<sup>3</sup> If a member of the management board or the supervisory board shall not be entitled to vote pursuant to sentence 2, such person's voting rights may not be exercised by another person on his behalf.

- (2) <sup>1</sup>If the shareholders' meeting rejects a motion to appoint special auditors to audit any matter relating to the formation of the company or the management of the company's business affairs within the last five years, upon petition by shareholders whose aggregate holdings at the time of filing the petition equal or exceed one per cent of the share capital or amount to at least 100,000 euro, the court shall appoint special auditors, provided that facts exist which give reason to suspect that improprieties or gross breaches of the law or the articles have occurred in connection with such matter; the foregoing shall also apply to matters within the last ten years for companies that were listed on a stock exchange at the point in time the matter occurred. <sup>2</sup>The petitioners must furnish evidence that they have been the holders of the shares for at least three months prior to the date of the shareholders' meeting and will continue to hold the shares until a decision on the petition is rendered. <sup>3</sup>§ 149 shall apply accordingly to agreements that are concluded in order to avoid such special audit.
  - (3) (1) and (2) shall not apply to matters which may be the subject of special audit pursuant to § 258.
  - (4) <sup>1</sup>If the shareholders' meeting has appointed special auditors, upon petition by shareholders whose aggregate holdings at the time of filing the petition equal or exceed one per cent of the share capital or amount to at least 100,000 euros, the court shall appoint another special auditor if this appears necessary for reasons relating to the individual special auditor appointed, namely if such auditor lacks the expertise required for this subject matter of the special audit or if concerns as to his impartiality or doubts as to his reliability exist. <sup>2</sup>Such motion shall be made within a period of two weeks from the date of the shareholders' meeting.
  - (5) <sup>1</sup>The court shall hear, in addition to the parties concerned, the supervisory board and, in the case of (4), the special auditor appointed by the shareholders' meeting. <sup>2</sup>An appeal may be made against such decision. <sup>3</sup>The regional court of the company's registered seat shall decide on any petitions pursuant to paragraphs (2) and (4).
  - (6) <sup>1</sup>Special auditors appointed by the court shall be entitled to reimbursement of reasonable cash expenses and remuneration for their services. <sup>2</sup>The court shall set such expenses and remuneration. <sup>3</sup>An appeal may be made against such decision; appeals on points of law shall be precluded. <sup>4</sup>A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.
  - (7) If the company has issued securities within the meaning of § 2(1) of the Securities Trading Act that are admitted to trading on a German stock exchange in the regulated market, then in the case of paragraph (1) sentence 1, the management board or, in the case of paragraph (2) sentence 1, the court shall inform the Federal Financial Supervisory Authority of the appointment of a special auditor and his audit report; furthermore, the court shall inform the Federal Financial Supervisory Authority of the receipt of a petition for the appointment of a special auditor.
  - (8) The judicial proceedings pursuant to paragraphs (2) through (6) shall be governed by the provisions of the Act on Court Procedure in Family Matters and Non-litigious Matters unless this Act provides otherwise.
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## § 143 Selection of Special Auditors

- (1) Unless the subject matter of the special audit requires additional expertise, special auditors shall be:
1. persons who are sufficiently trained and experienced in accounting;
  2. auditing firms at least one of whose legal representatives is sufficiently trained and experienced in accounting.
- (2) <sup>1</sup>No special auditor may be appointed who does not qualify to serve, or would not have qualified to serve at the time when the matter subject to the audit occurred, as external auditor pursuant to § 319 (2), (3), § 319a (1), § 319b of the Commercial Code. <sup>2</sup>An auditing firm may not serve as special auditor if it does not qualify to serve, or would not have qualified to serve at the time when the matter subject to the audit occurred, as external auditor pursuant to § 319 (2), (3), § 319a (1), § 319b of the Commercial Code.

## § 144 Responsibility of Special Auditors

§ 323 of the Commercial Code concerning the responsibility of external auditors shall apply accordingly.

## § 145 Rights of Special Auditors; Audit Report

- (1) The management board shall permit the special auditors to audit the company's books, records, and its assets, in particular cash, securities and merchandise.
- (2) The special auditors may require from the members of the management board and the supervisory board all information and evidence required for a diligent audit of the relevant matters.
- (3) The special auditors shall have the rights pursuant to (2) also with respect to any member of the group and any controlled or controlling enterprises.
- (4) Upon petition of the management board the court shall permit that certain facts be omitted in the report provided that overriding interests of the company make their omission necessary and the disclosure of such facts is not required in order to prove the occurrence of improprieties or gross breaches pursuant to § 142 (2).
- (5) <sup>1</sup>The regional court of the company's registered seat shall decide on petitions pursuant to paragraph (4). <sup>2</sup>§ 142 (5) sentence 2 and (8) shall apply accordingly.
- (6) <sup>1</sup>The special auditors shall render a written report on the result of the audit. <sup>2</sup>The audit report shall include facts whose disclosure is apt to cause material damage to the company or an affiliated enterprise, provided that if knowledge of such facts required for the shareholders' meeting to form an opinion as to the matter subject to audit. <sup>3</sup>The special auditors shall sign the report and promptly submit such report to the management board and the commercial register of the company's domicile. <sup>4</sup>The management board upon request shall provide a copy of the audit report to each shareholder. <sup>5</sup>The management board shall present the report to the supervisory board and, when the next shareholders' meeting is called, announce that such report will be an item on the agenda.

## § 146 Costs

<sup>1</sup>If the court appoints special auditors, the company shall bear the court costs and the expenses of the audit. <sup>2</sup>If the petitioner has achieved the appointment of the special auditors by making false statements either intentionally or by gross negligence, he shall be required to reimburse the company for such costs.

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## § 147 Assertion of Damage Claims

- (1) <sup>1</sup>Claims of the company for damages against persons liable pursuant to §§ 46 to 48 and § 53 that have arisen in connection with the formation of the company, against members of the management board or supervisory board with respect to the management of the company or pursuant to § 117, shall be asserted if the shareholders' meeting so resolves by a simple majority of votes. <sup>2</sup>Any damage claims must be brought within six months from the date of the shareholders' meeting.
- (2) <sup>1</sup>The shareholders' meeting may appoint special representatives to assert a claim for damages. <sup>2</sup>The court (§ 14) shall, upon petition by shareholders whose aggregate holdings amount to at least one-tenth of the share capital or one million Euro, appoint persons other than those appointed to represent the company pursuant to § 78, § 112 or sentence 1 as the company's representatives to assert the claim for damages if, in the opinion of the court, such appointment is appropriate for the proper assertion of such claim. <sup>3</sup>If the court grants the motion, the company shall bear the court costs. <sup>4</sup>An appeal may be made against such decision. <sup>5</sup>The court-appointed representatives may request from the company reimbursement of reasonable cash expenses and remuneration for their services. <sup>6</sup>The expenses and the remuneration shall be set by the court. <sup>7</sup>An appeal may be made against such decision; appeals on point of law shall be precluded. <sup>8</sup>A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.
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## § 148 Court Procedure for Petitions Seeking Leave to File an Action for Damages

- (1) <sup>1</sup>Shareholders whose aggregate holdings at the time of filing the petition equal or exceed one per cent of the share capital or amount to at least 100,000 euros, may file a petition for the right to assert the claims of the company for damages mentioned in § 147(1) sentence 1 in their own name. <sup>2</sup>The court shall give them leave to file such action for damages if
1. the shareholders furnish evidence that they or, in the case of universal succession, their predecessors in title have acquired the shares before learning about the alleged breaches of duty or alleged damage from a publication;
  2. the shareholders demonstrate that they in vain filed a petition to the company requesting to institute the necessary legal proceedings itself within an appropriate period of time;
  3. facts exist which give reason to suspect that the company has suffered a loss as a result of improprieties or gross breaches of the law or articles; and
  4. no overriding interests of the company exist which would prevent the assertion of such damage claim.

- (2) <sup>1</sup>The regional court of the company's registered seat shall decide on the petition seeking leave to file such action. <sup>2</sup>If the regional court maintains a chamber for commercial matters, such chamber shall have jurisdiction in lieu of the chamber for civil matters. <sup>3</sup>The state government may by regulation transfer jurisdiction for several regional courts to one regional court if such transfer is required to ensure uniformity of decisions. <sup>4</sup>The state government may transfer such power to the state ministry of justice. <sup>5</sup>The statute of limitation for the claim at issue is stayed by the filing of such petition until the petition has been dismissed by a final and binding decision or the period allowed for bringing an action has expired. <sup>6</sup>Before rendering its decision, the court shall provide the other party with an opportunity to comment on the matter. <sup>7</sup>Such decision may be appealed immediately. <sup>8</sup>Appeals on points of law are not permitted. <sup>9</sup>The company shall be made a party in the judicial proceedings deciding on the petition pursuant to paragraph (1) as well as in such action for damages.
- (3) <sup>1</sup>The company may assert its claims for damages itself at any time; as soon as the company files such action, all pending proceedings instituted by the shareholders concerning that particular damage claim become inadmissible. <sup>2</sup>The company may decide to take over a pending action in which its own damage claims are being asserted by another party in its current state at the time when the action is taken over. <sup>3</sup>In the event of sentences 1 and 2, all former petitioners or claimants shall be joined as parties.
- (4) <sup>1</sup>If the petition is granted, the action may only be brought before the court with jurisdiction pursuant to paragraph (2) within three months from the date on which the decision has become final and binding, provided that the shareholders have one more time to no avail requested the company to institute the necessary legal proceedings itself within an appropriate period of time. <sup>2</sup>The action shall be brought against the persons specified in § 147(1) sentence 1 with the aim of obtaining compensation for the company. <sup>3</sup>Interventions by shareholders are not permitted after the petition has been granted. <sup>4</sup>If more than one such action is brought, they shall be consolidated in order to be heard and decided together.
- (5) <sup>1</sup>Such judgement shall be binding on the company and all other shareholders even if the action is dismissed in the judgement. <sup>2</sup>The same shall apply to a settlement to be made pursuant § 149; however, such settlement shall only be effective in favour of or against the company after the permission to file an action has been granted.
- (6) <sup>1</sup>The person filing the petition shall bear the costs of the judicial proceedings if and to the extent that the petition is dismissed. <sup>2</sup>If the petition is dismissed for reasons of opposing interests of the company, of which the company could have informed the petitioner prior to filing the petition but failed to do so, then the company shall reimburse the petitioner for the costs. <sup>3</sup>In all other respects, a decision on the allocation on costs will be rendered in the final judgement. <sup>4</sup>If the company files an action itself or takes over a pending action brought by shareholders, it shall bear all costs incurred by the petitioner until such time and may, except for the three-year waiting period, withdraw its action on the conditions set forth in § 93 (4) sentences 3 and 4 only. <sup>5</sup>If the action is dismissed in whole or in part, the company shall reimburse the claimant for the costs to be borne by them unless the claimant obtained the court's permission to file an action by making false statements intentionally or by gross negligence. <sup>6</sup>Shareholders acting jointly as petitioners or party shall only be reimbursed for the costs of one attorney unless the engagement of another attorney was necessary to prosecute the action.

## **§ 149 Notices on Actions for Damages**

- (1) As soon as the decision granting judicial leave to file an action for damages in accordance with § 148 has become final and binding, the company whose shares are listed on a stock exchange shall immediately publish notice of the petition as well as the termination of the proceedings in the company's journals.
- (2) <sup>1</sup>The notice of termination of the proceedings must contain the kind of settlement reached, the full wording of all agreements and ancillary restraints related thereto, as well as the names of the parties involved. <sup>2</sup>Payments made by the company as well as payments by third parties which are attributable to the company shall be clearly pointed out and described separately. <sup>3</sup>All payment obligations become effective only upon complete publication. <sup>4</sup>The validity of any legal action terminating the proceedings is not affected by the publication of the notice. <sup>5</sup>Payments may be reclaimed if they were made although the payment obligations were unenforceable.
- (3) The foregoing provisions apply accordingly to agreements entered into for the purpose of avoiding litigation.

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## **Division Five. Statement of Accounts. Appropriation of Profits**

### **Section One. Annual Accounts and Annual Report Declaration of Conformity**

## **§ 150 Legal Reserve; Capital Reserve**

- (1) A legal reserve shall be created in the balance sheet of the annual financial statements to be prepared pursuant to §§ 242 and 264 of the Commercial Code.
- (2) The amount to be transferred to such reserve shall be one-twentieth of annual net profit, after deducting any loss carried forward from the previous year, until the legal reserve and the capital reserves pursuant to § 272 (2) sentences 1 to 3 of the Commercial Code in aggregate amount to one-tenth of the share capital or any higher percentage set by the articles.
- (3) If the legal reserve and the capital reserves pursuant to § 272 (2) sentence 1 to 3 of the Commercial Code in aggregate do not exceed one-tenth of the share capital or any higher percentage set by the articles, such reserves may be used only:
  1. to offset an annual net loss to the extent such loss is not covered by profits carried forward from the previous year and cannot be offset by a transfer from other profit reserves;
  2. to offset a loss carried forward from the previous year to the extent such loss is not covered by an annual net profit and cannot be offset by a transfer from other profit reserves.
- (4) <sup>1</sup>If the legal reserve and the capital reserves pursuant to § 272 (2) sentence 1 to 3 of the Commercial Code in aggregate exceed one-tenth of the share capital or any higher percentage set by the articles, such excess may be used:
  1. to cover an annual net loss to the extent such loss is not covered by profits carried forward from the previous year;
  2. to cover a loss carried forward from the previous year to the extent such loss is not covered by annual net profit;

3. for an increase of the share capital from the corporation's reserves under §§ 207 to 220.

<sup>2</sup>Such excess may not be used pursuant to Nos. 1 and 2 if at the same time transfers are made from profit reserves for the purpose of payment of dividends.

## §§ 150a, 151 [repealed]

§ 150a [repealed]

§ 151 [repealed]

## § 150a [repealed]

## § 151 [repealed]

## § 152 Provisions regarding the Balance Sheet

- (1) <sup>1</sup>The share capital shall be shown in the balance sheet as subscribed capital. <sup>2</sup>The portion of the share capital allocated to each class of shares shall be stated separately. <sup>3</sup>Conditional capital shall be indicated at par value. <sup>4</sup>If shares with multiple voting rights exist, the item subscribed capital shall indicate the aggregate number of votes of shares with multiple voting rights and other shares.
- (2) The item 'capital reserve' shall specify in the balance sheet or in the notes
  1. the amount that was transferred to such reserve during the fiscal year;
  2. the amount which was withdrawn during the fiscal year
- (3) The individual items for profit reserves shall specify in the balance sheet or in the notes:
  1. the amounts which the shareholders' meeting has transferred to such reserves from the distributable profits of the previous year;
  2. the amounts which are transferred to such reserves from the annual net profit for the fiscal year;
  3. the amounts which were withdrawn for the fiscal year.
- (4) (1) to (3) do not apply to corporations that are small corporations within the meaning of § 267a of the Commercial Code if they use the facilitation within the meaning of § 266 (1) sentence 4 of the Commercial Code. <sup>2</sup>(2) and (3) shall be applied by small corporations within the meaning of § 267 (1) of the Commercial Code subject to the proviso that the information has to be provided in the balance sheet.

## § 153 [repealed]

## § 154 [repealed]

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## § 155 [repealed]

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## § 156 [repealed]

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## § 157 [repealed]

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## § 158 Provisions regarding the Profit and Loss Statement

(1) <sup>1</sup>The profit and loss statement shall after the item Annual net profit/annual net loss in consecutive numeration include the following items:

1. profit carried forward/loss carried forward from the previous year;
2. withdrawals from the capital reserve;
3. withdrawals from profit reserves
  - a) from the legal reserve
  - b) from the reserves for participations in a controlling enterprise or parent company
  - c) from reserves pursuant to the articles
  - d) from other profit reserves
4. transfer to profit reserves
  - a) to the legal reserve
  - b) to the reserves for participations in a controlling enterprise or parent company
  - c) to reserve pursuant to the articles
  - d) to other profit reserves
5. distributable profits/accumulated loss.

<sup>2</sup>The items in sentence 1 may also be stated in the notes.

(2) <sup>1</sup>The compensation to be paid under a profit transfer agreement or agreement to transfer a portion of profits to outside shareholders shall be deducted from the income out of such agreement; if such compensation exceeds the income, the amount in excess shall be shown under expenses from losses. <sup>2</sup>Other amounts may not be deducted.

(3) (1) and (2) do not apply to corporations that are small corporations within the meaning of § 267a of the Commercial Code if they use the facilitation within the meaning of § 275 (5) of the Commercial Code.

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## § 159 [repealed]

## § 160 Provisions regarding the Notes

(1) The notes shall also include:

1. the shares previously held and acquired by a shareholder on behalf of the company or a controlled enterprise or subsidiary or by a controlled enterprise or subsidiary, as founder or subscriber or by exercise of a conversion or subscription right granted in connection with a conditional capital increase; if such shares were sold during the fiscal year, the sale shall also be reported stating the amount of the proceeds and the use thereof;
2. the own shares which the company or a controlled enterprise or subsidiary or another person on behalf of the company or a controlled enterprise or a subsidiary has acquired or taken as a pledge; the number of such shares and the portion of the share capital allocated to them as well as the portion of share capital represented by such shares, and in the case of shares acquired the date of acquisition and reasons for the acquisition shall be stated. If such shares were acquired or sold during the fiscal year, such acquisition or sale shall also be reported stating the number of such shares, the portion of share capital allocated to them, the portion of the share capital represented by such shares, the acquisition or sales price and the use of the proceeds;
3. the number of such shares of each class, whereas in case of par-value shares the par value and in case of no-par value shares the notional value of each share shall be stated, to the extent such information may not be derived from the balance sheet; shares which were subscribed during the fiscal year in connection with a conditional capital increase or an authorised issue of capital, shall be stated separately;
4. the authorised capital;
5. the number of warrant bonds according to § 192 (2) No. 3;
6. [repealed]
7. the existence of a cross-shareholding stating the enterprise concerned;
8. the existence of a shareholding in the company which has been communicated to it pursuant to § 20 (1) or (4) of this Act or § 21 (1) or (1a) of the Securities Trade Act; in doing so, the published content according to § 20 (6) of this Act or § 26 (1) of the Securities Trade Act shall be stated in the communication.

(2) Such information shall be omitted to the extent the public interest of the Federal Republic of Germany or one of the states thereof so requires.

(3) <sup>1</sup>(1) Nos. 1 and 3 to 8 shall not be applicable to corporations which are small corporations within the meaning of § 267 (1) of the Commercial Code. <sup>2</sup>(1) No. 2 shall be applicable to such corporations, provided that the company is required to provide information only about own shares acquired and held by it or by another person for the account of the company and is not required to report on the use of proceeds realised from the sale of own shares.

## **§ 161 Corporate Governance Codex Declaration**

- (1) <sup>1</sup>The management board and supervisory board of the listed company shall declare annually that the recommendations of the ‘Government Commission German Corporate Governance Codex’ published by the Federal Ministry of Justice and Consumer Protection in the official part of the Federal Gazette has been and will be complied with or which recommendations have not been or will not be applied and why. <sup>2</sup>The same shall apply to the management board and the supervisory board of a company which has exclusively issued other securities than shares for trading on an organised market within the sense of § 2 (5) of the Securities Trading Act and the issued shares of which shall, on the company’s own initiative, only be traded via a multilateral trading system within the sense § 2 (3) sentence 1 No. 8 of the Securities Trading Act.
- (2) The declaration shall be continuously available to the public on the company’s Internet page.

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## **Section Two. Examination of Annual Financial Statements**

### **Subsection One. Audit by External Auditors**

#### **§ 162 [repealed]**

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#### **§ 163 [repealed]**

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#### **§ 164 [repealed]**

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#### **§ 165 [repealed]**

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#### **§ 166 [repealed]**

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#### **§ 167 [repealed]**

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#### **§ 168 [repealed]**

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#### **§ 169 [repealed]**

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### **Subsection Two. Examination by the Supervisory Board**

#### **§ 170 Submission to the Supervisory Board**

- (1) <sup>1</sup>The management board shall promptly submit the annual financial statements and the annual report to the supervisory board upon completion. <sup>2</sup>Sentence 1 shall apply accordingly to individual accounts pursuant to § 325 (2a) of the Commercial Code, as well as to the annual financial statements and the group management report of parent companies (§ 290 (1) and (2) of the Commercial Code).
- (2) <sup>1</sup>The management board shall at the same time submit to the supervisory board the proposal for appropriation of distributable profits that is intended to be presented to the shareholders’ meeting. <sup>2</sup>The proposal shall, unless circumstances require otherwise, be



set out as follows:

- |                                |       |
|--------------------------------|-------|
| 1. dividends                   | ..... |
| 2. transfer to profit reserves | ..... |
| 3. profit carried forward      | ..... |
| 4. distributable profits       | ..... |

- (3) <sup>1</sup>Every member of the supervisory board shall be entitled to take cognisance of the documents submitted. <sup>2</sup>Such documents shall also be delivered to every member of the supervisory board or, to the extent the supervisory board has made such decision, to the members of a committee.

## § 171 Examination by the Supervisory Board

- (1) <sup>1</sup>The supervisory board shall examine the annual financial statements, the annual report and the proposal for appropriation of distributable profits, in the case of parent companies (section 290 (1), (2) of the Commercial Code) also the consolidated financial statement and consolidated annual report. <sup>2</sup>If the financial statements are required to be audited by external auditors, the external auditors shall be present at the supervisory board's or the audit committee's deliberations regarding such statements and shall report on material results of their audit, in particular on major weaknesses in the internal control and risk management system with regard to the accounting process. <sup>3</sup>The external auditor shall inform on circumstances which might give rise to concerns as to his impartiality and on services he provided in addition to those provided in connection with the audit.
- (2) <sup>1</sup>The supervisory board shall report on the results of its examination in writing to the shareholders' meeting. <sup>2</sup>The supervisory board shall in such report state in which manner and to what extent it has examined the management of the company during the fiscal year; in case of listed companies it shall state, in particular, which committees have been set up and how many meetings the supervisory board or such committees have been held. <sup>3</sup>If the annual financial statements are required to be audited by an external auditor, the supervisory board shall in addition state its opinion on the result of the audit of the annual financial statements by the external auditor. <sup>4</sup>The supervisory board shall at the end of its report state whether or not objections are to be raised as a result of the definitive findings of its examination and whether it approves the annual financial statements as prepared by the management board. <sup>5</sup>In the case of parent companies (section 290 (1), (2) of the Commercial Code), sentences 3 and 4 shall apply accordingly to the consolidated financial statement.
- (3) <sup>1</sup>The supervisory board shall submit its report to the management board within one month after receipt of such statements. <sup>2</sup>If the report has not been submitted to the management board within such period, the management board shall promptly set an additional period not exceeding one month for the supervisory board. <sup>3</sup>If the report has not been submitted to the management board within such further period, the annual financial statements shall be deemed not approved by the supervisory board; in the case of parent companies (section 290 (1), (2) of the Commercial Code), the same shall apply to the consolidated financial statement.
- (4) <sup>1</sup>Paragraphs (1) through (3) shall also apply to the individual accounts pursuant to

§ 325 (2a) of the Commercial Code. <sup>2</sup>The management board may disclose the individual accounts referred to in sentence 1 only after they have been approved by the supervisory board.

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### Section Three: Approval of the Annual Financial Statements Appropriation of Profits

#### Subsection One: Approval of the Annual Financial Statements

#### § 172 Approval by Management Board and Supervisory Board

<sup>1</sup>The annual financial statements shall be deemed to have been approved, upon approval thereof by the supervisory board, unless the management board and the supervisory board resolve that the annual financial statements are to be approved by the shareholders' meeting.

<sup>2</sup>Such resolution by the management board and supervisory board shall be included in the report of the supervisory board to the shareholders' meeting.

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#### § 173 Approval by the Shareholders' Meeting

- (1) <sup>1</sup>The annual financial statements shall be approved by the shareholders' meeting if the management board and the supervisory board have resolved that the annual financial statements are to be approved by the shareholders' meeting or if the supervisory board has not approved the annual financial statements. <sup>2</sup>If the supervisory board of a parent enterprise (§ 290 (1), (2) of the Commercial Code) does not approve the consolidated financial statements, the shareholders' meeting may decide on the approval.
- (2) <sup>1</sup>The provisions governing the preparation of the annual financial statements shall apply to their approval. <sup>2</sup>In connection with the approval of the annual financial statements, the shareholders' meeting may transfer to profit reserves only those amounts that are required to be transferred to such reserves pursuant to law or the articles.
- (3) <sup>1</sup>If the shareholders' meeting amends annual financial statements which have been audited by an external auditor in accordance with statutory requirements, resolutions on the approval of the annual financial statements and the appropriation of profits which have been adopted by the shareholders' meeting prior to the new audit pursuant to § 316 (3) Commercial Code, shall become effective only if, as a result of such new audit, an unqualified auditors' certificate has been given with respect to such amendments. <sup>2</sup>Such resolutions shall become null and void if an unqualified auditors' certificate has not been provided with respect to such amendments within two weeks after the passing of such resolutions.

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#### Subsection Two: Appropriation of Profits

#### § 174 [Resolution on the Appropriation of Profits]

- (1) <sup>1</sup>The shareholders' meeting shall resolve on the appropriation of distributable profits. <sup>2</sup>In such connection the annual financial statements as approved shall be binding on the shareholders' meeting.
- (2) Such resolution shall specify in detail the appropriation of distributable profits, including in particular the following:
  1. the amount of distributable profits;

2. the amount to be distributed to shareholders;
  3. the amounts to be transferred to profit reserves;
  4. any profit carried forward;
  5. any additional expense resulting from such resolution.
- (3) Such resolution shall not be deemed to constitute an amendment to the annual financial statements as approved.

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### Subsection Three. Ordinary Shareholders' Meeting

#### § 175 Notice

- (1) <sup>1</sup>The management board shall, promptly upon receipt of the report of the supervisory board, give notice of a shareholders' meeting to receive the approved annual financial statements and the annual report, the individual accounts pursuant to § 325(2a) of the Commercial Code which have been approved by the supervisory board and to resolve the appropriation of distributable profits, in the case of a parent company (Section 290 (1), (2) Commercial Code) also to receive the approved consolidated annual financial statements and the consolidated annual report. <sup>2</sup>Such shareholders' meeting shall be held during the first eight months of the fiscal year.
- (2) <sup>1</sup>The annual financial statements, the individual accounts pursuant to § 325(2a) of the Commercial Code which have been approved by the supervisory board, the annual report, the report of the supervisory board and the proposal of the management board regarding the appropriation of distributable profits shall be displayed for inspection by shareholders at the company's offices as from the date of notice of the meeting. <sup>2</sup>Each shareholder shall upon request be provided with a copy of such documents. <sup>3</sup>In the case of a parent company (Section 290 (1), (2) Commercial Code), sentences 1 and 2 shall also apply to consolidated annual financial statement and the consolidated annual report, and the report of the supervisory board thereon. <sup>4</sup>The duties in sentences 1 to 3 shall not arise if the documents referred to therein are accessible on the stock corporation's Internet page for the same period of time.
- (3) <sup>1</sup>If the shareholders' meeting is to approve the annual financial statements or the consolidated financial statements, (1) and (2) shall apply accordingly to the notice of the shareholders' meeting for the approval of the annual financial statements or the consolidated financial statements and to making available the relevant documents and the provision of copies thereof. <sup>2</sup>The deliberations on the approval of the annual financial statements and the appropriation of distributable profits should be combined.
- (4) <sup>1</sup>The management board and the supervisory board shall be bound by the statements regarding the annual financial statements contained in the report of the supervisory board (§§ 172, 173 (1)) as from the date of notice of the shareholders' meeting for receipt of the approved annual financial statements or, if the shareholders' meeting is to approve the annual financial statements, as from the date of the shareholders' meeting for approval of the annual financial statements. <sup>2</sup>In the case of a parent company (Section 290 (1), (2) Commercial Code), sentence 1 shall apply to the supervisory board's declaration on the approval of the consolidated financial statement.
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## **§ 176 Documents to be Presented, Presence of the External Auditor**

- (1) <sup>1</sup>The management board shall make available to the shareholders' meeting the documents specified in § 175 (2) and, in the case of listed companies, an explanatory report on the statements pursuant to § 289 (4), § 315 (4) of the Commercial Code. <sup>2</sup>At the beginning of the meeting, the management board shall comment on the documents that have been presented by it and the chairman of the supervisory board shall comment on the report of the supervisory board. <sup>3</sup>The management board shall in such connection also comment on any annual net loss or any loss that has materially adversely affected the annual result. <sup>4</sup>Sentence 3 shall not apply to credit institution.
- (2) <sup>1</sup>If the annual financial statements are required to be audited by an external auditor, the external auditor shall be present at the deliberations on the approval of the annual financial statements. <sup>2</sup>Sentence 1 shall apply accordingly to the deliberations on the approval of the consolidated financial statements. <sup>3</sup>The external auditor shall not be obligated to provide information to any shareholder.

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## **Section Four: Announcement of Annual Financial Statements**

### **§ 177 [repealed]**

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### **§ 178 [repealed]**

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## **Division Six. Amendment of Articles, Measures to Increase or Reduce the Share Capital**

### **Section One. Amendment of Articles**

## **§ 179 Resolution of Shareholders' Meeting**

- (1) <sup>1</sup>Any amendment of the articles shall require a resolution of the shareholders' meeting. <sup>2</sup>The shareholders' meeting may confer upon the supervisory board the authority to make amendments that relate solely to the wording of the articles.
- (2) <sup>1</sup>The resolution of the shareholders' meeting shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>2</sup>The articles may provide for a different capital majority, however, in the case of an amendment of the purpose of the enterprise, only for a larger capital majority. <sup>3</sup>The articles may provide for additional requirements.
- (3) <sup>1</sup>If the existing relationship of more than one class of shares is to be amended to the disadvantage of any class, the resolution of the shareholders' meeting shall require the consent of the shareholders adversely affected in order to be effective. <sup>2</sup>The shareholders adversely affected shall decide on such consent by adopting a separate resolution. <sup>3</sup>(2) shall apply to such separate resolution.

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## **§ 179a Duty to Transfer the Entire Assets of the Company**

- (1) <sup>1</sup>A contract by which a company binds itself to transfer the entirety of its assets and whereby the transfer does not fall under the provisions of the Transformation Act requires a resolution of the shareholders' meeting according to § 179 even if it does not involve a

change in the company objects.<sup>2</sup>The articles may only provide for a larger majority.

- (2) <sup>1</sup>The contract shall be presented for the review of the shareholders in the business premises of the company from the convocation of the shareholders' meeting that is to resolve its approval. <sup>2</sup>On request, every shareholder is to be given a copy. <sup>3</sup>The duties pursuant to sentences 1 and 2 shall not apply if the agreement is made available on the company's Internet page for the same period of time. <sup>4</sup>The agreement shall be made available for inspection at the shareholders' meeting. <sup>5</sup>The management board shall explain it at the beginning of the proceedings. <sup>6</sup>The agreement shall be appended to the minutes.
- (3) If on the occasion of the transfer of the corporate assets the company is dissolved, then a publicly certified copy of the contract shall be attached to the notification of the dissolution.

### § 180 Consent of Shareholders Concerned

- (1) Any resolution imposing ancillary obligations on shareholders shall require the consent of all shareholders concerned in order to be effective.
- (2) The foregoing shall apply to any resolution that makes the transfer of registered or interim share certificates subject to the company's consent.

### § 181 Registration of Amendment of Articles

- (1) <sup>1</sup>The management board shall file the amendment of the articles for registration in the commercial register. <sup>2</sup>The full text of the articles shall be appended to such filing; such text shall be provided with the certificate of a notary that the provisions of the articles which have been amended conform to the resolution to amend the articles and that the provisions which have not been amended conform to the full text of the articles last submitted to the commercial register.
- (2) Unless the amendment relates to the matters set out in § 39, a reference to the documents submitted to the court shall suffice for purposes of registration.
- (3) An amendment shall become effective only upon registration thereof in the commercial register of the company's domicile.

## Section Two. Measures to Increase the Capital

### Subsection One. Capital Increase against Contributions

### § 182 Requirements

- (1) <sup>1</sup>A resolution to increase the share capital against contributions shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>2</sup>The articles may provide for a different capital majority, however, in the case of the issue of non-voting preferred shares, only for a larger capital majority. <sup>3</sup>The articles may provide for additional requirements. <sup>4</sup>The capital increase may only be carried out by issuance of new shares. <sup>5</sup>In the case of companies with non-par shares, the number of shares must be increased proportionately to the share capital.
- (2) <sup>1</sup>If there is more than one class of shares, resolutions of the shareholders' meeting shall require the consent of the shareholders of each class in order to be effective. <sup>2</sup>Such consent shall require a separate resolution by the shareholders of each class. <sup>3</sup>(1) shall

apply to such separate resolution.

- (3) If the new shares are to be issued for an amount exceeding the minimum issue price, the minimum price they shall be issued for shall be stipulated in the resolution on the share capital increase.
- (4) <sup>1</sup>The share capital shall not be increased for as long as contributions to share capital are still outstanding and collectible. <sup>2</sup>In the case of insurance companies, the articles may provide otherwise. <sup>3</sup>A share capital increase shall not be precluded if immaterial amounts of contributions are outstanding.

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### **§ 183 Capital Increase against Contributions in kind; Repayment of Contributions**

- (1) <sup>1</sup>In the case of a contribution in kind (§ 27 (1) and (2)), the resolution on the share capital increase shall stipulate the object, the person from whom the company is to acquire such object and the par value or, in case of non-par shares the number, of shares to be granted for the contribution in kind. <sup>2</sup>Such resolution may only be adopted if the contribution in kind and the stipulations pursuant to sentence 1 have been explicitly and duly announced.
- (2) § 27 (3) and (4) shall apply accordingly.
- (3) <sup>1</sup>In the case of a capital increase against Contributions in kind, an audit shall be made by one or more auditors. <sup>2</sup>§ 33 (3) to (5), §§ 34, 35 shall apply accordingly.

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### **§ 183a Capital Increase against Contributions in kind without Audit**

- (1) <sup>1</sup>If the requirements pursuant to § 33a are met, an audit of the contribution in kind (§ 183 (3)) may be refrained from. <sup>2</sup>If this is the case, the following paragraphs shall apply.
- (2) <sup>1</sup>The management board shall announce the date of the resolution on the capital increase as well as the statements pursuant to § 37a (1) and (2) in the company's journals. <sup>2</sup>The implementation of the capital increase may not be registered with the commercial register before the expiration of four weeks since the announcement.
- (3) <sup>1</sup>If the requirements pursuant to § 33a (2) are met, the local court shall appoint one or more auditors upon application of shareholders who held a total of five per cent of the share capital on the date of the resolution and are still holding a total of five per cent of the share capital on the date of application. <sup>2</sup>The application may be filed up until the date of the registration of the implementation of the share capital increase (§ 189). <sup>3</sup>The court shall hear the management board before deciding on the application. <sup>4</sup>Such decision may be appealed against.
- (4) § 33 (4) and (5), §§ 34, 35 shall apply accordingly to the further procedure.

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### **§ 184 Filing for Registration of the Resolution**

- (1) <sup>1</sup>The management board and the chairman of the supervisory board shall file the resolution on the share capital increase for registration in the commercial register. <sup>2</sup>Such filing for registration purposes shall state which contributions to existing share capital are still outstanding and why they are not collectible. <sup>2</sup>If the capital contribution is not to

be audited and if the date of the resolution on the capital increase has been announced in advance (§ 183a (2)), the persons filing for registration only need to assert in the filing for registration that they have not become aware of any circumstances within the meaning of § 37a (2) since the announcement.

- (2) The audit report on the Contributions in kind (§ 183 (3)) or the attachments specified in § 37a (3) shall be appended to such filing.
- (3) <sup>1</sup>The court may reject registration if the value of the contribution in kind is not insignificantly lower than the minimum issue price of the shares to be granted for the contribution in kind. <sup>2</sup>If the contribution in kind is not audited pursuant to § 183a (1), § 38 (3) shall apply accordingly.

## § 185 Subscription to New Shares

- (1) <sup>1</sup>Subscription to new shares shall be effected by means of a written note (subscription form) specifying the number, par value and, if more than one class is being issued, class of shares to be subscribed. <sup>2</sup>The subscription notice shall be executed in duplicate. <sup>3</sup>It shall specify:
1. the date on which the resolution on the share capital increase was adopted;
  2. the share issue price, the amount of payments to be made and the scope of any ancillary obligations;
  3. the stipulations required in the case of a capital increase against Contributions in kind and, if more than one class is being issued, the portion of the share capital allocated to each class of shares;
  4. the date on which the subscription shall cease to be effective, if the completion of the share capital increase has not been registered prior thereto.
- (2) Any subscription notice which does not contain all such particulars or which contains limitations in respect of the obligation of the subscriber, other than the limitation pursuant to (1) No. 4, shall be null and void.
- (3) A subscriber may not assert the invalidity or non-binding nature of the subscription notice once the completion of the share capital increase has been registered if he has by virtue of the subscription notice exercised rights or performed obligations as a shareholder.
- (4) Any limitation not contained in the subscription notice shall be unenforceable with respect to the company.

## § 186 Subscription Rights

- (1) <sup>1</sup>Each shareholder shall be entitled, upon demand, to subscribe to new shares in proportion to his holdings in the existing share capital. <sup>2</sup>A period of not less than two weeks shall be set for exercising such subscription rights.
- (2) <sup>1</sup>The management board shall announce the issue price or the basis for setting it and the subscription period set in accordance with (1) in the company's journals. <sup>2</sup>If only the basis

is announced, then no later than three days before the end of the subscription period, the management board shall announce the price in the company's journals and through an electronic information service.

- (3) <sup>1</sup>Subscription rights may be excluded in whole or in part, however, only in the resolution on the share capital increase. <sup>2</sup>In such an event the resolution shall require in addition to the requirements provided by law or the articles for such capital increase, a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>3</sup>The articles may provide for a larger capital majority and for additional requirements. <sup>4</sup>An exclusion of subscription rights is permitted in particular if the capital increase against cash contributions does not exceed 10 per cent of the initial share capital and the issue price is not significantly below the stock exchange price.
- (4) <sup>1</sup>A resolution by which subscription rights are excluded in whole or in part may be adopted only if the proposed exclusion has been explicitly and duly announced. <sup>2</sup>The management board shall make available to the shareholders' meeting a written report stating the grounds for the proposed exclusion, in whole or in part, of subscription rights; such report shall provide an explanation of the proposed issue price.
- (5) <sup>1</sup>A resolution providing that the new shares are to be acquired by a credit institution or an enterprise operating under § 53 (1) sentence 1 or § 53b (1) sentence 1 or (7) of the Banking Act with the obligation to offer such shares to the shareholders for subscription shall not be deemed to constitute an exclusion of subscription rights. <sup>2</sup>The management board shall announce the subscription offer with the statements according to (2) sentence 1 and a final issue value according to (2) sentence 2; the foregoing shall apply if the new shares are to be acquired by a person other than a credit institution with the obligation to offer such shares to the shareholders for subscription.

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## **§ 187 Offer of Rights to Subscribe to New Shares**

- (1) Any offer of rights to subscribe to new shares may only be made subject to the subscription rights of the shareholders.
- (2) Any such offer made prior to the resolution on the share capital increase shall be unenforceable with respect to the company.

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## **§ 188 Filing and Registration of Implementation of Share Capital Increase**

- (1) The management board and the chairman of the supervisory board shall file the implementation of the share capital increase for registration in the commercial register.
- (2) <sup>1</sup>§ 36 (2), § 36a and § 37 (1) shall apply accordingly to such filing. <sup>2</sup>Subscription payments may not be made by credit to an account in the name of the management board.
- (3) The following shall be appended to the filing:
1. the duplicates of the subscription forms and a list of the subscribers signed by the management board and stating the shares issued to each subscriber and the payments made in respect thereof;
  2. in the case of a capital increase by Contributions in kind, the agreements on which



the stipulations pursuant to § 183 were based or which have been entered into in execution thereof;

3. a computation of the expenses which the company will incur through the issue of new shares;
- (4) The filing and registration of the completion of the share capital increase may be made together with the filing and registration of the resolution on such increase.

### **§ 189 Effectiveness of the Capital Increase**

The increase of share capital shall become effective upon registration of the implementation of the share capital increase.

### **§ 190 [repealed]**

### **§ 191 Prohibited issue of Share Certificates and Interim Certificates**

<sup>1</sup>The new shares may not be transferred and new share certificates and interim certificates may not be issued prior to registration of the completion of the share capital increase. <sup>2</sup>New share certificates and interim certificates issued prior to such registration shall be null and void. <sup>3</sup>The issuers shall be jointly and severally liable to the shareholders for any damage resulting from such Issue.

### **Subsection Two. Conditional Capital Increase**

#### **§ 192 Requirements**

- (1) The shareholders' meeting may resolve upon an increase of share capital which shall be carried out only to the extent that conversion rights or stock warrants which obligate the company to issue new shares (new shares) are exercised (contingent capital increase).
- (2) A resolution on a conditional capital increase may be adopted only for any of the following purposes:
  1. to grant conversion rights or stock warrants on the basis of convertible bonds or warrant bonds;
  2. to prepare a merger of enterprises;
  3. to grant rights to employees of the company to subscribe to new shares against the contribution of amounts due to such employees under a profit sharing plan established by the company.
- (3) <sup>1</sup>The par value of conditional capital may not exceed one half and the par value of the capital resolved according to (2) sentence 3 may not exceed one-tenth of the share capital as at the date of the adoption of the resolution on the conditional capital increase. <sup>2</sup>§ 182 (1) sentence 5 shall apply accordingly. <sup>3</sup>Sentence 1 does not apply to a conditional capital increase pursuant to (2) No. 1 which is resolved solely for the purpose of enabling the company to carry out a conversion it is entitled to carry out in case of its imminent

insolvency or to avoid over-indebtedness. <sup>4</sup>If the company is an institution within the meaning of § 1 (1b) of the Banking Act, sentence 1 shall also not apply to a conditional capital increase pursuant to (2) No. 1 which is resolved for the purpose of enabling the company to carry out a conversion to fulfil banking regulatory requirements or requirements imposed for restructuring or liquidation purposes. <sup>5</sup>Conditional capital which is subject to sentence 3 or 4 shall not be set-off against other conditional capital.

- (4) A resolution of the shareholders' meeting which contravenes the resolution on the conditional capital increase shall be null and void.
  - (5) The following provisions regarding share warrants shall apply accordingly to conversion rights.
- 

### **§ 193 Requirements for the Resolution**

- (1) <sup>1</sup>The resolution on the conditional capital increase shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>2</sup>The articles may provide for a larger capital majority and additional requirements. <sup>3</sup>§ 182 (2) and § 187 (2) shall apply.
  - (2) The resolution shall also stipulate:
    - 1. the purpose of the conditional capital increase;
    - 2. the persons entitled to subscribe;
    - 3. the issue price or the basis on which such price is to be computed; in case of a conditional capital increase for the purposes of § 192 (2) No. 1 it shall be sufficient if the resolution or the associated resolution pursuant to § 221 determines the minimum issue price or the basis for the determination of the issue price or the minimum issue price; and
    - 4. in the case of resolutions according to § 192 (2) No. 3 also to the allocation of subscription rights to members of the management board and employees, performance targets, acquisition and exercise periods and the waiting period for first exercise (at least four years).
- 

### **§ 194 Conditional Capital Increase against Contributions in kind; Repayment of Contributions**

- (1) <sup>1</sup>In the case of a contribution in kind, the resolution on the conditional capital increase shall stipulate the object, the person from whom the company shall acquire the object and the par value of the shares to be granted for the contribution in kind. <sup>2</sup>The conversion of bonds into new shares shall not be deemed to constitute a contribution in kind. <sup>3</sup>The resolution may only be adopted if the proposed Contributions in kind have been explicitly and duly announced.
- (2) § 27 (3) and (4) shall apply accordingly; the date of the filing for registration pursuant to § 27 (3) sentence 3 and the registration pursuant to § 27 (3) sentence 4 shall each be replaced by the date of issue of the new shares.
- (3) (1) and (2) shall not apply to the contribution of amounts due to employees of the company

under a profit-sharing plan established by the company.

- (4) <sup>1</sup>In the case of a capital increase against Contributions in kind, an audit shall be made by one or more auditors. <sup>2</sup>§ 33 (3) to (5), §§ 34, 35 shall apply accordingly.
- (5) § 183a shall apply accordingly.

## § 195 Registration of the Resolution

- (1) <sup>1</sup>The management board and the chairman of the supervisory board shall file the resolution on the conditional capital increase for registration in the commercial register. <sup>2</sup>§ 184 (1) sentence 3 shall apply accordingly.
- (2) The following shall be appended to the filing:
1. in the case of a conditional capital increase against Contributions in kind, the articles on which the stipulations pursuant to § 194 were based or which have been entered into in execution thereof and the report on the audit of Contributions in kind (§ 194 (4)) or the attachments specified in § 37a (3);
  2. a computation of the expenses which the company will incur through the issue of new shares.
- (3) <sup>1</sup>The court may reject registration if the value of the contribution in kind is not insignificantly lower than the minimum issue price of the shares to be granted for the contribution in kind. <sup>2</sup>If the contribution in kind is not audited pursuant to § 183a (1), § 38 (3) shall apply accordingly.

## § 196 [repealed]

## § 197 Prohibited Issue of Shares

<sup>1</sup>The new shares may not be issued prior to registration of the resolution on the conditional capital increase. <sup>2</sup>A right to subscribe shall not arise prior to such date. <sup>3</sup>New shares issued prior to such registration shall be null and void. <sup>4</sup>The issuers shall be jointly and severally liable to the shareholders for any damage resulting from such Issue.

## § 198 Exercise Notice

- (1) <sup>1</sup>Rights to subscribe shall be exercised by means of a written notice. <sup>2</sup>Such notice (exercise notice) shall be executed in duplicate. <sup>3</sup>The exercise notice shall state the number, in case of par-value shares the par value and, if more than one class is being issued, the class of shares, the stipulations required pursuant to § 193 (2), the stipulations required pursuant to § 194 in respect of Contributions in kind, and the date on which the resolution on the conditional capital increase was adopted.
- (2) <sup>1</sup>The exercise note shall have the same effect as a subscription notice. <sup>2</sup>Any exercise notice whose contents does not comply with (1) or which contain limitations in respect of the obligation of the person giving such notice shall be null and void.

- (3) If new shares are issued despite the exercise notice being null and void, the person who has given such notice may not assert the invalidity of the exercise notice if he has by virtue of such notice exercised rights or performed obligations as a shareholder.
  - (4) Any limitation not contained in the exercise notice shall be unenforceable with respect to the company.
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### **§ 199 Issue of New Shares**

- (1) The management board may issue new shares only in fulfilment of the purpose stipulated in the resolution on the conditional capital increase and in no event prior to full performance of the price resulting from such resolution.
  - (2) <sup>1</sup>The management board may issue new shares in exchange for convertible bonds or warrant bonds only if the difference between the issue price of the bonds surrendered for conversion and the higher minimum issue price of the new shares is offset by profit reserves which may be used for such purpose or by an additional payment from the person entitled to conversion. <sup>2</sup>The foregoing shall not apply if the aggregate amount for which the bonds were issued equals or exceeds the minimum issue price of the new shares.
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### **§ 200 Effectiveness of the Conditional Capital Increase**

The increase of the share capital shall become effective upon issue of the new shares.

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### **§ 201 Registration of the Issue of New Shares**

- (1) At least once a year by the end of the calendar month following the expiration of the fiscal year, the management board shall file for registration of any new shares which have been issued with the commercial register.
  - (2) <sup>1</sup>Duplicates of the exercise notice and a list, signed by the management board, of the persons who have exercised the subscription rights, shall be appended to the report for filing. <sup>2</sup>Such list shall state the shares granted to each shareholder and the contribution made in respect thereof.
  - (3) The management board shall certify in filing that the new shares were issued solely in fulfilment of the purpose stipulated in the resolution on the conditional capital increase and in no event prior to full performance of the price resulting from such resolution.
- 

### **Subsection Three. Authorised Capital**

#### **§ 202 Requirements**

- (1) The articles may authorise the management board, for a period not exceeding five years after registration of the company, to increase the share capital up to a specified par value (authorised capital) by issuing new shares against contributions.
- (2) <sup>1</sup>Such authorisation may also be granted by amendment of the articles for a period not exceeding five years as from the date of registration of such amendment of the articles.

<sup>2</sup>The resolution of the shareholders' meeting shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>3</sup>The articles may provide for a larger capital majority and for additional requirements. <sup>4</sup>§ 182 (2) shall apply.

- (3) <sup>1</sup>The par value of the authorised capital may not exceed one half of the share capital as the date of such authorisation. <sup>2</sup>The new shares may be issued only with the consent of the supervisory board. <sup>3</sup>§ 182 (1) sentence 5 shall apply accordingly.
- (4) The articles may also provide that the new shares are to be issued to employees of the company.

### § 203 Issue of New Shares

- (1) <sup>1</sup>§§ 185 to 191 relating to a capital increase against contributions shall apply accordingly to the issue of new shares, unless the following provisions provide otherwise. <sup>2</sup>In respect of §§ 185 to 191, the authorisation in the articles to issue new shares shall be substituted for the resolution on the share capital increase.
- (2) <sup>1</sup>The authorisation may provide that the management board shall have the authority to exclude subscription rights. <sup>2</sup>§ 186 (4) shall apply accordingly if such authorisation is contained in an amendment of the articles.
- (3) <sup>1</sup>The new shares shall not be issued as long as contributions to the previously existing share capital are still outstanding and collectible. <sup>2</sup>In the case of insurance companies, the articles may provide otherwise. <sup>3</sup>The issue of new shares shall not be precluded if immaterial amounts of contributions are outstanding. <sup>4</sup>The first filing for registration of the completion of the share capital increase shall state which contributions to the previously existing share capital are still outstanding and why they are not collectible.
- (4) (3) sentences 1 and 4 shall not apply if the shares are issued to employees of the company.

### § 204 Conditions of Share Issues

- (1) <sup>1</sup>The management board shall, to the extent that the authorisation does not contain provisions thereon, decide as to the rights arising under shares and the conditions of the share issue. <sup>2</sup>The decision of the management board shall require the consent of the supervisory board; the foregoing shall apply to the decision of the management board pursuant to § 203 (2) regarding the exclusion of the subscription rights.
- (2) If there are non-voting preferred shares, preferred shares that have priority to or equal standing with respect to the distribution of profits or assets may be issued only if the authorisation so provides.
- (3) <sup>1</sup>If the annual financial statements, which are provided with an unqualified auditors' certificate, show an annual net profit, shares may also be issued to employees of the company in such manner that the contribution to be made thereupon is covered by that portion of the annual net profit which the management board and the supervisory board may transfer to other profit reserves pursuant to § 58 (2). <sup>2</sup>The provisions regarding a capital increase against contributions in cash shall, with the exception of § 188 (2),

apply to the issue of new shares.<sup>3</sup>The approved annual financial statements that are provided with an auditors' certificate shall be appended to the filing for registration of the completion of the share capital increase.<sup>4</sup>The persons making such filing shall further certify as provided by § 210 (1) sentence 2.

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## **§ 205 Issue against Contributions in kind; Repayment of Contributions**

- (1) Shares may be issued against Contributions in kind only if the authorisation so provides.
  - (2) <sup>1</sup>Unless stipulated in the authorisation, the object of the contribution in kind, the person from whom the company is to acquire such object and the par value of the shares to be granted for contribution in kind shall be stipulated by the management board and stated in the subscription notice.<sup>2</sup>The management board shall make such stipulations only with the consent of the supervisory board.
  - (3) § 27 (3) and (4) shall apply accordingly.
  - (4) (2) and (3) shall not apply to the contribution of amounts due to employees of the company under a profit-sharing plan established by the company.
  - (5) <sup>1</sup>In the case of an issue of shares against Contributions in kind, an audit shall be made by one or more auditors; § 33 (3) to (5), §§ 34, 35 shall apply accordingly.<sup>2</sup>§ 183a shall be applied accordingly.<sup>3</sup>Instead of the date of the resolution of the capital increase, the management board shall announce its decision on issuing new shares against Contributions in kind as well as the statements pursuant to § 37a (1) and (2) in the company's journals.
  - (6) As far as the contribution in kind is not audited, § 184 (1) sentence 3 and (2) shall also apply accordingly to the filing of the implementation of the capital increase for registration with the commercial register (§ 203 (1) sentence 1, § 188).
  - (7) <sup>1</sup>The court may reject registration if the value of the contribution in kind is not insignificantly lower than the minimum issue price of the shares to be granted for the contribution in kind.<sup>2</sup>If the contribution in kind is not audited pursuant to § 183a (1), § 38 (3) shall apply accordingly.
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## **§ 206 Agreements on Contributions in kind before Company's Registration**

<sup>1</sup>If prior to registration of the company, agreements have been entered into which provide for a contribution in kind to be made on the authorised capital, the articles must contain the stipulations which are required for an issue against Contributions in kind.<sup>2</sup>§ 27 (3) and (5), §§ 32 to 35, § 37 (4) sentences 2, 4 and 5, §§ 37a, 38 (2) and (3) and § 49 regarding formation of the company shall apply accordingly.<sup>3</sup>In respect of such provisions the management board shall be substituted for the founders and the registration of the completion of the share capital increase shall be substituted for the registration of the company.

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### **Subsection Four. Capital Increase from the Company's Reserves**

## **§ 207 Requirements**

- (1) The shareholders' meeting may resolve on an increase of the share capital by means of conversion of the capital reserve or profit reserves into share capital.
- (2) <sup>1</sup>§ 182 (1) and § 184 (1) shall apply accordingly to the respective resolution and the registration of such resolution. <sup>2</sup>Companies with non-par shares may increase their share capital without issuing new shares; the resolution on the increase must specify the type of increase.
- (3) The resolution shall be based on a balance sheet.

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### § 208 Capital and Profit Reserves Qualifying for Conversion

- (1) <sup>1</sup>The capital reserve and the profit reserves which are to be converted into share capital must have been shown in the latest annual balance sheet and, if the resolution is based on a balance sheet other than the latest balance sheet, also in such balance sheet as capital reserve or profit reserves or, in the last resolution on the appropriation of the annual net profit or distributable profits, as transfer to such reserves. <sup>2</sup>Subject to (2) other profit reserves and transfers thereto may be converted in full into share capital, however, the capital reserve and the legal reserve including transfers thereto only to the extent that in aggregate such items exceed one-tenth or a higher proportion of the previously existing share capital which has been determined by the articles.
- (2) <sup>1</sup>The capital reserve and the profit reserves as well as transfers thereto may not be converted to the extent that the relevant balance sheet shows a loss, including a loss carried forward. <sup>2</sup>Profit reserves and transfers thereto which are designated for a specific purpose may only be converted to the extent that such conversion is compatible with such designated purpose.

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### § 209 Balance Sheet to be based on

- (1) The resolution concerning conversion may be based on the latest balance sheet if such annual balance sheet has been audited and the approved annual balance sheet is provided with an unqualified auditors' certificate and if the balance sheet closing date is not more than eight months prior to the registrations of the resolution in the commercial register.
- (2) <sup>1</sup>If the resolution is not based on the latest annual balance sheet, the balance sheet shall comply with §§ 150 and 152 of this Act and §§ 242 to 256a, 264 to 274a of the Commercial Code. <sup>2</sup>The balance sheet closing date may be not more than eight months prior to the registration of the resolution in the commercial register.
- (3) <sup>1</sup>The balance sheet must be audited by an external auditor as to whether it complies with §§ 150 and 152 of this Act and §§ 242 to 256a, 264 to 274a of the Commercial Code. <sup>2</sup>Such balance sheet must be provided with an unqualified auditors' certificate.

- (4) <sup>1</sup>Unless the shareholders' meeting elects another auditor, the auditor who was elected by the shareholders' meeting to audit the latest annual financial statements or who was appointed by the court for such purpose shall be deemed to have been elected. <sup>2</sup>Unless the special nature of the audit requires otherwise, § 318 (1) sentence 3 and 4, § 319 (1) to (4), §319a (1), §319b (1), §320 (1) and (2), §§ 321, 322 (7) and § 323 of the Commercial Code shall apply accordingly to the audit.
- (5) <sup>1</sup>In the case of insurance companies, the auditor shall be appointed by the supervisory board; (4) sentence 1 shall apply accordingly. <sup>2</sup>Unless the special nature of the audit requires otherwise, § 341k of the Commercial Code shall apply to the audit.
- (6) In the case of (2) to (5), § 175 (2) shall apply accordingly to making the balance sheet accessible for inspection and the distribution of copies.
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### **§ 210 Filing and Registration of the Resolution**

- (1) <sup>1</sup>The filing of the resolution for registration in the commercial register shall include the relevant balance sheet for the capital increase together with the auditors' certificate and, in the case of § 209 (2) to (6), in addition the latest annual balance sheet, if not already submitted pursuant to § 325 (1) of the Commercial Code. <sup>2</sup>The persons filing shall declare to the court that, to their knowledge, no reduction in value of assets has occurred between the closing date of the relevant balance sheet and the date of filing which would preclude a capital increase if such resolution were to be adopted on the date of the filing.
- (2) The court may register the resolution only if the record date of the balance sheet on which the capital increase was no later than eight months prior to the filing and a declaration in accordance with (1) sentence 2 has been given.
- (3) The court need not examine whether the balance sheets comply with statutory provisions.
- (4) The registration entry of the resolution shall state that the capital increase was made from the company's reserves.
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### **§ 211 Effectiveness of the Capital Increase**

- (1) The increase of share capital shall become effective upon registration of the resolution on the share capital increase.
- (2) [repealed]
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### **§ 212 Persons Entitled to New Shares**

<sup>1</sup>The new shares shall be allocated to the shareholders in proportion to their holdings of the previously existing share capital. <sup>2</sup>Any resolution of the shareholders' meeting to the contrary shall be null and void.

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### **§ 213 Fractional Shares**



- (1) If the capital increase shall result in only a fraction of a new share being allocated to a holding of the previously existing share capital, such fractional share may be separately disposed of or inherited.
- (2) The rights arising under a new share, including the right to receive a share certificate, may be exercised only if fractional shares that in aggregate comprise a full share are held by one person or if several persons, whose fractional shares comprise a full share, exercise such rights jointly.

### § 214 Request to Shareholders

- (1) <sup>1</sup>After registration of the resolution on the share capital increase, the management board shall promptly request the shareholders to take delivery of the new share certificates. <sup>2</sup>Such notice shall be published in the company's journals. <sup>3</sup>Such publication shall state:
1. the amount by which the share capital has been increased.
  2. the proportion in which new shares have been allocated for previously existing shares.
- <sup>4</sup>Such announcement shall further state that the company may, after three warnings, sell any shares on behalf of the persons entitled thereto which have not been collected within one year after publication of the notice.
- (2) <sup>1</sup>Upon expiration of one year from the date of the notice, the company shall warn that any shares not collected may be sold. <sup>2</sup>Such warning shall be published three times in intervals of not less than one month in the company's journals. <sup>3</sup>The last publication must be made prior to the expiration of eighteen months from the date of publication of the notice.
- (3) <sup>1</sup>Upon expiration of one year from the date of the last publication of the warning, the company shall sell on behalf of the persons entitled thereto any shares not collected at the official stock exchange quotation through the intermediation of a stock broker and in the absence of a stock exchange quotation by public auction. <sup>2</sup>§ 226 (3) sentences 2 to 6 shall apply accordingly.
- (4) <sup>1</sup>(1) to (3) shall apply accordingly to companies that have not issued share certificates. <sup>2</sup>Such companies shall request the shareholders to accept the allocation of new shares.

### § 215 Own Shares. Partially Paid Shares

- (1) Own shares shall participate in any increase of share capital.
- (2) <sup>1</sup>Partially paid shares shall participate in any increase of share capital in proportion to their share in the share capital. <sup>2</sup>In such cases, the capital increase may not be carried out by issuing new shares, in case of par-value shares, the par value shall be increased. <sup>3</sup>If shares paid in full exist in addition of partially paid shares, the capital increase in respect to such shares paid in full may be carried out by increasing the par value of the shares and issuing new shares; the resolution on the share capital increase shall specify the manner of the increase. <sup>4</sup>If the capital increase is carried out by increasing the par value of the shares, the amount of such capital increase shall be so computed that the amount allocated to each share is fully covered by the increase in the par value.

## § 216 Preservation of the Rights of Shareholders and Third Parties

- (1) The proportion of rights arising from shares shall not be affected by the capital increase.
  - (2) <sup>1</sup>To the extent that specific rights arising from partially paid shares, in particular the right to participate in the distributions of profit or the right to vote, are determined by the contribution made in respect of each share, the shareholders shall have such rights, until performance of the contributions still outstanding, only in proportion to the amount of the respective contributions made increased by the per centage increase in the share capital which was computed for the par value of the share capital. <sup>2</sup>If further contributions are made, such rights shall increase proportionately. <sup>3</sup>In the case of § 271 (3), the amounts of the increase shall be deemed to be paid in full.
  - (3) <sup>1</sup>The financial terms of agreements between the company and third parties that are related to the distribution of the company's profits or the par value or market value of its share capital or the previously existing capital or profitability, shall not be affected by the capital increase. <sup>2</sup>The foregoing shall apply to the ancillary obligations of the shareholders.
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## § 217 Commencement of Participation in Profits

- (1) Unless otherwise provided, the new shares shall participate in profits of the entire fiscal year in which the resolution on the share capital increase was adopted.
  - (2) <sup>1</sup>The resolution on the share capital increase may provide that the new shares also participate in the profits of the latest fiscal year ended prior to adoption of the resolution on the capital increase. <sup>2</sup>In such case the resolution on the share capital increase shall be adopted prior to adoption of the resolution on the appropriation of distributable profits of the last fiscal year ended prior to adoption of such resolution on the capital increase. <sup>3</sup>The resolution on the appropriation of the distributable profits of the last fiscal year ended prior to adoption of the resolution on the capital increase shall become effective only after the share capital has been increased. <sup>4</sup>The resolution on the share capital increase and the resolution on the appropriation of the distributable profits of the last fiscal year ended prior to adoption of the resolution on the capital increase shall be null and void if the resolution on the capital increase has not been registered in the commercial register within three months after adoption of the resolution. <sup>5</sup>The running of such period shall be tolled for as long as a contesting or invalidity action against the resolution is pending.
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## § 218 Conditional Capital

<sup>1</sup>Conditional capital shall increase in the same proportion as share capital. <sup>2</sup>If the purpose of the conditional capital is to grant conversion rights to holders of convertible or warrant bonds, a special reserve shall be created in an amount equal to the difference between the issue price of bonds of the higher minimum issue price of the new shares to be issued for these to the extent that additional payments by the persons entitled to conversion have not been agreed upon.

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## § 219 Prohibited Issue of Share Certificates and Interim Certificates

New share certificates and interim certificates may not be issued prior to registration of the resolution on the share capital increase in the commercial register.

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## § 220 Valuation Rates

<sup>1</sup>The costs of acquisition of the shares acquired prior to the share capital increase and the new shares issued for these shall be deemed to be the amounts attributable to the individual shares after allocation of the costs of acquisition of the shares acquired to the share capital increase between such shares and the new shares issued for these in proportion to the respective share in the share capital. <sup>2</sup>The additional shares may not be shown as newly acquired shares.

### Subsection Five. Convertible or Warrant Bonds, Dividend Bonds

## § 221 [Convertible or Warrant Bonds, Dividend Bonds]

- (1) <sup>1</sup>Bonds which provide holders or the company with a conversion right or share warrant (convertible or warrant bonds) and bonds in which the rights of the holders are related to dividends paid to shareholders (dividend bonds) may only be issued on the basis of a resolution of the shareholders' meeting. <sup>2</sup>The resolution shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>3</sup>The articles may provide for a different capital majority and additional requirements. <sup>4</sup>§ 182 (2) shall apply.
- (2) <sup>1</sup>The management board may be authorised for a period of not more than five years to issue convertible or warrant bonds. <sup>2</sup>The management board and the chairman of the supervisory board shall submit to the commercial register the resolution on the issue of convertible or warrant bonds and a confirmation of their issue. <sup>3</sup>An announcement as to the resolution and the confirmation of issue shall be published in the company's journals.
- (3) (1) shall apply accordingly to the issue of participation rights.
- (4) <sup>1</sup>Shareholders shall have subscription rights with respect to convertible or warrant bonds, dividend bonds and participation rights. <sup>2</sup>§§ 186 and 193 (2) number 4 shall apply accordingly.

### Section Three. Measures to Reduce the Share Capital Subsection One. Ordinary Capital Reduction

## § 222 Requirements

- (1) <sup>1</sup>A reduction of the share capital shall require a resolution that has been adopted by a majority or not less than three fourths of the share capital represented at the passing of the resolution. <sup>2</sup>The articles may provide for a larger capital majority and additional requirements.
- (2) <sup>1</sup>If there is more than one class of share, resolutions of the shareholders' meeting shall require the consent of the shareholders of each class in order to be effective. <sup>2</sup>Such consent shall require a separate resolution by the shareholders of each class. <sup>3</sup>(1) shall apply to such separate resolution.

- (3) The resolution shall stipulate the purpose of the capital reduction, in particular whether part of the share capital is to be repaid.
  - (4) <sup>1</sup>The reduction of the share capital of a company with par shares requires the reduction of the par value of the shares. <sup>2</sup>To the extent that the corresponding proportion of the reduced share falls below the minimum value according to § 8(2) sentence 1 or (3) sentence 3, the reduction shall occur through consolidation of shares. <sup>3</sup>The resolution must stipulate in which manner the capital reduction is to be made.
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### **§ 223 Filing for Registration of the Resolution**

The management board and the chairman of the supervisory board shall file the resolution on the reduction of the share capital for registration in the commercial register.

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### **§ 224 Effectiveness of the Capital Reduction**

The reduction of the share capital shall become effective upon registration of the resolution on the share capital reduction.

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### **§ 225 Protection of Creditors**

- (1) <sup>1</sup>Creditors whose claims arose prior to the date of the announcement of the registration of the resolution shall, upon request within six months of the date of such announcement be granted security to the extent that they may not demand satisfaction. <sup>2</sup>In the announcement of registration, the creditors shall be advised of such right. <sup>3</sup>Creditors who in the case of insolvency have a right to preferential satisfaction from a fund that has been established based on statutory provisions for their protection and is subject to governmental supervision shall not have the right to demand security.
  - (2) <sup>1</sup>Payments to shareholders in connection with the reduction of share capital may only be made upon the expiration of six months from the date of the announcement of registration and after those creditors who have made a timely request have been satisfied or granted security. <sup>2</sup>A release of shareholders from the obligation to make contributions shall not be effective prior to the aforementioned date and before the creditors who have made a timely request have been satisfied or granted security.
  - (3) The right of creditors to demand security shall not be conditional on payments having been made to shareholders in connection with the reduction of share capital.
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### **§ 226 Cancellation of Shares**

- (1) <sup>1</sup>If share certificates are to be consolidated in connection with the reduction of share capital by exchanging or stamping share certificates or a similar procedure, the company may declare the share certificates that despite notice have been surrendered to have been cancelled. <sup>2</sup>The foregoing shall apply to share certificates surrendered which are insufficient in number for replacement by new share certificates and which have not been submitted to the company for sale on behalf of the persons concerned.
- (2) <sup>1</sup>The notice to surrender share certificates shall give warning of cancellation. <sup>2</sup>Cancellation may be made only after such request has been announced in the manner prescribed

for the grace period pursuant to § 64 (2).<sup>3</sup>Cancellation shall become effective upon publication in the company's journals.<sup>4</sup>Such announcement shall designate the share certificates which have been cancelled in such a manner that it may be ascertained from the announcement itself whether a share certificate has been cancelled.

- (3) <sup>1</sup>The new share certificates that are to be issued in place of the cancelled share certificates shall be promptly sold by the company on behalf of the persons concerned at the official stock exchange quotation in the absence of a stock exchange quotation by public auction. <sup>2</sup>If adequate results cannot be expected from an auction at the company's domicile, the shares shall be sold at an appropriate location. <sup>3</sup>The time, location and object of the auction shall be announced publicly. <sup>4</sup>The persons concerned shall be notified separately; such notification may be omitted if not feasible. <sup>5</sup>Such announcement and notification shall be made not less than two weeks prior to the auction. <sup>6</sup>The proceeds shall be paid to the persons concerned or, if a right to deposit exists, be deposited.

## § 227 Filing of the Implementation of Share Capital Reduction

- (1) The management board shall file the completion of the share capital reduction for registration in the commercial register.
- (2) The filing and registration of the completion of the share capital reduction may be made together with the filing and registration of the resolution on the reduction.

## § 228 Reduction to Less than the Minimum Par Value

- (1) The share capital may be reduced to less than the minimum par value prescribed in § 7 if the minimum par value is restored by means of a capital increase which has been resolved upon at the same time as the capital reduction and for which Contributions in kind have not been stipulated.
- (2) <sup>1</sup>Such resolution shall be null and void if the resolutions and the completion of the increase have not been registered in the commercial register within six months after the date of adoption of the resolutions. <sup>2</sup>The running of such period shall be tolled for as long as a contesting or invalidity action against the resolution is pending. <sup>3</sup>The resolutions and the completion of the share capital increase may only be registered at the same time in the commercial register.

### Subsection Two. Simplified Procedure for Capital Reduction

## § 229 Requirements

- (1) <sup>1</sup>A simplified procedure may be employed for a share capital reduction for the purpose of compensation for a decline in the value of assets, offsetting other losses or transferring amounts to the capital reserve. <sup>2</sup>The resolution shall stipulate that the reduction is made for such purposes.
- (2) <sup>1</sup>The simplified procedure for capital reduction may only be employed after any amount by which the sum of the legal reserve and the capital reserve exceeds 10 per cent of the share capital remaining after such reduction and any amounts in the profit reserves have been released. <sup>2</sup>Such simplified procedure may not be employed for as long as profit carried forward is shown.

(3) § 222 (1), (2) and (4), §§ 223, 224 and 226 to 228 regarding the ordinary capital reduction shall apply accordingly.

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### **§ 230 Prohibition of Payments to Shareholders**

<sup>1</sup>The amounts that are obtained from the release of the capital and profit reserves and the capital reduction may not be utilised for payments to shareholders or to exempt shareholders from their obligation to make contributions. <sup>2</sup>Such amount may be utilised only to compensate for declines in the value of assets, to offset other losses and to transfer amounts to the capital reserve or the legal reserve. <sup>3</sup>Such amounts may be utilised for such purpose only to the extent that the resolution states that such utilization is the purpose of the reduction.

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### **§ 231 Limited Transfer to the Capital Reserve and the Legal Reserve**

<sup>1</sup>The transfer to the legal reserve of amounts obtained from the release of other profit reserves and to the capital reserve of amounts obtained from the capital reduction may be made only to the extent that the sum of the capital reserve and the legal reserve does not exceed 10 per cent of the share capital. <sup>2</sup>In such case, the share capital shall be deemed to be the par value that results from the reduction but not less than the minimum par value prescribed in § 7. <sup>3</sup>In comparing the amounts that may be transferred, amounts that are to be transferred to the capital reserve after the adoption of the resolution on the capital reduction shall not be taken into account even if such transfer is based on a resolution, which is adopted at the same time as the resolution on the capital reduction.

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### **§ 232 Transfer of Amounts to the Capital Reserve in the case of Overestimated Losses**

If it becomes apparent in connection with the preparation of the annual balance sheet for the fiscal year in which the resolution on the capital reduction was adopted or for one of the two following fiscal years that declines in the value of assets or other losses have not in fact occurred in the amount estimated when the resolution was adopted or have been offset, the amount of the differences shall be transferred to the capital reserve.

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### **§ 233 Payments of Dividends. Creditor Protection**

- (1) <sup>1</sup>Dividends may not be paid for as long as the legal reserve and the capital reserve in aggregate do not amount to 10 per cent of the share capital. <sup>2</sup>In such case, the share capital shall be deemed to be the par value that results from the reduction but not less than the minimum par value prescribed in § 7.
- (2) <sup>1</sup>A dividend exceeding four per cent may not be paid for a fiscal year beginning earlier than two years after the resolution on the capital reduction has been adopted. <sup>2</sup>The foregoing shall not apply if creditors whose claims arose prior to announcement of the registration of such resolution have been satisfied or provided with security, if they have applied for this purpose within six months after publication of the annual financial statements which formed the basis for the resolution on the dividend. <sup>3</sup>It is not necessary to secure creditors who in the case of insolvency have a right to preferential satisfaction from a fund that has been established pursuant to statutory provisions for their protection

and is subject to governmental supervision.<sup>4</sup>In the announcement pursuant to § 325 (1) sentence 2 of the Commercial Code the creditors shall be advised of such satisfaction or provision of security.

- (3) The foregoing provisions do not permit the payment of dividends from amounts released from the capital and legal reserves or obtained in connection with the capital reduction.

### § 234 Retroactive Effect of the Capital Reduction

- (1) In the annual financial statements for the latest fiscal year ended prior to adoption of the resolution on the capital reduction the subscribed capital and the capital and legal reserves may be shown in the respective amounts that will prevail upon completion of the capital reduction.
- (2) <sup>1</sup>In such case, the shareholders' meeting shall resolve on approval of the annual financial statements. <sup>2</sup>Such resolution should be adopted together with the resolution on the capital reduction.
- (3) <sup>1</sup>The resolution shall be null and void if the resolution on the capital reduction has not been registered in the commercial register within three months of adoption of the resolution. <sup>2</sup>The running of such period shall be tolled for as long as a contesting or invalidity action against the resolution is pending.

### § 235 Retroactive Effect of a Simultaneous Capital Increase

- (1) <sup>1</sup>If in the case of § 234 a capital reduction and a share capital increase have been resolved upon at the same time, the capital increase may also be treated in the annual financial statements as having been completed. <sup>2</sup>Such a resolution may only be adopted if the new shares have been subscribed, no Contributions in kind have been stipulated and the payment that is required to be made pursuant to § 188 (2) at the time of the filing for registration of the completion of the capital increase has been made with respect to each share. <sup>3</sup>Proof of the subscription and such payment shall be submitted to the notary who records the resolution on the share capital increase.
- (2) <sup>1</sup>All resolutions shall be null and void if the resolutions on the capital reduction and the capital increase and the completion of the increase have not been registered in the commercial register within three months of the adoption of such resolutions. <sup>2</sup>The running of such period shall be tolled for as long as a contesting or invalidity action against the resolution is pending. <sup>3</sup>The resolutions and the completion of the share capital increase may only be registered at the same time in the commercial register.

### § 236 Disclosure

Disclosure of the annual financial statements pursuant to § 325 of the Commercial Code may only be made in the case of § 234 after registration of the resolution on the capital reduction, in the case of § 235 after the resolutions on the capital reduction and capital increase and the completion of the capital increase have been registered.

### Subsection Three. Capital Reduction through Redemption of Shares – Exception for non-par shares

#### § 237 Requirements

- (1) <sup>1</sup>Shares may be cancelled by means of mandatory redemption or acquisition by the company. <sup>2</sup>A mandatory redemption may only be made if prescribed or permitted in the original articles or an amendment of the articles prior to acquisition or subscription of the shares.
- (2) <sup>1</sup>The provisions regarding an ordinary capital reduction shall govern such cancellation. <sup>2</sup>The conditions governing a mandatory redemption and the respective procedure shall be stipulated in the articles or the resolution of the shareholders' meeting. <sup>3</sup>§ 225 (2) shall apply accordingly to the payment of the consideration that is to be granted to shareholders in the case of a mandatory redemption or an acquisition of shares for the purpose of cancellation and to the release of such shareholders from the obligation to make contributions.
- (3) The provisions regarding an ordinary capital reduction need not be observed if shares with respect to which the issue price has been paid in full
  1. are surrendered to the company free of charge; or
  2. are cancelled by a charge to distributable profits or another profit reserve, to the extent a charge against such items may be made for such purpose; or
  3. are non-par shares and the resolution of the shareholders meeting provides that through the cancellation the share of the remaining shares in the share capital increases according to § 8 (3); if the management board is authorised to cancel shares, it may also be authorised to adjust the number indicated in the articles.
- (4) <sup>1</sup>In the cases of (3) also, a capital reduction by means of cancellation of shares shall require a resolution of the shareholders' meeting. <sup>2</sup>A simple majority of votes shall suffice for such resolution. <sup>3</sup>The articles may provide for a larger capital majority and additional requirements. <sup>4</sup>The resolution shall stipulate the purpose of the capital reduction. <sup>5</sup>The management board and the chairman of the supervisory board shall file the resolution for registration in the commercial register.
- (5) In the cases of (3) No. 1 and 2, an amount shall be transferred to the capital reserve that is equal to the portion of the share capital allocated to the shares cancelled.
- (6) <sup>1</sup>If a mandatory redemption is prescribed by the articles, a resolution of the shareholders' meeting shall not be required. <sup>2</sup>In such case, with respect to applicability of the provisions regarding an ordinary capital reduction, the decision of the management board regarding cancellation shall be substituted for the resolution of the shareholders' meeting.

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#### § 238 Effectiveness of the Capital Reduction

<sup>1</sup>The reduction of the share capital by the amount allocated to the shares cancelled shall become effective upon registration of the resolution or, in the case of subsequent cancellation, upon cancellation. <sup>2</sup>In the case of a mandatory redemption prescribed by the articles, the reduction of the share capital shall become effective upon such mandatory redemption, unless the shareholders' meeting resolves on such capital reduction. <sup>3</sup>The



cancellation shall require an act of the company that has the purpose of nullifying the rights arising with respect to specific shares.

## **§ 239 Filing of the Implementation of Share Capital Reduction**

- (1) <sup>1</sup>The management board shall file the completion of the share capital reduction for registration in the commercial register. <sup>2</sup>The foregoing shall also apply in the case of a mandatory redemption prescribed by the articles.
- (2) The filing and registration of the completion of the reduction may be combined with the filing and registration of the resolution on the reduction.

### **Subsection Four. Presentation of Capital Reduction**

## **§ 240 [Separate Presentation]**

<sup>1</sup>The amount obtained in connection with the capital reduction shall be shown separately in the profit and loss statement as ‘Income from capital reduction’ after the item ‘Releases from profit reserves.’ <sup>2</sup>A transfer to the capital reserve pursuant to § 229 (1) and § 232 shall be shown separately as ‘Transfer to the capital reserve pursuant to the provisions governing simplified procedure for capital reduction’. <sup>3</sup>The notes shall explain whether and to what extent the amounts received in connection with the capital reduction and the release of profit reserves have been utilised:

1. to offset a decline in the value of assets;
2. to offset other losses; or
3. for transfer to the capital reserve.

<sup>4</sup>If the company is a small corporation (§ 267 (1) of the Commercial Code), it is not required to apply sentence 3.

### **Division Seven. Annulment of Resolution of the Shareholders’ Meeting and the Approved Annual Financial Statements Special Audit due to Inadmissible Undervaluation**

#### **Section One. Annulment of Resolutions of the Shareholders’ Meeting**

##### **Subsection One. General Provisions**

## **§ 241 Grounds for Invalidity**

Except in the case of § 192 (4), §§ 212, 217 (2), § 228(2), § 234 (3) and § 235 (2) a resolution of the shareholders’ meeting shall be null and void only if it:

1. was adopted in a shareholders’ meeting which was not called pursuant to § 121 (2)

- and (3) sentence 1 or (4);
2. has not been recorded pursuant to § 130 (1) and (2) sentence 1 and (4);
  3. is not compatible with the nature of the company or by its terms violates provisions which exist exclusively or primarily for the protection of the company's creditors or otherwise in the public interest;
  4. by its terms is unethical;
  5. has been declared null and void by a judgment upon a contesting action which is final and not subject to appeal;
  6. has been cancelled as null and void pursuant to § 398 of the Act on Court Procedure in Family Matters and Non-litigious Matters by virtue of a decision which is final and not subject to appeal.
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### **§ 242 Curing of Invalidity**

- (1) The invalidity of a resolution of the shareholders' meeting which contrary to § 130 (1) and (2) sentence 1 and (4) has not been recorded or has not been duly recorded, may no longer be asserted if the resolution has been registered in the commercial register.
  - (2) <sup>1</sup>If a resolution of the shareholders' meeting is null and void pursuant to § 241 numbers 1, 3 or 4, such invalidity may no longer be asserted if the resolution has been registered in the commercial register and three years have since lapsed. <sup>2</sup>If upon expiration of such period an invalidity action against the resolution of the shareholders' meeting is pending, such period shall be extended until a decision on the action has been issued which is final and not subject to appeal or the action has been otherwise finally disposed of. <sup>3</sup>A cancellation of the resolution as null and void without application pursuant to § 398 of the Act on Court Procedure in Family Matters and Non-litigious Matters shall not be precluded by the expiration of such period. <sup>4</sup>If a shareholders resolution is null due to a violation of § 121 (4) sentence 2 according to § 241 No. 1, then the invalidity can no longer be asserted if the shareholder who did not receive notice approves the resolution. <sup>5</sup>If a resolution of the shareholders' meeting is void pursuant to § 241 number 5 or § 249, the judgement may not be registered pursuant to § 248 (1) sentence 3 if in accordance with § 246a (1) it has been established in a final and binding manner that the deficiencies of the resolution do not affect the validity of the registration; § 398 of the Act on Court Procedure in Family Matters and Non-litigious Matters shall not apply.
  - (3) (2) shall apply accordingly if in the case of § 217 (2), § 228(2), § 234(3) and § 235(2) the necessary registration entries have not been made within the periods prescribed.
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### **§ 243 Grounds for Contesting Action**

- (1) A resolution of the shareholders' meeting may be set aside upon an action based on violation of law or the articles.
- (2) <sup>1</sup>A contesting action aside may also be based on the grounds that a shareholder has attempted by exercising voting rights to attain special benefits for himself or another person to the detriment of the company or other shareholders and that the resolution is

apt to serve such purpose.<sup>2</sup>The foregoing shall not apply if the resolution grants to other shareholders adequate compensation for their losses.

(3) A contesting action cannot be based:

1. on a violation of rights exercised electronically pursuant to § 118 (1) sentence 2, (2) and § 134 (3) where the violation was caused by a technical malfunction, unless the company can be accused of gross negligence or intent; the articles may provide for a stricter standard of fault;
2. on a violation of § 121 (4a), § 124a or § 128;
3. on grounds which would justify proceedings pursuant to § 318(3) of the Commercial Code.

(4) <sup>1</sup>A contesting action may only be based on the grounds of incorrect, incomplete or refused information if a shareholder of rational and sound reasoning would have regarded the provision of the information as essential for its ability to exercise its participation and membership rights duly. <sup>2</sup>A contesting action may not be based on the provision of incorrect, incomplete or insufficient information in the shareholders' meeting with respect to the determination, amount or appropriateness of compensation payments, additional payments or other payments if the law provides for a corporate appraisal procedure for complaints concerning such assessment matters.

### **§ 244 Ratification of Voidable Resolutions of the Shareholders' Meeting**

<sup>1</sup>A contesting action may no longer be brought if the shareholders' meeting has ratified a voidable resolution by a new resolution and a contesting action against such resolution has not been instituted within the period of limitation for such action or such contesting action has been denied in a decision which is final and not subject to appeal. <sup>2</sup>If the claimant has a legal interest in having the voidable resolution declared null and void for the period of the resolution on ratification, he may continue to pursue such action for the purpose of having such voidable resolution declared null and void for such period.

### **§ 245 Standing to contest**

The following persons shall have standing to institute a contesting action:

1. each shareholder who acquired the shares prior to the publication of the agenda and was present at the shareholders' meeting if he has objected to the resolution in the minutes;
2. each shareholder who was not present at the shareholders' meeting if he was wrongfully refused admission to the shareholders' meeting or if the meeting was not duly called or the object of the resolution was not duly announced;

3. in case § 243 (2) each shareholder, provided that he acquired the shares prior to publication of the agenda;
  4. the management board;
  5. each member of the management board and supervisory board if by executing the resolution members of the management board or supervisory board would commit a criminal act or administrative offence or would be liable for damages.
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### **§ 246 Contesting Action**

- (1) Any contesting action must be instituted within one month after adoption of the resolution.
  - (2) <sup>1</sup>The action shall be brought against the company. <sup>2</sup>The company shall be represented by the management board and the supervisory board. <sup>3</sup>If the action is brought by the management board or a member of the management board, the company shall be represented by the supervisory board; if the action is brought by a member of the supervisory board the company shall be represented by the management board.
  - (3) <sup>1</sup>The regional court in the district of which the dependent company has its seat shall have exclusive jurisdiction regarding the action. <sup>2</sup>if the district court maintains a chamber for commercial matters, such chamber shall have jurisdiction in lieu of the chamber for civil matters. <sup>3</sup>§ 148 (2) sentences 3 and 4 shall apply accordingly. <sup>4</sup>No hearing shall be held prior to expiration of the one-month period in (1). Immediately after the expiration of the one-month period in (1), the company may ask to receive the statement of case filed even before the action is served and ask the court to provide extracts and copies. <sup>5</sup>If more than one such action is brought such actions shall be consolidated in order to be heard and decided together.
  - (4) <sup>1</sup>The management board shall promptly announce the institution of any such action in the company's journals. <sup>2</sup>A shareholder may only join the action as party within one month of the publication of the notice.
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### **§ 246a Procedure Governing Petitions for Registration of Contested Resolutions of the Shareholders' Meeting**

- (1) <sup>1</sup>If an action is brought against a resolution of the shareholders' meeting for a capital increase, a capital reduction (§§ 182 through 240) or an inter-company agreement (§§ 291 through 307), the court may find, upon petition by the company, that the bringing of the action does not prohibit the registration of the resolution and that its deficiencies do not affect the validity of the registration. <sup>2</sup>As far not stipulated otherwise, § 247, §§ 82, 83 (1) and § 84 of the Code of Civil Procedure as well as the provisions of the Code of Civil Procedure applying to the proceedings of first instance at the regional courts shall apply to the proceedings on such action accordingly. <sup>3</sup>The senate of the higher regional court of

the company's registered seat shall decide on such petition.

- (2) A resolution pursuant to (1) is valid if
1. the action is deficient or manifestly unfounded;
  2. the claimant has not documented proof within one week after serving of the petition that he has been holding shares representing an amount of at 1.000 euros since the publication of the convocation; or
  3. the immediate effectiveness of the resolution of the shareholders' meeting should be given priority as, according to the court's opinion, the material disadvantages to the company and its shareholders as set forth by the claimant outweigh the disadvantages for the respondent, unless the infringement is particularly severe.
- (3) <sup>1</sup>A transfer to a single judge shall be excluded; conciliatory hearings shall not be required. <sup>2</sup>In urgent cases the proceedings may be conducted without an oral hearing. <sup>3</sup>The facts that are submitted and are the basis on which the decision may be made, shall be supported by evidence. <sup>4</sup>Such decision is incontestable. <sup>5</sup>It is binding on the registration court; the validity of the registration thus established shall be binding on everyone. <sup>6</sup>The decision of the court should be rendered no later than three months following the petition; delays in rendering the decision must be explained in a non-appealable judgement.
- (4) <sup>1</sup>If the action proves to be founded, the company that has obtained the resolution shall compensate the opponent for any damages it has incurred due to the fact that the resolution of the shareholders' meeting has been registered as a result of the court decision. <sup>2</sup>Any deficiencies concerning the resolution shall not affect its implementation after registration; it is not possible to demand as compensation that this effect of the registration be eliminated.

## § 247 Value in Dispute

- (1) <sup>1</sup>The court shall use equitable discretion in determining the value in dispute by taking into consideration all circumstances of the individual case, in particular the importance of the matter for the parties. <sup>2</sup>Such value in dispute shall, however, only exceed one-tenth of the share capital or, if such one-tenth exceeds 500,000 euros, exceed 500,000 euros if the importance of the matter for the claimant requires a higher valuation.
- (2) <sup>1</sup>If a party presents evidence that the assessment of court costs on the basis of the value in dispute pursuant to (1) would materially impair its financial condition, the court may upon motion order that the party's obligation to pay court costs shall be determined on the basis of a value which has been adjusted to reflect such financial condition. <sup>2</sup>As a consequence of such order, the benefiting party shall only be required to pay attorney fees that have been determined on the basis of such adjusted value. <sup>3</sup>If costs of litigation are imposed on or assumed by such party, such party shall be required only to reimburse the court costs and attorney fees which have been paid by the other party on the basis of such adjusted value. <sup>4</sup>If costs other than court fees are imposed on or assumed by the other party, the attorney of the benefiting party may collect his fees from the other party on the basis of the value applicable to such other party.
- (3) <sup>1</sup>The motion pursuant to (2) may be made to the record of the court clerk. <sup>2</sup>Such motion shall be made prior to the hearing of the subject matter. <sup>3</sup>A subsequent motion may only

be made if the amount in controversy that has been assumed or set is increased by the court.<sup>4</sup>The other party shall be heard prior to any decision on such motion.

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### **§ 248 Effect of Judgment**

- (1) <sup>1</sup>If the resolution has been declared null and void by a judgment that is final and not subject to appeal, such judgment shall be binding on all shareholders and the members of the management board and the supervisory board, even if such persons were not parties to the action. <sup>2</sup>The management board shall promptly submit the judgment to the commercial register. <sup>3</sup>If the resolution has been registered in the commercial register, the judgment shall likewise be registered. <sup>4</sup>The registration of the judgment shall be announced in the same manner as the registration of the resolution.
- (2) If the resolution contained an amendment of the articles, the judgment shall be submitted to the commercial register together with the full text of the articles resulting from the judgment and all previous amendments to the articles together with a certification of a notary on such fact.
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### **§ 248a Notices on the Contesting Action**

<sup>1</sup>If the contesting action is terminated, the listed company shall without undue delay publish a notice regarding the termination of the action in the company's journals. <sup>2</sup>§ 149 (2) and (3) shall apply accordingly.

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### **§ 249 Invalidation Action**

- (1) <sup>1</sup>If a shareholder, the management board or a member of the management board or supervisory board brings an action against the company to annul a resolution of the shareholders' meeting, § 246(2), § 246(3) sentences 1 through 5, § 246(4), §§ 246a, 247, 248 and 248a shall apply accordingly. <sup>2</sup>The invalidity of such resolution may be asserted by means other than by bringing an action. <sup>3</sup>If a resolution of the shareholders' meeting lays the foundation for a transformation pursuant to § 1 of the Transformation Act and the resolution for the transformation is registered, § 20(2) of the Transformation Act shall apply accordingly to the resolution of the shareholders' meeting.
- (2) <sup>1</sup>If more than one invalidity action has been instituted, such actions shall be consolidated in order to be heard and decided together. <sup>2</sup>Actions to set aside and actions to annul may be consolidated.
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### **Subsection Two. Invalidation of Certain Resolutions of the Shareholders' Meeting**

### **§ 250 Invalidation of the Election of Members of the Supervisory Board**

- (1) The election of a member of the supervisory board by the shareholders' meeting shall, except in the case of § 241 numbers 1, 2 and 5, only be null and void if:
1. the supervisory board is composed in violation of § 96 (4), § 97 (2) sentence 1 or § 98 (4);
  2. the shareholders' meeting, although bound by nominations (§§ 6 and 8 of the Coal

- and Steel Co-determination Act), has elected a person that has not been nominated;
3. as a result of the election, the maximum number of members of the supervisory board set by law has been exceeded (§ 95);
  4. the person elected may not serve as a member of the supervisory board pursuant to § 100(1) and (2) at the commencement of his term of office;
  5. the election violates § 96 (2).
- (2) The following shall have standing to bring an action to declare the election of a member of the supervisory board to be null and void:
1. the company's general labour council or, if only one labour council exists in the company, such labour council, and, if the company is the controlling enterprise of a group, the group labour council,
  2. the general or the company's central managing employees labour council or, if only one managing employees council exists in the company, such managing employees council, and, if the company is the controlling enterprise of a group, the group managing employees council,
  3. the general labour council of another enterprise whose employees participate in the election of members of the supervisory board of the company directly or through electors or, if only one labour council exists in the other enterprise, such labour council,
  4. the general or the company's managing employees council of another enterprise whose employees participate in the election of members of the supervisory board of the company directly or through electors or, if only one managing employees council exists in the other enterprise, such managing employees council,
  5. each labour union represented in the company or in an enterprise whose employees participate directly or through electors in the election of members of the supervisory board of the company and the central organisation of the labour union.
- (3) <sup>1</sup>If a shareholder, the management board, or a member of the management board or the supervisory board or an organisation or representatives of the employees designated in (2) bring an action against the company to declare that the election of a member of the supervisory board is null and void, § 246 (2), (3) sentence 1 to 4, (4), §§ 247, 248 (1) sentence 2, §§248a and § 249 (2) shall apply accordingly. <sup>2</sup>The invalidity of such resolution may be asserted by means other than by bringing of an action.

## **§ 251 Contestation of the Election of Members of the Supervisory Board**

- (1) <sup>1</sup>The election of a member of the supervisory board by the shareholders' meeting may be contested by bringing an action on the basis of a violation of law or the articles. <sup>2</sup>Such contestation may also be based, where the shareholders' meeting is bound by nominations, on the nominations being made illegally. <sup>3</sup>§ 243(4) and § 244 shall apply.
- (2) <sup>1</sup>§ 245 numbers 1, 2 and 4 shall apply to the standing to bring an action. <sup>2</sup>The election of a member of the supervisory board, who has been elected on the basis of a nomination by the labour councils pursuant to the Coal and Steel Codetermination Act, may also

be contested by any labour council of an business of the company, any labour union represented in the operations of the company or its central organisation.<sup>3</sup>The election of an additional member, who has been elected on the basis of a nomination by the other members of the supervisory board pursuant to the Coal and Steel Codetermination Act or the Supplemental Codetermination Act may also be contested by any member of the supervisory board.

(3) §§ 246, 247, 248 (1) sentence 2 and § 248a shall apply to the contesting.

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### **§ 252 Effect of Judgment**

(1) If a shareholder, the management board or a member of the management board or of the supervisory board or an organisation or representatives of the employees designated in § 250(2) bring an action against the company to declare the election of a member of the supervisory board by the shareholders' meeting to be null and void, a judgment which is final and not subject to appeal and which declares the election to be null and void shall be binding on all shareholders and employees of the company, all employees of other enterprises whose employees participate in the election of members of the supervisory board of the company directly or by electors, the members of the management board and the supervisory board and the organisations and the representatives of the employees designated in § 250(2), even if they were not parties to the proceedings.

(2) <sup>1</sup>If the election of a member of the supervisory board by the shareholders' meeting has been declared null and void by a judgment which is final and not subject to appeal, such judgment shall be binding on all shareholders and members of the management board and the supervisory board, even if they were not parties to the proceedings. <sup>2</sup>In the case of § 251(2) sentence 2 the judgment shall also be binding on the labour councils, labour unions and central organisations that pursuant to these provisions have standing to bring an action even if they were not parties to the proceedings.

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### **§ 253 Invalidity of a Resolution on the Appropriation of Distributable Profits**

(1) <sup>1</sup>A resolution on the appropriation of distributable profits shall except in the case of § 173(3), § 217(2) and § 241 only be null and void if the approval of the annual financial statements on which such resolution is based is null and void. <sup>2</sup>The invalidity of such resolution for this reason may no longer be asserted if the invalidity of the approval of the annual financial statements may no longer be asserted.

(2) § 249 shall apply to an action against the company to declare such resolution to be null and void.

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### **§ 254 Contesting a Resolution on the Appropriation of Distributable Profits**

(1) A resolution on the appropriation of distributable profits may, in addition to § 243, also be contested if the shareholders' meeting transfers amounts from distributable profits to profit reserves or carries such amounts forward as profit, and the payment of such amounts as dividends to the shareholders is not precluded by law or the articles, even though the transfer to reserves or carrying forward of profit is not necessary according to reasonable business judgment in order to secure the viability of the company for a period



which is foreseeable with respect to economic and financial circumstances and therefore no dividend may be paid to shareholders in excess of four per cent of the share capital less any contributions not yet called.

- (2) <sup>1</sup>§§ 244 to 246, 247 to 248a shall apply to the contestation. <sup>2</sup>The period for such contestation shall commence on the date of adoption of the resolution even if the annual financial statements are to be reaudited pursuant to § 316(3) of the Commercial Code. <sup>3</sup>Shareholders shall have standing to contest pursuant to (1) only if their aggregate shareholdings amount to one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros.

## § 255 Contestation of a Capital Increase against Contributions

- (1) A resolution on a capital increase against contributions may be contested pursuant to § 243.
- (2) <sup>1</sup>A contestation may, if the pre-emptive rights of the shareholders have been excluded in whole or in part, also be based on the ground that the issue price resulting from the resolution on the increase or the minimum price for the issuance of new shares are unreasonably low. <sup>2</sup>The foregoing shall not apply if the new shares are to be acquired by a third party subject to the obligation to offer the shares to the shareholders for subscription.
- (3) §§ 244 to 248a shall apply to the contestation.

## Section Two. Invalidity of the Approved Annual Financial Statements

### § 256 Invalidity

- (1) Except in the case of § 173 (3), § 234 (3) and § 235 (2), the approved annual financial statements shall be null and void if:
1. by their terms, they violate provisions which exist exclusively or primarily for the protection of the company's creditors;
  2. in case of a statutory audit requirement, they have not been audited in accordance with § 316 (1) and (3) of the Commercial Code;
  3. in the event of a statutory audit requirement, they have been audited by persons who are not auditors pursuant to § 319 (1) of the Commercial Code or Article 25 of the Introductory Act to the Commercial Code or who were not appointed as auditors on other grounds than the following:
    - a) violation of § 319 (2), (3) or (4) of the Commercial Code;
    - b) violation of § 319a (1) or (3) of the Commercial Code;
    - c) violation of § 319b (1) of the Commercial Code;
    - d) violation of Regulation (EU) No. 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (Official Journal L 158 of 27 May 2014, p. 77, L 170 of 11 June 2014, p. 66);
  4. in connection with their approval, the provisions of law or the articles regarding

the transfer of amounts to the capital or profit reserves or regarding the release of amounts from the capital or profit reserves have been violated.

- (2) In cases other than (1), annual financial statements which have been approved by the management board and supervisory board shall only be null and void if the management board or the supervisory board has not duly taken part in the approval.
- (3) In cases other than (1), annual financial statements which have been approved by the shareholders' meeting shall only be null and void if the approval:
  1. was resolved in a shareholders' meeting which was called in violation of § 121 (2) and (3) sentence 1 or (4);
  2. has not been recorded pursuant to § 130 (1) and (2) sentence 1 and (4);
  3. has been declared null and void by a judgment upon a contesting action which is final and not subject to appeal;
- (4) The annual financial statements shall only be null and void on the ground of a violation of the provisions on the structure of the annual financial statements or failure to observe forms for the structure of the annual financial statements if its clearness and clarity has been materially impaired thereby.
- (5) <sup>1</sup>The annual financial statements shall only be null and void for violation of the provisions of valuation if:
  1. items have been overvalued; or
  2. items have been undervalued and the financial condition and profitability of the company has been intentionally misrepresented or distorted thereby.

<sup>2</sup>Asset items shall be deemed to be overvalued if they are shown at a higher value and liability items shall be deemed to be overvalued if they are shown at a lower value than permitted pursuant to § 253 to 256a of the Commercial Code. <sup>3</sup>Asset items shall be deemed to be undervalued if they are shown at a lower value and liability items shall be deemed to be undervalued if they are shown at a higher value than permitted pursuant to § 253 to 256a of the Commercial Code. <sup>4</sup>In the case of credit institution and financial services institutions as well as in the case of investment management companies in the sense of § 17 of the Capital Investment Act, the valuation regulations shall not be violated to the extent that deviations are permissible according to the provisions applicable to such credit institutions and financial services institutions, in particular §§ 340e to 340g of the Commercial Code; the same shall apply to insurance companies according to the provisions applicable to such insurance companies, in particular §§ 341b to 341h of the Commercial Code.

- (6) <sup>1</sup>An invalidity action pursuant to (1) numbers 1, 3 and 4, (2), (3) No. 1 and 2, (4) and (5) may no longer be brought if, in the case of (1) numbers 3 and 4, (2) and (3) numbers 1 and 2, six months have lapsed since publication pursuant to § 325 (2) of the Commercial Code or, in other cases, three years have lapsed. <sup>2</sup>If, upon expiration of such period, an action to declare the annual financial statements null and void is pending, such period shall be extended until a decision on the action had been issued which is final and not subject to appeal or until the action has been otherwise finally disposed of.

- (7) <sup>1</sup>§ 249 shall apply accordingly to an action against the company to declare the financial statements null and void. <sup>2</sup>If the company has issued securities within the meaning of § 2 (1) of the Securities Trading Act that are admitted to trading on a German stock exchange in the regulated market, the court shall inform the Federal Financial Supervisory Authority of the receipt of an invalidity action as well as of all final and binding decisions regarding such action.

### **§ 257 Contesting the Approval of the Annual Financial Statements by the Shareholders' Meeting**

- (1) <sup>1</sup>The approval of the annual financial statements by the shareholders' meeting may be contested pursuant to § 243. <sup>2</sup>Such contestation may, however, not be based on the ground that the contents of the annual financial statements violate law or the articles.
- (2) <sup>1</sup>§§ 244 to 246, 247 to 248a shall apply to the contestation. <sup>2</sup>The limitation period for such contestation shall commence on the date of adoption of the resolution even if the annual financial statements are to be reaudited pursuant to § 316 (3) of the Commercial Code.

### **Section Three. Special Audit due to Inadmissible Undervaluation**

#### **§ 258 Appointment of Special Auditors**

- (1) <sup>1</sup>The court shall, upon motion, appoint special auditors if there is reason to assume that:
1. certain items in the approved financial statements have been materially undervalued (§ 256 (5) sentence 3); or
  2. the notes do not or do not fully contain the required information and the management board has not furnished such missing information at the shareholders' meeting even though such information has been requested and the inclusion of the respective question in the minutes has been demanded.

<sup>2</sup>The special auditors shall examine the contested items as to whether they have been materially undervalued. <sup>3</sup>Such auditors shall examine the notes as to whether the required information has not been or has not been fully furnished and whether the management board has not furnished the missing information even though such information has been requested and the inclusion of the respective question in the minutes has been demanded.

- (1a) In the case of credit institution or financial services institutions as well as in the case of investment management companies in the sense of § 17 of the Capital Investment Act, a special auditor cannot be appointed under (1) to the extent that the overvaluation or the missing information in the notes is due to the application of § 340f of the Commercial Code.
- (2) <sup>1</sup>The motion must be made within one month after the shareholders' meeting on the annual financial statements. <sup>2</sup>The foregoing shall also apply if the annual financial statements are to be reaudited pursuant to § 316 (3) of the Commercial Code. <sup>3</sup>Such motion may only be made by shareholders whose aggregate holdings reach the threshold

set forth in § 142 (2).<sup>4</sup>The parties making motion shall deposit their shares until a decision on the motion has been rendered or submit a statement of the depository institution affirming that the shares will not be sold until such time, and furnish evidence that they have been holders of such shares for not less than three months prior to the date of the shareholders' meeting.<sup>5</sup>An affidavit made before a notary shall constitute sufficient evidence.

- (3) <sup>1</sup>Prior to such appointment, the court shall hear the management board, the supervisory board and the external auditors. <sup>2</sup>An appeal may be made against such decision. <sup>3</sup>The regional court of the company's registered seat shall decide on any motion pursuant to paragraph (1).
- (4) <sup>1</sup>Special auditors pursuant to (1) may only be certified public accountants and certified public accounting firms. <sup>2</sup>§ 319 (2) to (4), § 319a (1) and § 319b (1) of the Commercial Code shall apply accordingly to their selection. <sup>3</sup>The company's external auditors and persons who have served as external auditors of the company during the last three years prior to such appointment may not serve as special auditors pursuant to (1).
- (5) <sup>1</sup>§ 142 (6) regarding the reimbursement of reasonable cash expenses and remuneration of court-appointed special auditors, § 145 (1) to (3) regarding the rights of special auditors, § 146 regarding the expenses of the special audit and § 323 of the Commercial Code regarding the responsibility of the external auditor shall apply accordingly. <sup>2</sup>The special auditors pursuant to (1) shall have the rights pursuant to § 145 (2) also against the company's external auditor.

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## § 259 Audit Report. Conclusive Findings

- (1) <sup>1</sup>The special auditors shall render a written report on the result of the audit. <sup>2</sup>If the special auditors in carrying out their duties determine that items have been overvalued (§ 256 (5) sentence 2) or that the provisions governing the structure of the annual financial statements have been violated or the required forms have not been observed, they shall also include such findings in their report. <sup>3</sup>§ 145 (4) to (6) shall apply accordingly to the report.
- (2) <sup>1</sup>If the special auditors determine that the contested items have not been materially undervalued (§ 256 (5) sentence 3), they shall declare in the findings set out at the end of their report:
1. the minimum value at which the individual asset items should be shown and the maximum amount at which the individual liability items should be shown;
  2. the amount by which the annual net profit would have increased or the annual net loss would have decreased if such amounts had been applied.

<sup>2</sup>The special auditors shall base their opinion on the circumstances prevailing at the closing date of the annual financial statements. <sup>3</sup>In determining the values and amounts in number 1, they shall apply the same valuation and depreciation methods that the company used in its last proper valuation of the items to be valued or similar items.

- (3) If the special auditors determine that the contested items have not been or have only been immaterially undervalued (§ 256 (5) sentence 3), the special auditors shall declare in the findings set out at the end of their report that, in their opinion and in accordance with the audit carried out with due professional diligence, the contested items have not been improperly undervalued.

- (4) <sup>1</sup>If the special auditors determine that the notes do not or do not fully contain the required information and the management board has not furnished the missing information at the shareholders' meeting, even though such information has been requested and the inclusion of the respective question in the minutes has been demanded, the special auditors shall furnish the missing information in their findings set out at the end of their report. <sup>2</sup>If information regarding inconsistencies in valuation or depreciation methods has been omitted, the findings shall state the amount by which the annual net profit or annual net loss would have been higher or lower without the inconsistencies that were omitted to be mentioned. <sup>3</sup>If the special auditors determine that no information pursuant to sentence 1 has been omitted, the special auditors shall declare in their findings that, in their opinion and in accordance with the audit carried out with due professional diligence, no information required to be given has been omitted in the notes.
- (5) The management board shall promptly publish the findings of the special auditors pursuant to (2) to (4) in the company's journals.

### **§ 260 Judicial Decision on the Conclusive Findings of the Special Auditors**

- (1) <sup>1</sup>The company or shareholders whose shares in aggregate amount to one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros may make motion to the court with jurisdiction pursuant to § 132 (1) for a decision against the conclusive findings of the special auditors pursuant to § 259 (2) and (3) within one month after publication in the Federal Gazette. <sup>2</sup>§ 258 (2) sentences 4 and 5 shall apply accordingly. <sup>3</sup>The motion shall seek determination of the minimum amount at which the asset items specified in the motion should have been shown or the maximum amount at which liability items specified in the motion should have been shown. <sup>4</sup>The company's motion may also seek determination that the annual financial statements did not contain the undervaluations stated in the conclusive findings of the special auditors.
- (2) <sup>1</sup>The court shall at its discretion decide on the motion with due regard to all circumstances. <sup>2</sup>§ 259 (2) sentence 2 and 3 shall apply. <sup>3</sup>To the extent that a full investigation of all relevant circumstances would entail considerable difficulties, the court shall estimate the values or amounts to be shown.
- (3) <sup>1</sup>§ 99 (1), (2) sentence 1, (3) and (5) shall apply accordingly. <sup>2</sup>The court shall serve its decision on the company and, if shareholders have made motion pursuant to (1), also on such shareholders. <sup>3</sup>Furthermore, the court shall announce the decision in the company's journals without setting out the grounds on which the decision is based. <sup>4</sup>An appeal may be made by the company and shareholders whose shares in aggregate amount to one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros. <sup>5</sup>§ 258 (2) sentence 4 and 5 shall apply accordingly. <sup>6</sup>The period for appeal shall commence on the date of publication of the decision in the Federal Gazette but, in the case of the company and shareholders who have made motion pursuant to (1), not prior to service of the decision.
- (4) <sup>1</sup>The company shall be liable for the costs if the motion is granted, otherwise the party making motion shall be liable. <sup>2</sup>§ 247 shall apply accordingly.

## § 261 Decision on Income Based on Higher Valuation

- (1) <sup>1</sup>If the special auditors have determined in their conclusive findings that items have been undervalued, and no motion for judicial decision against such determination has been made within the period provided in § 260 (1), such items shall, in the first annual financial statements which are prepared after such period has lapsed, be shown at the amounts determined by the special auditors. <sup>2</sup>The foregoing shall not apply to the extent that, by reason of changed circumstances, in particular, in the case of assets which are subject to wear and tear, by reason of such wear and tear in accordance with §§ 253 to 256a of the Commercial Code or generally accepted accounting principles, a lower amount should be shown for an asset item or a higher amount should be shown for a liability item. <sup>3</sup>In such case, the grounds for this shall be specified in the notes and the means by which the amount pursuant to sentence 2 was computed from the amount determined by the special auditors shall be shown separately. <sup>4</sup>If such assets no longer exist, the notes shall report such fact and the appropriation of the income from the disposal of such assets. <sup>5</sup>Reference shall be made under the respective items in the annual balance sheet to the amounts by which asset items have been shown at an increased value or liability items have been shown at a decreased amount pursuant to sentences 1 and 2. <sup>6</sup>The sum of such increases and decreases shall be shown separately on the liability side of the balance sheet and in the profit and loss statement as 'Income Based on Higher Valuation in accordance with the Results of the Special Audit.' <sup>7</sup>If the company is a small corporation (§ 267 (1) of the Commercial Code), it is required to apply sentences 3 and 4 only if the prerequisites of § 264 (2) sentence 2 of the Commercial Code have been met, taking into account the special audit carried out in accordance with this section.
- (2) <sup>1</sup>If the court to which motion has been made pursuant to § 260 determines that items have been undervalued, (1) shall apply accordingly to the valuation of items shown in the first annual financial statements prepared after the judicial decision has become final and not subject to appeal. <sup>2</sup>The sum of such increases and decreases shall be shown separately as 'Income Based on Higher Valuation in accordance with Judicial Decision.'
- (3) <sup>1</sup>The income based on higher valuation pursuant to (1) and (2) shall not be considered part of the annual net profit for the purpose of § 58. <sup>2</sup>The shareholders' meeting shall decide on the appropriation of such income less the taxes payable thereon, to the extent that the annual financial statements do not show a balance sheet loss which is not offset by capital or profit reserves.

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## § 261a Notifications to the Federal Financial Supervisory Authority

The court shall inform the Federal Financial Supervisory Authority of the receipt of a petition for the appointment of a special auditor, all final and binding decisions on the appointment of special auditors, the audit report as well as a final and binding court decision pursuant to § 260 on the special auditors' conclusive findings if the company has issued securities within the meaning of § 2 (1) of the Securities Trading Act that are admitted to trading on a German stock exchange in the regulated market.

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**Division Eight. Dissolution and Declaration of Annulment of the Company**  
**Section One. Dissolution**  
**Subsection One. Grounds for Dissolution and Filing**

**§ 262 Grounds for Dissolution**

(1) The stock corporation is dissolved:

1. upon expiration of the period set in the articles;
2. upon resolution of the shareholders' meeting; such resolution shall require a majority of not less than three-fourths of the share capital represented at the passing of the resolution; the articles may provide for a larger capital majority and additional requirements;
3. upon institution of insolvency proceedings over the company's assets;
4. upon a decision which is final and not subject to appeal denying the institution of insolvency proceedings for lack of assets sufficient to cover the costs of the proceedings;
5. upon an order of the court for registration, which is final and not subject to appeal, by which a deficiency in the articles pursuant to § 399 of the Act on Court Procedure in Family Matters and Non-Litigious Matters is determined;
6. through cancellation of the company for lack of assets according to § 394 of the Act on Court Procedure in Family Matters and Non-Litigious Matters.

(2) The provisions of this section shall also apply if the company is dissolved for other grounds.

**§ 263 Filing and Registration of the Dissolution**

<sup>1</sup>The management board shall file the dissolution of the company for registration in the commercial register. <sup>2</sup>The foregoing shall not apply in the case of institution or denial of institution of insolvency proceedings (§ 262 (1) Nos. 3 and 4) or in the case of judicial determination of a deficiency in the articles (§ 262 (1) No. 5). <sup>3</sup>In such cases, the court shall register the dissolution and the grounds therefor ex officio. <sup>4</sup>In the case of a cancellation of the company (§ 262 (1) No. 6), entry of the dissolution shall be omitted.

**Subsection Two. Liquidation**

**§ 264 Requirement of Liquidation**

- (1) Upon dissolution of the company, liquidation shall take place unless insolvency proceedings have been instituted over the company's assets.
- (2) <sup>1</sup>If the company has been dissolved by cancellation due to lack of assets, liquidation shall only take place if it becomes apparent after the cancellation that there are assets subject to distribution. <sup>2</sup>Liquidators shall be appointed by the court upon application by a party involved.
- (3) To the extent that this sub-paragraph or the purpose of the liquidation does not otherwise

require, the provisions for undissolved companies shall apply to the company until completion of the liquidation.

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## § 265 Liquidators

- (1) The members of the management board shall carry out the liquidation as liquidators.
  - (2) <sup>1</sup>The articles or a resolution of the shareholders' meeting may appoint other persons as liquidators. <sup>2</sup>§ 76 (3) sentence 2 and 3 shall apply accordingly to the selection of the liquidators. <sup>3</sup>A legal entity may also act as liquidator.
  - (3) <sup>1</sup>The court shall appoint or remove liquidators for cause upon motion by the supervisory board or a minority of shareholders whose shares in aggregate amount to one-twentieth of the share capital or represent an amount of the share capital corresponding to 500,000 euros. <sup>2</sup>The shareholders shall provide evidence that they have been holders of the shares for not less than three months. <sup>3</sup>An affidavit made before a court or a notary shall constitute sufficient evidence. <sup>4</sup>An appeal may be made against such decision.
  - (4) <sup>1</sup>The liquidators appointed by the court shall be entitled to reimbursement of reasonable cash expenses and remuneration for their services. <sup>2</sup>If the liquidator appointed by the court and the company do not agree, the court shall stipulate the expenses and the remuneration. <sup>3</sup>An appeal may be made against such decision; appeals on points of law shall be precluded. <sup>4</sup>A decision that has become final and may not be appealed may be enforced in accordance with the provisions of the Code of Civil Procedure.
  - (5) <sup>1</sup>Liquidators who have not been appointed by the court may be removed by the shareholders' meeting at any time. <sup>2</sup>Claims arising under the contract of employment shall be governed by general provisions of law.
  - (6) (2) to (5) shall not apply to the labour director to the extent that his appointment and removal are governed by the provisions of the Coal and Steel Co-determination Act.
- 

## § 266 Filing of the Liquidators for Registration

- (1) The management board shall file the first liquidators and their representative authorities, and the liquidators shall file every change in the liquidators and in their representative authorities for registration in the commercial register.
  - (2) The records regarding the appointment or removal and the representative authority shall be appended to the filing in original or officially certified copy.
  - (3) <sup>1</sup>In such filing, the liquidators shall affirm that no circumstances exist which preclude their appointment pursuant to § 265 (2) sentence 2 and that they have been informed of their obligation to make full disclosure to the court. <sup>2</sup>§ 37 (2) sentence 2 shall apply.
  - (4) The appointment or removal of liquidators by the court shall be registered by the court ex officio.
-



## § 267 Notice to Creditors

<sup>1</sup>The liquidators shall give notice to the company's creditors to file their claims, referring in such notice to the dissolution of the company. <sup>2</sup>Such notice shall be published in the company's journals.

## § 268 Duties of the Liquidators

- (1) <sup>1</sup>The liquidators shall wind up all current transactions, collect claims, convert the remaining assets to cash and provide satisfaction to the creditors. <sup>2</sup>To the extent required to carry out the liquidation, the liquidators may also enter into new transactions.
- (2) <sup>1</sup>The liquidators shall otherwise have the same rights and duties as the management board within the scope of their assigned functions. <sup>2</sup>The liquidators shall, in the same manner as the management board, be subject to the supervision of the supervisory board.
- (3) The prohibition on competition of § 88 shall not apply to the liquidators.
- (4) <sup>1</sup>All business letters which are addressed to a specific recipient shall state the company's legal form and domicile, the fact that the company is in liquidation, the court of registration of the company's domicile, the number under which the company has been registered in the commercial register, and the surname and at least one forename of all liquidators and the chairman of the supervisory board. <sup>2</sup>If information is provided regarding the company's capital, the amount of the share capital shall be stated in any event and, if the issue price has not been paid in full, the aggregate amount of the contributions outstanding. <sup>3</sup>The information pursuant to sentence 1 needs not be given in communications or reports which are made in the course of an existing business relationship and for which forms are customarily used in which only the details of the specific transaction need be added. <sup>4</sup>Order forms shall be deemed to be business letters in the meaning of sentence 1; sentence 3 shall not apply thereto.

## § 269 Representation by the Liquidators

- (1) The liquidators shall represent the company in and out of court.
- (2) <sup>1</sup>If more than one liquidator has been appointed, all liquidators shall only be authorised to represent the company jointly, unless the articles or the body with authority to make such appointment provide otherwise. <sup>2</sup>If a statement with legally binding effect is to be made to the company, it shall suffice if such statement is made to one liquidator.
- (3) <sup>1</sup>The articles or the body with authority to make such appointment may also provide that individual liquidators are authorised to represent the company by acting solely or jointly with a registered authorised officer (*Prokurist*). <sup>2</sup>The supervisory board may so provide if authorised to do so by the articles or a resolution of the shareholders' meeting. <sup>3</sup> (2) sentence 2 shall apply accordingly in such cases.
- (4) <sup>1</sup>Liquidators authorised to represent the company by acting jointly may authorise individual liquidators to engage in certain transactions or kinds of transactions. <sup>2</sup>The foregoing shall apply accordingly if an individual liquidator is authorised to represent the company by acting jointly with a registered authorised officer (*Prokurist*).
- (5) The authority of the liquidators to represent the company may not be restricted.

- (6) Liquidators shall sign on behalf of the company by adding to the company's business name a reference to the liquidation and their signature.
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### **§ 270 Opening Balance Sheet, Annual Financial Statement and Annual Report**

- (1) The liquidators shall prepare a balance sheet as at the commencement of liquidation (opening balance sheet) and an explanatory report regarding the opening balance sheet, and, as at the end of each year, annual financial statements and an annual report.
- (2) <sup>1</sup>The shareholders' meeting shall resolve on the approval of the opening balance sheet and the annual financial statements and on the ratification of the acts of the liquidators and the members of the supervisory board. <sup>2</sup>The provisions governing the annual financial statements shall apply accordingly to the opening balance sheet and the explanatory report. <sup>3</sup>Fixed assets shall, however, be shown in accordance with the valuation methods applicable to current assets to the extent that their sale is intended within a foreseeable period of time or such assets no longer serve the operation of the business; the foregoing shall also apply to the annual financial statements.
- (3) <sup>1</sup>The court may exempt the company from the requirement of an audit of the annual financial statements and the annual report by external auditors if the condition of the company is so readily apparent that an audit does not appear to be necessary in the interest of the creditors and the shareholders. <sup>2</sup>An appeal may be made against such decision.
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### **§ 271 Distribution of the Assets**

- (1) The assets of the company remaining after fulfilment of all liabilities shall be distributed among the shareholders.
- (2) The assets shall be distributed in proportion to the shares in the share capital unless shares exist which grant different rights with respect to the distribution of the company's assets.
- (3) <sup>1</sup>If the contributions to share capital have not been made in the same proportion with respect to all shares, the contributions made shall be refunded and any surplus remaining distributed in proportion to the shares in the share capital. <sup>2</sup>If the assets do not suffice to refund the contributions, the shareholders shall bear the loss in proportion to the shares in the share capital; the contributions still outstanding shall, to the extent necessary, be collected.
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### **§ 272 Protection of Creditors**

- (1) The assets may only be distributed if one year has elapsed from the date on which the notice to creditors has been published.
- (2) If a known creditor does not answer, the amount owed shall be placed on deposit for him, if a right to such deposit exists.
- (3) If a liability cannot be fulfilled for the time being or is disputed, the assets may only be distributed if security has been provided to the creditor.
-

## § 273 Completion of the Liquidation

- (1) <sup>1</sup>If the liquidation has been completed and the final statement of accounts rendered, the liquidators shall file the completion of the liquidation for registration in the commercial register. <sup>2</sup>The entry of the company in the commercial register shall be cancelled.
- (2) The company's books and records shall be deposited for safekeeping for ten years at a safe place to be designated by the court.
- (3) The court may permit shareholders and creditors to inspect the books and records.
- (4) <sup>1</sup>If it subsequently becomes apparent that further liquidation measures are necessary, the court shall upon motion by a party concerned reappoint the previous liquidators or appoint other liquidators. <sup>2</sup>§ 265 (4) shall apply.
- (5) An appeal against the decisions pursuant to (2), (3) and (4) sentence 1 may be made.

## § 274 Continuation of a Dissolved Company

- (1) <sup>1</sup>If a stock corporation has been dissolved by lapse of time or a resolution of the shareholders' meeting, the shareholders' meeting may resolve the continuation of the company if the distribution of assets among shareholders has not commenced. <sup>2</sup>The resolution shall require a majority of at least three fourths of the share capital represented at the passing of the resolution. <sup>3</sup>The articles may provide for a larger capital majority and for additional requirements.
- (2) The foregoing shall apply if the company:
  1. has been dissolved by the institution of insolvency proceedings, but such insolvency proceedings were terminated upon motion by the debtor or cancelled following a confirmation of the insolvency plan providing for the continuation of the company;
  2. has been dissolved by a judicial finding of a deficiency in the articles pursuant to § 262 (1) No. 5, but an amendment to the articles which cures such deficiency has been resolved not later than the resolution for continuation of the company.
- (3) <sup>1</sup>The liquidators shall file the continuation of the company for registration in the commercial register. <sup>2</sup>They shall furnish proof in connection with such filing that the distribution of the assets of the company among the shareholders has not yet commenced.
- (4) <sup>1</sup>The resolution on continuation shall only become effective upon registration in the commercial register of the company's domicile. <sup>2</sup>In the case of (2) sentence 2, the resolution on continuation shall not be effective until it has been registered in the commercial register of the company's domicile together with the resolution on amendment of the articles; both resolutions shall only be registered in the commercial register together.

## Section Two. Declaration of Annulment of the Company

### § 275 Action for Declaration of Annulment

- (1) <sup>1</sup>If the articles do not contain provisions regarding the amount of the share capital or the

company's purpose or if the provisions of the articles regarding the company's purpose are null and void, each shareholder and each member of the management board and the supervisory board may bring an action for declaration of annulment of the company.<sup>2</sup>Such action may not be based on any other grounds.

- (2) If the deficiency is capable of being cured pursuant to § 276, the action may only be instituted after a party with standing to bring such action has demanded that the company cure such deficiency and the company has failed to comply with such demand within three months.
- (3) <sup>1</sup>Such action must be brought within three years after registration of the company. <sup>2</sup>A cancellation of the registration of the company upon the court's own motion pursuant to § 397 (1) of the Act on Court Procedure in Family Matters and Non-litigious Matters shall not be precluded by the expiration of such period.
- (4) <sup>1</sup>§ 246 (2) to (4), §§ 247, 248 (1) sentence 1, §§ 248a, 249 (2) shall apply accordingly to a contesting action. <sup>2</sup>The management board shall submit a certified copy of the complaint and a decision that is final and not subject to appeal to the commercial register. <sup>3</sup>The annulment of the company by virtue of such judgment shall be registered.

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## § 276 Curing of Deficiencies

Any deficiency that relates to the provisions governing the company's purpose may be cured in accordance with the provisions of law and the articles regarding amendments of the articles.

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## § 277 Effectiveness of Registration of Annulment

- (1) If the annulment of the company by virtue of a judgment which is final and not subject to appeal or a decision by the court of registration has been registered in the commercial register, liquidation shall be carried out in accordance with the provisions regarding liquidation in the case of dissolution.
- (2) The validity of transactions entered into in the name of the company shall not be affected by the annulment.
- (3) The shareholders shall make contributions to the extent necessary to fulfil the liabilities incurred.

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## Book Two. Partnership Limited by Shares

### § 278 Nature of the Partnership Limited by Shares

- (1) The partnership limited by shares is a company which constitutes a separate legal entity, in which at least one partner has unlimited liability with regard to the creditors of the company (general partner) and the other shareholders are not personally liable for the obligations of the company (limited shareholders) participate in the share capital.
- (2) The legal relations of the general partners among themselves and with respect to the body of limited shareholders and to third parties, in particular the authority of the general partners to manage the business and represent the company, shall be governed by the provisions of the Commercial Code regarding limited partnerships.

- (3) For the rest, the provisions of Book One regarding the stock corporation shall apply accordingly to the partnership limited by shares unless the following provisions or the absence of a management board necessitate otherwise.

### § 279 Business Name

- (1) The business name of the partnership limited by shares, even if it is continued according to § 22 of the Commercial Code or similar legal provisions, shall contain the designation ‘*Kommanditgesellschaft auf Aktien*’ or a generally understood abbreviation of this designation.
- (2) If in the partnership no natural person is general partner, the business name shall contain a designation indicating the limitation of liability, even if it is continued according to § 22 of the Commercial Code or similar legal provisions.

### § 280 Establishment of the Articles. Founders

- (1) <sup>1</sup>The articles shall be established in the form of a notarial deed. <sup>2</sup>The deed shall specify the par value in case of par-value shares, the number of shares in case of no-par value shares, the issue price and, if there is more than one class of shares, the class of shares acquired by each party. <sup>3</sup>Attorneys-in-fact shall require a power of attorney certified by a notary.
- (2) <sup>1</sup>All general partners shall participate in the establishment of the articles. <sup>2</sup>In addition to the general partners, the persons who as limited shareholders subscribe to shares against contributions shall participate in the establishment of the articles.
- (3) The general partners and limited shareholders who have established the articles are the founders of the company.

### § 281 Contents of the Articles

- (1) The articles shall contain, in addition to the stipulations pursuant to § 23 (3) and (4), the surname, forename and place of residence of each general partner.
- (2) The articles shall stipulate the amount and kind of any contributions of assets by general partners that are not made against the issuance of share capital.

### § 282 Registration of the General Partners

<sup>1</sup>The registration of the company in the commercial register shall, in lieu of the members of the management board, designate the general partners. <sup>2</sup>In addition, the authority of the general partners to represent the company shall be registered.

### § 283 General Partners

The provisions governing the management board of the stock corporation with regard to the

following subjects shall apply accordingly to the general partners:

1. filings, submissions, declarations, and proof to be furnished to the commercial register and announcements;
2. the formation audit;
3. duty of diligence and responsibility;
4. duties in relation to the supervisory board;
5. permission to grant credit;
6. notice of a shareholders' meeting;
7. special audits;
8. assertion of claims for damages in connection with the management of the business;
9. preparation, submission and audit of the annual financial statements and the proposals for the appropriation of the net retained profits;
10. submission and audit of the annual report as well as the consolidated financial statements and group annual report;
11. submission, audit and disclosure of the individual accounts pursuant to § 325 (2a) of the Commercial Code;
12. issuance of shares in the case of a conditional capital increase, authorised capital or a capital increase from the company's reserves;
13. annulment and setting aside of a resolution of the shareholders' meeting;
14. petition for institution of insolvency proceedings.

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## **§ 284 Prohibition of Competition**

- (1) <sup>1</sup>A general partner may not without the express consent of the other general partners and of the supervisory board enter into transactions on his own behalf or on behalf of another person in the company's field of business or become member of the management board, manager or general partner of a similar commercial enterprise. <sup>2</sup>The consent may only be granted for specific kinds of business or specific commercial enterprises.
- (2) <sup>1</sup>If a general partner violates such prohibition, the company may claim damages. <sup>2</sup>In lieu thereof, the company may require that the partner treat the transactions made for his own account as having been made on behalf of the company and remit any remuneration obtained for transactions made on behalf of another person or assign his claim to such remuneration.
- (3) <sup>1</sup>The Partnership has three months from the date on which the other general partners and the members of the supervisory board obtained knowledge, or without gross negligence should have obtained knowledge of the act giving rise to the damage claim, to make any claims. <sup>2</sup>Irrespective of such knowledge or lack of knowledge as a result of gross

negligence, the statute of limitation for such claims shall be five years from the time when they arose.

## § 285 Shareholders' Meeting

(1) <sup>1</sup>In the shareholders' meeting, the general partners shall only have voting rights in respect of the shares held by them. <sup>2</sup>They may not exercise voting rights on behalf of themselves or other persons in the case of resolutions regarding:

1. election or removal of the supervisory board;
2. ratification of the acts of the general partners and members of the supervisory board;
3. appointment of special auditors;
4. assertion of claims for damages;
5. waiver of claims for damages;
6. appointment of external auditors.

<sup>3</sup>In the case of resolutions regarding such matters, their voting rights may also not be exercised by any other person.

(2) <sup>1</sup>The resolutions of the shareholders' meeting shall require the consent of the general partners to the extent that they relate to matters which in the case of a limited partnership require the consent of the general partners and the limited partners. <sup>2</sup>Consent of the general partners shall not be required for the exercise of the authority of the shareholders' meeting or of a minority of limited shareholders to appoint auditors or assert claims of the company arising from the formation or management of the company.

(3) <sup>1</sup>Resolutions of the shareholders' meeting that require the consent of the general partners may be submitted to the commercial register only after such consent has been granted. <sup>2</sup>Such consent shall, in the case of resolutions that are required to be registered in the commercial register, be recorded in the minutes of the meeting or in an appendix to the minutes.

## § 286 Annual Accounts, Annual Report

(1) <sup>1</sup>The shareholders' meeting shall resolve upon approval of the annual financial statements. <sup>2</sup>Such resolution shall require the consent of the general partners.

(2) <sup>1</sup>The capital participations of the general partners shall be shown separately in the annual balance sheet following the item Subscribed Capital. <sup>2</sup>The share of a general partner in any loss for the fiscal year shall be deducted from such capital participation. <sup>3</sup>If the amount of the loss exceeds such capital participation, such excess shall be shown separately on the asset side as on accounts receivable, designated Payment Obligation of General Partner, to the extent that a payment obligation exists; if no payment obligation exists, such excess shall be designated as Share of General Partners in Losses which are not Offset by Contributions of Assets and shown in accordance with § 268 (3) of the Commercial Code. <sup>4</sup>Credits falling under § 89 that the company has granted to general partners, to their spouses or minor children or to third parties that are acting on behalf

of such persons, shall be shown on the asset side under the appropriate items with the designation, of which credits granted to general partners and their relatives.

- (3) The profit or loss attributable to the capital participations of the general partners need not be shown separately in the profit and loss statement.
- (4) § 285 No. 9 lit. a and b of the Commercial Code shall apply to general partners, provided, however, that the profit attributable to the capital participation of a general partner need not be indicated separately.

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### **§ 287 Supervisory Board**

- (1) The supervisory board shall carry out the resolutions of the limited shareholders unless the articles provide otherwise.
- (2) <sup>1</sup>The supervisory board shall represent the limited shareholders, unless the shareholders' meeting has elected special representatives, in the case of litigation by the limited shareholders as a body against the general partners or in the case of litigation by the general partners against the limited shareholders as a body. <sup>2</sup>The company shall be liable for the costs of the litigation that are incurred by the limited shareholders irrespective of the company's right to recourse against the limited shareholders.
- (3) General partners may not also be members of the supervisory board.

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### **§ 288 Withdrawals by General Partners; Granting of Credits**

- (1) <sup>1</sup>A general partner may not withdraw any profit with respect to his capital participation if his share of a loss exceeds his capital participation. <sup>2</sup>He also may not withdraw any share of profits or cash for his capital participation as long as the sum of any balance sheet loss, any payment obligations, the share of general partners in any losses and any amounts owed under credits granted to general partners and their relatives exceeds the sum of any profit carried forward, the capital and profit reserves and the capital participations of the general partners.
- (2) <sup>1</sup>The company may not grant any credit falling under § 286 (2) sentence 4 as long as the conditions set forth in (1) sentence 2 apply. <sup>2</sup>Any such credit that has been granted in violation of the foregoing shall be repaid immediately irrespective of any agreements to the contrary.
- (3) <sup>1</sup>The foregoing provisions shall not affect the claims of general partners for remuneration for services that are not related to profits. <sup>2</sup>§ 87 (2) sentence 1 and 2 shall apply accordingly to any reduction of such remuneration.

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### **§ 289 Dissolution**

- (1) The grounds for dissolution of a partnership limited by shares and for the resignation of one or several general partners from the company shall be governed by the provisions of the Commercial Code regarding limited partnerships, unless (2) to (6) provide otherwise.
- (2) The partnership limited by shares shall also be dissolved:



1. upon a decision which is final and not subject to appeal denying the institution of insolvency proceedings for lack of assets sufficient to cover the costs of the proceedings;
  2. upon an order of the court for registration which is final and not subject to appeal determining a deficiency in the articles pursuant to § 399 of the Act on Court Procedure in Family Matters and Non-Litigious Matters;
  3. upon cancellation of the company for lack of assets according to § 394 of the Act on Court Procedure in Family Matters and in Non-Litigious Matters.
- (3) <sup>1</sup>The company shall not be dissolved by reason of the institution of insolvency proceedings over the assets of a limited shareholder. <sup>2</sup>The creditors of a limited shareholder shall not be entitled to terminate the company.
- (4) <sup>1</sup>Termination of the company by the limited shareholders or their consent to the dissolution of the company shall require a resolution of the shareholders' meeting. <sup>2</sup>The foregoing shall also apply to a motion for dissolution of the company by judicial decision. <sup>3</sup>The resolution shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>4</sup>The articles may provide for a larger capital majority and for additional requirements.
- (5) General partners may, except in the case of expulsion, resign only when the articles so permit.
- (6) <sup>1</sup>All general partners shall file the dissolution of the company or the resignation of a general partner for registration in the commercial register. <sup>2</sup>§ 143 (3) of the Commercial Code shall apply accordingly. <sup>3</sup>In the cases of (2) the court shall register the dissolution and the reason for it ex officio. <sup>4</sup>In the case of (2) No. 3, the registration of the dissolution may be omitted.

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## § 290 Liquidation

- (1) All general partners and one or more persons elected by the shareholders' meeting shall carry out liquidation of the company as liquidators, unless the articles provide otherwise.
  - (2) Each general partner may also make motion for the appointment or removal of liquidators by the court.
  - (3) <sup>1</sup>If the company has been dissolved by cancellation due to lack of assets, liquidation shall only take place if it becomes apparent after the cancellation that there are assets subject to distribution. <sup>2</sup>Liquidators shall be appointed by the court upon motion by a party involved.
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**Book Three. Affiliated Enterprises**  
**Division One. Enterprise Agreements**  
**Section One. Types of Enterprise Agreements**

**§ 291 Control Agreement, Profit Transfer Agreement**

- (1) <sup>1</sup>An agreement in which a stock corporation or partnership limited by shares submits the direction of the company to another enterprise (control agreement) or undertakes to transfer its entire profits to another enterprise (profit transfer agreements) shall constitute enterprise agreements. <sup>2</sup>An agreement in which a stock corporation or partnership limited by shares agrees to conduct its business on behalf of another enterprise shall also constitute a profit transfer agreement.
- (2) If enterprises that are not controlled by one another submit by agreement to common direction, without one of such enterprises becoming controlled by another contracting enterprise, such agreement shall not constitute a control agreement.
- (3) Payments made by a company in case of an existing control agreement or profit transfer agreement shall not constitute a violation of §§ 57, 58 and 60.
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**§ 292 Other Enterprise Agreements**

- (1) Agreements in which a stock corporation or partnership limited by shares:
1. undertakes to pool its profits or the profits of certain operations in whole or in part with the profits of other enterprises or certain operations of other enterprises for the purpose of dividing the pool's profits (profit pool);
  2. undertakes to transfer a share of its profit or the profit of certain operations in whole in part to another person (agreement to transfer a share of profits);
  3. leases or otherwise surrenders the operation of its business to another person (agreement to lease operations, agreement to surrender operations)
- shall also constitute enterprise agreements.
- (2) An agreement on profit sharing with members of the management board and the supervisory board or with individual employees of the company as well as an arrangement as to profit sharing under agreements entered into in the ordinary course of business or under licensing agreements shall not constitute an agreement to transfer a share of profits.
- (3) <sup>1</sup>The fact that an agreement violates §§ 57, 58 and 60 shall not render any agreement to lease or surrender operations, or the resolution by which the shareholders' meeting has consented to such agreement, null and void. <sup>2</sup>Sentence 1 shall not preclude a contesting action against such resolution on the grounds that such agreement violates such provisions.
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**Section Two. Conclusion, Amendments and Termination of Enterprise Agreements**

**§ 293 Consent of the Shareholders' Meeting**

- (1) <sup>1</sup>An enterprise agreement shall only become effective upon consent of the shareholders'

meeting.<sup>2</sup>The resolution shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution.<sup>3</sup>The articles may provide for a larger capital majority and for additional requirements.<sup>4</sup>The provisions of law and the articles governing amendments to the articles shall not apply to such resolution.

- (2) <sup>1</sup>A control agreement or profit transfer agreement shall, if the other party to the agreement is a stock corporation or partnership limited by shares, become effective only if the shareholders' meeting of such other company also consents thereto.<sup>2</sup>(1) sentences 2 to 4 shall apply accordingly to any such resolution.
- (3) Any such agreement must be made in writing and duly signed.

### § 293a Report on the Enterprise Agreement

- (1) <sup>1</sup>The management board of any stock corporation or partnership limited by shares that is party to an enterprise agreement shall make, to the extent that the approval of the shareholders' meeting is required according to § 293, a comprehensive written report that explains and justifies legally and economically the conclusion of the enterprise agreement, its detailed provisions and especially the nature and the level of compensation according to § 304 and of the settlement according to § 305; the management boards may make the report jointly.<sup>2</sup>Special difficulties in the valuation of the contracting enterprises and the consequences for the shareholders' holdings must be indicated.
- (2) <sup>1</sup>The report need not include facts whose disclosure would be suited to cause considerable disadvantage to one of the contracting enterprises or an affiliated enterprise.<sup>2</sup>In such case, the report must explain the reasons for not disclosing these facts.
- (3) The report need not be made if all shareholders of all contracting enterprises waive this right by a publicly certified declaration.

### § 293b Examination of the Enterprise Contract

- (1) The enterprise contract shall be audited by one or more expert auditors (contract auditors) for each contracting stock corporation or partnership limited by shares, unless all shares in the dependent company are held by the dominant company.
- (2) § 293a (3) shall apply accordingly.

### § 293c Appointment of Contract Auditors

- (1) <sup>1</sup>The contract auditors are each to be selected and appointed by the court upon motion by the management boards of the contracting companies.<sup>2</sup>Upon joint motion by the management boards, the auditors may be appointed jointly for all contracting parties.<sup>3</sup>The Regional court in the district of which the dependent company has its seat shall have jurisdiction.<sup>4</sup>If the Regional court has a commercial chamber, then this chamber shall decide instead of the civil chamber.<sup>5</sup>§ 318 (5) of the Commercial Code shall apply for the reimbursement of the court appointed auditors and their remuneration.

(2) § 10 (3) to (5) of the Transformation Act shall apply accordingly.

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### **§ 293d Selection, Position and Accountability of the Contract Auditors**

(1) <sup>1</sup>For the selection and the information right of the contract auditors, § 319 (1) to (4), § 319a (1), § 319b (1), § 320 (1) sentence 2 and (2) sentences 1 and 2 of the Commercial Code shall apply accordingly. <sup>2</sup>The information right exists with respect to the contracting enterprises and to a group enterprise as well as to a dependent and to a dominant enterprise.

(2) <sup>1</sup>For the accountability of the contract auditors, their assistants and the legal representatives of any auditing company collaborating in the audit, § 323 of the Commercial Code shall apply accordingly. <sup>2</sup>They shall be accountable with respect to contracting enterprises and their shareholders.

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### **§ 293e Audit Report**

(1) <sup>1</sup>The contract auditors shall report in writing on the results of the audit. <sup>2</sup>The audit report shall conclude with a recommendation as to whether the proposed compensation or the proposed settlement are adequate. <sup>3</sup>The following must be indicated:

1. the methods by which compensation and settlement were determined;
2. why the use of these methods is appropriate;
3. what compensation or what settlement would have resulted in each case from the use of different methods, to the extent that several methods were used; at the same time, it must be indicated which weight was given to the various methods in determining the proposed compensation or settlement and the underlying assets and which special difficulties occurred in assessing the contracting enterprises.

(2) § 293a (2) and (3) shall apply accordingly.

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### **§ 293f Preparation for the Shareholders' Meeting**

(1) From the convocation of the shareholders' meeting that is to resolve on the approval of the enterprise contract, the following must be laid out in the business premises of each of the participating stock corporations or companies limited by shares for review by the shareholders:

1. the enterprise contract;
2. annual accounts and annual reports of the contracting enterprises for the preceding three years;
3. the reports of the management boards made according to § 293a and the reports of the contract auditors made according to § 293e.

(2) On request, each shareholder shall be given a copy of the documents listed in (1) without delay or charge.

- (3) The duties under (1) and (2) do not apply if the documents listed in (1) for the same periods of time are available on the company's Internet page.

### § 293g Conduct of the Shareholders' Meeting

- (1) The documents listed in § 293f (1) shall be made available in the shareholders' meeting.
- (2) <sup>1</sup>The management board shall orally explain the enterprise contract at the beginning of the meeting. <sup>2</sup>It shall be attached to the minutes.
- (3) Each shareholder shall also receive in the shareholders' meeting, on request, information about all matters relating to the other contracting party that are relevant to the conclusion of the contract.

### § 294 Registration, Effectiveness

- (1) <sup>1</sup>The management board of the company shall file the existence and form of the enterprise agreement and the name of the other contracting party for registration in the commercial register; if there several agreements to transfer a share of profit, the name of the other contracting party may be replaced by another designation determining the respective agreement to transfer a share of profit. <sup>2</sup>The agreement and, if such agreement only becomes effective upon the consent of the shareholders' meeting of the other contracting party, the minutes of such resolution including attachments shall be appended to the filing in original, duplicate or officially certified copy.
- (2) The agreement shall only become effective upon registration in the commercial register of the company's domicile.

### § 295 Amendment

- (1) <sup>1</sup>An enterprise agreement may only be amended with the consent of the shareholders' meeting. §§ 293 to 294 shall apply accordingly.
- (2) <sup>1</sup>The consent of the shareholders' meeting of the company to any amendment of the terms of the agreement which would obligate the company to pay compensation to its outside shareholders or to acquire their shares shall require a separate resolution of the outside shareholders in order to become effective. <sup>2</sup>§ 293 (1) sentences 2 and 3 shall apply to such separate resolution. <sup>3</sup>At the shareholders' meeting resolving upon such consent, each outside shareholder shall upon request be provided with information regarding all matters relating to the other contracting party that are material in the context of such amendment.

### § 296 Cancellation

- (1) <sup>1</sup>An enterprise agreement may only be cancelled by mutual agreement at the end of the fiscal year or the accounting period otherwise contractually agreed upon. <sup>2</sup>A retroactive cancellation is not admissible. <sup>3</sup>Cancellation shall be made in writing and duly signed.
- (2) <sup>1</sup>An agreement that obligates the company to pay compensation to outside shareholders or to acquire their shares may only be cancelled if the outside shareholders consent

by separate resolution. <sup>2</sup>§ 293 (1) sentences 2 and 3, § 295 (2) sentence 3 shall apply accordingly to such separate resolution.

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### **§ 297 Termination**

- (1) <sup>1</sup>An enterprise agreement may be terminated for cause without observing any period of notice. <sup>2</sup>Cause shall in particular exist if it is likely that the other contracting party will not be able to fulfil its obligations arising from the agreement.
  - (2) <sup>1</sup>The management board of the company may only terminate without cause an agreement which obligates the company to pay compensation to the outside shareholders or to acquire their shares if the outside shareholders consent thereto by separate resolution. <sup>2</sup>§ 293 (1) sentences 2 and 3, § 295 (2) sentence 3 shall apply accordingly to such separate resolution.
  - (3) The notice of termination shall be made in written form.
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### **§ 298 Filing and Registration**

The management board of the company shall without undue delay file the cancellation or termination of an enterprise agreement, the grounds and the date of cancellation or termination for registration in the commercial register.

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### **§ 299 Prohibition of Instructions**

An enterprise agreement may not serve as the basis for an instruction to the company to amend, continue, cancel or terminate the agreement.

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## **Section Three. Protection of the Company and the Creditors**

### **§ 300 Legal Reserve**

The following amounts are to be transferred to the legal reserve in lieu of the amount specified in § 150 (2):

1. if a profit transfer agreement exists, that amount of the annual net profit accruing without such profit transfer, after deducting any loss carried forward from the previous year, which is required in order to fill up, during the first five fiscal years commencing during the term of such agreement or upon completion of a capital increase, the legal reserve, plus the amount of any capital reserve, in equal instalments to one-tenth of the share capital or a higher proportion specified by the articles, but in any event not less than the amount specified in number 2.
2. if an agreement to transfer a share of profits exists, that share of the annual net profit accruing without such profit transfer, after deducting any loss carried forward from the previous year, which would be transferred to the legal reserve pursuant to § 150 (2).
3. if a control agreement exists which does not obligate the company to transfer its entire profit, that amount which is required to fill up the legal reserve in accordance with No. 1, but in any event not less than the amount specified in § 150 (2) or, if the company is

obligated to transfer a share of its profit, the amount specified in No. 2.

### § 301 Maximum Amount of Profit Transfer

<sup>1</sup>Irrespective of any agreements made regarding the amount of profit to be transferred, a company may in no event transfer as profit an amount exceeding the annual net profit accruing without such profit transfer, after deducting any loss carried forward from the previous year, the amount to be transferred to the legal reserve pursuant to § 300 and the undistributable, restricted amount pursuant to § 268 (8) of the Commercial Code. <sup>2</sup>If during the term of the agreement amounts have been transferred to other profit reserves, such amounts may be withdrawn from such other profit reserves and transferred as profit.

### § 302 Assumption of Losses

- (1) In the case of a control agreement or profit transfer agreement, the other contracting party shall compensate any annual net loss occurring during the term of the agreement to the extent that such loss is not compensated by withdrawing amounts from the other profit reserves which were transferred to such reserves during the term of the agreement.
- (2) If a controlled company has leased or otherwise surrendered the operation of its business to its controlling enterprise, such controlling enterprise shall compensate any annual net loss occurring during the term of the agreement to the extent that the consideration agreed upon for such lease or surrender of operation does not constitute adequate compensation.
- (3) <sup>1</sup>The company may only waive or compromise any claim for compensation after the expiration of three years from the date on which the registration of the cancellation or termination of the agreement in the commercial register has been announced pursuant to § 10 of the Commercial Code. <sup>2</sup>The foregoing shall not apply if the party obligated to compensate is insolvent and enters into settlement with his creditors to avoid insolvency proceedings. <sup>3</sup>Such waiver or settlement shall only become effective if the outside shareholders consent thereto by separate resolution and no minority whose holding in aggregate equals or exceeds one-tenth of the share capital represented at the passing of the resolution has recorded an objection in minutes.
- (4) The statute of limitation for any claims pursuant to the foregoing provisions shall be ten years starting from the day on which notice of the registration of termination of the agreement with the commercial register has been announced pursuant to § 10 of the Commercial Code.

### § 303 Protection of Creditors

- (1) <sup>1</sup>If a control agreement or profit transfer agreement is cancelled or terminated, the other contracting part shall provide security to the creditors of the company whose claims arose prior to the date on which the registration of the cancellation or termination of the agreement in the commercial register has been announced pursuant to § 10 of the Commercial Code, provided that such creditors have applied to such contracting party for such purpose within six months from the date of the announcement of the registration. <sup>2</sup>In the announcement of registration, the creditors shall be advised of such right.
- (2) Creditors who in the case of insolvency proceedings have a right to preferential

satisfaction from a fund that has been established pursuant to statutory provisions for their protection and is subject to governmental supervision shall not have the right to demand security.

- (3) <sup>1</sup>The other contracting party may in lieu of security guarantee the claim. <sup>2</sup>§ 349 of the Commercial Code, which excludes the benefit of discussion, shall not apply.

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## Section Four. Protection of Outside Shareholders in Case of Control Agreements or Profit Transfer Agreements

### § 304 Adequate Compensation

- (1) <sup>1</sup>A profit transfer agreement shall provide for adequate compensation for outside shareholders by recurring payments in proportion to the shares in the share capital (compensation payment). <sup>2</sup>A control agreement shall, if the company is not obligated to transfer its entire profit, guarantee to the outside shareholders as adequate compensation a certain annual share of profit in the same amount as the compensation payment. <sup>3</sup>Adequate compensation only does not have to be determined if the company does not have any outside shareholders at the time of the adoption of the resolution of the shareholders' meeting on the agreement.
- (2) <sup>1</sup>The annual amount to be provided as compensation payment shall be not less than the amount which could be expected to be distributed as the average dividend for each share in view of the past profitability of the company and its prospective profits, taking into account adequate depreciation and reserves for declines in value but exclusive of other profit reserves. <sup>2</sup>If the other contracting party is a stock corporation or a partnership limited by shares, the amount to be provided as compensation payment may be the amount which is paid as dividend on shares of the other company achieving an appropriate conversion ratio. <sup>3</sup>Such appropriate conversion ratio shall be determined by the proportion in which shares of the company, in the case of a merger, would be entitled to shares of the other company.
- (3) <sup>1</sup>An agreement which contrary to (1) does not provide for any compensation payment shall be null and void. <sup>2</sup>A contesting action against the resolution by which the shareholders' meeting of the company has consented to the agreement or to an amendment of the agreement falling under § 295 (2), may not be based on § 243 (2) or on the grounds that the compensation provided for in the agreement is inadequate. <sup>3</sup>If the compensation provided for in the agreement is inadequate, the court with jurisdiction pursuant to § 2 of the Corporate Proceedings Act shall upon motion determine the contractually owed compensation and shall, if the agreement provides for a compensation payment computed pursuant to (2) sentence 2, determine the compensation pursuant to such provision.
- (4) If the court determines the amount of the compensation payment, the other contracting party may terminate the agreement without complying with any notice period within two months of the date on which the decision has become final and may not be appealed.

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### § 305 Settlement

- (1) A control agreement or profit transfer agreement shall, in addition to the obligation to provide compensation pursuant to § 304, include the obligation of the other contracting party to acquire the shares of any outside shareholder upon demand by such shareholder against an adequate settlement specified in the agreement.



- (2) The agreement shall provide for the following settlement:
1. if the other contracting party is a stock corporation or partnership limited by shares with seat in a member state of the European Union or another contracting state to the Agreement on the European Economic Area and is not a controlled enterprise or subsidiary, own shares of such other company;
  2. if the other contracting party is a stock corporation or partnership limited by shares which is a controlled enterprise or subsidiary and the controlling enterprise is a stock corporation or partnership limited by shares with seat in a member state of the European Union or another contracting company of the Agreement on the European Economic Area, either shares of the controlling enterprise or of the parent or a cash settlement;
  3. in all other cases, a cash settlement.
- (3) <sup>1</sup>If shares of another company are provided as settlement, such settlement shall be considered to be adequate if the shares are provided in the same proportion in which shares of the company would, in the case of a merger, be entitled to shares of the other company, provided that fractional amounts may be compensated by additional cash payments. <sup>2</sup>The adequate cash settlement must take into account the condition of the company at the time of its shareholders' meeting resolving on the agreement. <sup>3</sup>After expiry of the day on which the control agreement or the profit transfer agreement has become effective, interest shall accrue on the cash settlement at the annual rate of five per centage points over the basic rate according to § 247 of the Civil Code; claims for further damages are not excluded.
- (4) <sup>1</sup>The obligation to acquire shares may be limited to a specified period of time. <sup>2</sup>Such period of time shall expire not earlier than two months after the date on which the registration of the agreement in the commercial register has been announced pursuant to § 10 of the Commercial Code. <sup>3</sup>If motion has been made for determination of the amount of the compensation payment or settlement by the court with jurisdiction pursuant to § 2 Corporate Proceedings Act, such period of time shall expire not earlier than two months after the date on which the decision on the last motion disposed of has been announced in the Federal Gazette.
- (5) <sup>1</sup>A contesting action against the resolution by which the shareholders' meeting of the company has consented to the agreement, or to an amendment thereto falling under § 295 (2), may not be based on the ground that the agreement does not provide for an adequate settlement. <sup>2</sup>If the agreement does not provide for any settlement at all or for a settlement that does not comply with (1) to (3), the court with jurisdiction pursuant to § 2 Corporate Proceedings Act shall upon motion determine the amount of the settlement due under the agreement. <sup>3</sup>In the case of (2) sentence 2, if the agreement provides for the granting of shares of the controlling enterprise or parent company, the court shall determine the ratio in which such shares are to be granted, and if the agreement does not provide for the granting of shares of the controlling enterprise or parent company, the court shall determine the appropriate cash settlement. <sup>4</sup>§ 304 (4) shall apply accordingly.

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## § 306 [repealed]

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## **§ 307 Termination of Agreement in the Interests of Outside Shareholders**

If the company does not have any outside shareholder at the date of the resolution by its shareholders' meeting on a control agreement or profit transfer agreement, such agreement shall terminate no later than at the end of the fiscal year in which an outside shareholder acquires a shareholding in the company.

## **Division Two. Power to Direct and Liability in case of Interdependency on Enterprises**

### **Section One. Power to Direct and Liability in case of a Control Agreement**

## **§ 308 Power to Direct**

- (1) <sup>1</sup>In the case of a control agreement, the controlling enterprise shall be entitled to issue instructions to the management board of the company with respect to management of the company. <sup>2</sup>Unless otherwise provide in such agreement, instructions may be issued which are disadvantageous to the company, if they are advantageous to the controlling enterprise or to affiliated enterprises which are members of the same group as such controlling enterprise and such company.
- (2) <sup>1</sup>The management board shall be obligated to comply with the instructions of the controlling enterprise. <sup>2</sup>The management board may not refuse compliance with an instruction on the grounds that such instruction does not in its opinion serve the interests of the controlling enterprise or of affiliated enterprises that are members of the same group as such controlling enterprises and such controlled company, unless such instructions manifestly do not serve such interests.
- (3) <sup>1</sup>If the management board has been instructed to undertake a transaction which requires the consent of the company's supervisory board, and such consent has not been granted within a reasonable period of time, the management board of the controlled company shall inform the controlling enterprise thereof. <sup>2</sup>If after such notification the controlling enterprise renews its instruction, the consent of the supervisory board shall no longer be required; if the controlling enterprise has a supervisory board, such instruction may only be renewed with the consent of such supervisory board.

## **§ 309 Liability of the Legal Representatives of the Controlling Enterprise**

- (1) In the case of a control agreement, the legal representatives (in the case of a sole proprietor the owner) of the controlling enterprise shall, in issuing instructions to the company, employ the care of a diligent and conscientious manager.
- (2) <sup>1</sup>If such legal representatives violate their duties, they shall be jointly and severally liable to the company for any resulting damage. <sup>2</sup>They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager.
- (3) <sup>1</sup>The company may waive or compromise any claim for damages not prior to the expiration of three years from the date on which such claim has arisen and only if the outside shareholders consent thereto by separate resolution and no minority whose holding in aggregate equals or exceeds one-tenth of the share capital represented at the passing of the resolution records an objection in the minutes. <sup>2</sup>The foregoing limitation

period shall not apply if the person liable for damages is insolvent and enters into a settlement with his creditors to avoid or terminate insolvency proceedings or if the liability for damages is regulated in an insolvency plan.

- (4) <sup>1</sup>Any claim of the company for damages may also be asserted by any shareholder. <sup>2</sup>The shareholders may, however, only demand that compensation be paid to the company. <sup>3</sup>Such claim for damages may furthermore be asserted by the creditors of the company as far as such creditors cannot obtain satisfaction from the company. <sup>4</sup>Liability for damages with respect to the creditors shall neither be extinguished by a waiver nor by a settlement of the company. <sup>5</sup>If insolvency proceedings have been instituted over the assets of the company, the receiver in insolvency shall exercise the rights of the shareholders and creditors to assert any claim of the company for damages during the course of such proceedings.
- (5) Claims under the foregoing provisions shall be time barred after expiration of a period of five years.

### **§ 310 Liability of the Company's Board Members**

- (1) <sup>1</sup>The members of the management board and the supervisory board of the company shall, in addition to any person liable pursuant to § 309, be jointly and severally liable if they have acted in violation of their duties. <sup>2</sup>They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager.
- (2) The consent of the supervisory board to such act shall not preclude liability for damages.
- (3) The company's board members shall not be liable for damages if the act causing damage was based on an instruction that was binding pursuant to § 308 (2).
- (4) § 309 (3) to (5) shall apply.

### **Section Two. Liability in Case of no Control Agreement**

#### **§ 311 Limitation on the Exercise of Influence**

- (1) In the absence of a control agreement, a controlling enterprise may not exercise its influence to cause a controlled stock corporation or partnership limited by shares to undertake or refrain from undertaking a disadvantageous transaction or act, unless any disadvantage is compensated.
- (2) <sup>1</sup>If such compensation is not made during the fiscal year in which the controlled company is caused such disadvantage, the time and means by which such disadvantage shall be compensated shall be determined no later than the end of such fiscal year. <sup>2</sup>The controlled company shall be granted an entitlement to the measures designated to serve as compensation.

#### **§ 312 Report of the Management Board on Relations with Affiliated Enterprises**

- (1) <sup>1</sup>In the absence of a control agreement, the management board of a controlled company shall, within the first three months of each fiscal year, render a report on the company's

relations with affiliated enterprises.<sup>2</sup>Such report shall specify all transactions entered into by the company during the previous fiscal year with the controlling enterprise or any enterprise affiliated with such controlling enterprise or at the instruction or in the interest of any such enterprise and all other acts which the controlled company has undertaken or refrained from undertaking at the instruction or in the interest of any such enterprise.<sup>3</sup>Such report shall, with regard to transactions, specify any consideration given or received and, with regard to acts undertaken, state the reasons for such acts and the advantages and disadvantages for the controlled company.<sup>4</sup>If compensation for disadvantages was given, such report shall specify the manner in which such compensation was actually given during the fiscal year and for which measures the company has been granted an entitlement.

- (2) Such report shall comply with the principles of conscientious and accurate accounting.
- (3) <sup>1</sup>The management board shall, at the end of such reports, comment on whether the company, under the circumstance known to the board at the date on which the company entered into such transaction or undertook or refrained from undertaking such act, received adequate consideration for each such transaction or suffered any disadvantage by reason of undertaking or refraining from undertaking such act. <sup>2</sup>If the company suffered any disadvantage, the management board shall further comment on whether such disadvantage has been compensated. <sup>3</sup>Such comments shall be included in the annual report.

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### § 313 Audit by External Auditors

- (1) <sup>1</sup>If the annual financial statements are to be audited by an external auditor, the report on relations with affiliated enterprises shall be submitted to the external auditor together with the annual financial statements and the annual report. <sup>2</sup>The auditor shall examine whether:

1. the statements in such report on relation with affiliated enterprises are accurate;
2. the consideration given by the company for the transaction specified in such report was not unreasonably high in view of the circumstances known at the time such transactions were entered into; and, whether any disadvantages have been compensated;
3. there are no circumstances that would justify a different opinion in respect of the acts specified in the report than the opinion of the management board.

<sup>3</sup>§ 320 (1) sentence 2 and (2) sentences 1 and 2 of the Commercial Code shall apply accordingly. <sup>4</sup>The external auditor shall have the rights pursuant to the foregoing provisions also with respect to a member of an affiliated group or a controlled or controlling enterprise.

- (2) <sup>1</sup>The external auditor shall report in writing on the findings of the audit. <sup>2</sup>If the auditor finds in the course of the audit of the annual financial statements, the annual report and the report on the relations with affiliated enterprises that such report on relations with affiliated enterprises is incomplete, he shall also report thereon. <sup>3</sup>The external auditor shall sign and submit the audit report to the supervisory board; prior to such submission the management board shall have the right to make a statement thereon.
- (3) <sup>1</sup>If the conclusive findings of the audit do not give rise to any objections, the external

auditor shall confirm this with the following note to the report on relations with affiliated enterprises:

On the basis of my/our diligent examination and judgment I/we hereby confirm that:

1. the statements in such report on relation with affiliated enterprises are accurate;
2. the consideration given by the company for the transactions specified in the report was not unreasonably high and any disadvantages incurred have been compensated;
3. there are no circumstances that would justify a different opinion in respect of the acts specified in the report than the opinion of the management board.

<sup>2</sup>No. 2 may be omitted from such note if the report does not specify any transactions and No. 3 may be omitted from such note if the report does not specify any acts. <sup>3</sup>If the external auditor has not determined that the consideration given by the company for any transaction specified in the report was unreasonably high, No. 2 of such note shall be limited to confirmation of such fact.

- (4) <sup>1</sup>If objections are to be made or the external auditor has determined that the report on relations with affiliated enterprises is incomplete, the auditors shall either restrict the wording of the confirmation note or refuse to provide any confirmation. <sup>2</sup>If the management board has stated that the company has suffered a disadvantage as a result of certain transactions or acts, and that such disadvantages have not been compensated, such fact shall be stated in the note and the note shall be restricted to any other transactions or acts.
- (5) <sup>1</sup>The external auditor shall sign the confirmation note stating the place and date of signature. <sup>2</sup>Such note shall also be included in the audit report.

### **§ 314 Examination by the Supervisory Board**

- (1) <sup>1</sup>The management board shall submit to the supervisory board the report on relations with affiliated enterprises immediately after its preparation. <sup>2</sup>This report and, if the annual financial statements are to be audited by an external auditor, the audit report of the external auditor shall be delivered to each member of the supervisory board and, if the supervisory board has so resolved, the members of a committee.
- (2) <sup>1</sup>The supervisory board shall examine the report on relations with affiliated enterprises and comment on the findings of such examination in its report to the shareholders' meeting (§ 171 (2)). <sup>2</sup>If the annual financial statements are to be audited by an external auditor, the supervisory board shall in its report further comment on the findings of the audit of the report on relations with affiliated enterprises by the external auditor. <sup>3</sup>The confirmation note of the external auditor shall be included in such report and the refusal to provide such note shall be explicitly stated.
- (3) The supervisory board shall, at the end of the report, state whether or not based on the findings of its examination, objections are to be made to the comments of the management board at the end of the report on relations with affiliated enterprises.
- (4) If the annual financial statements are to be audited by an external auditor, the external auditor shall attend the deliberations of the supervisory board or a committee regarding

the report on relations with affiliated enterprises and provide a report on the material findings of his audit.

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### **§ 315 Special Audit**

<sup>1</sup>The court shall upon motion by a shareholder appoint special auditors to audit the business relations of the company with its controlling enterprise or an enterprise affiliated with such controlling enterprise if:

1. the external auditor has restricted or refused to provide a confirmation note on the report on relations with affiliated enterprises;
2. the supervisory board has stated that objections are to be made to the comments of the management board at the end of the report on relations with affiliated enterprises;
3. the management board has stated that the company has suffered a disadvantage as a result of certain transactions or acts, and such disadvantages have not been compensated.

<sup>2</sup>If other facts support the suspicion that the company has suffered an undue disadvantage, the petition may also be made by shareholders whose aggregate holdings reach the threshold set forth in § 142(2) if they furnish evidence that they have been the holders of the shares for at least three months prior to the date of filing the petition.

<sup>3</sup>The district court of the stock corporation's registered seat shall decide on such petition. <sup>4</sup>§ 142 (8) shall apply accordingly. <sup>4</sup>An appeal may be made against such decision. <sup>6</sup>If the shareholders' meeting has appointed special auditors to audit the same matters, each shareholder may file a motion pursuant to § 142 (4).

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### **§ 316 No Report on Relations with Affiliated Enterprises in the Case of a Profit Transfer Agreement**

§ 312 to 315 shall not apply if a profit transfer agreement between the controlled company and the controlling enterprise exists.

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### **§ 317 Liability of the Controlling Enterprise and its Legal Representatives**

- (1) <sup>1</sup>If a controlling enterprise causes a controlled company with which a control agreement does not exist to enter into a transaction or to undertake or refrain from undertaking any act which is disadvantageous for such controlled company, without compensating such disadvantage by the end of the fiscal year or granting to the controlled company an entitlement to any measures serving as compensation for this, such controlling enterprise shall be liable for any resulting damage to such controlled company. <sup>2</sup>Such controlling enterprise shall also be liable to the shareholders of the controlled company for any resulting damage to the shareholders insofar as they have suffered damage in addition to any loss incurred as a result of the damage to the company.
- (2) The controlling enterprise shall not be liable if a prudent and a conscientious manager of an independent company would have entered into such transaction or undertaken or refrained from undertaking such act.

(3) The legal representatives of the controlling enterprise who have caused the controlled company to enter into such transaction or undertake or refrain from undertaking such act shall, in addition to the controlling enterprise, be jointly and severally liable.

(4) § 309 (3) to (5) shall apply accordingly.

### § 318 Liability of the Board Members

(1) <sup>1</sup>The members of the management board of the company shall be jointly and severally liable together with the persons liable pursuant to § 317, if, in violation of their duties, they have failed to include any disadvantageous transaction or act in their report on relations of the company with affiliated enterprises or to state that the company has suffered a disadvantage as a result of such transaction or act and that such disadvantage has not been compensated. <sup>2</sup>They shall bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious manager.

(2) The members of the supervisory board of the company shall be jointly and severally liable together with persons liable pursuant to § 317, if, with respect to any disadvantageous transaction or act, they have violated their duty to examine the report on relations with affiliated enterprises and to report to the shareholders' meeting on the findings of such examination (§ 314); (1) sentence 2 shall apply accordingly.

(3) The board members shall not be liable to the company and the shareholders if any such act was based on a lawful resolution of the shareholders' meeting.

(4) § 309 (3) to (5) shall apply accordingly.

### Section Three. Integrated Companies

#### § 319 Integration

(1) <sup>1</sup>The shareholders' meeting of a stock corporation may resolve to integrate the company into another stock corporation with domicile in Germany (principal company), if all shares of such company are held by the prospective principal company. <sup>2</sup>The statutory provisions and the provisions of the articles governing amendments to the articles shall not apply to such resolution.

(2) <sup>1</sup>The resolution on integration shall become effective only upon consent by the shareholders' meeting of the prospective principal company. <sup>2</sup>The resolution on the consent shall require a majority of not less than three fourths of the share capital represented at the passing of the resolution. <sup>3</sup>The articles may provide for a larger capital majority and for additional requirements. <sup>4</sup>(1) sentence 2 shall apply.

(3) <sup>1</sup>From the convocation of the shareholders' meeting of the prospective principal company that is to resolve the approval of the integration, the following must be presented in the business premises of this company for review by the shareholders:

1. a draft of the integration resolution;
2. annual accounts and balance sheets of the participating companies for the preceding three years;

3. a comprehensive written report by the management board of the prospective principal company in which the integration is explained and justified legally and economically (integration report).

<sup>2</sup>Upon request, each shareholder shall receive without delay and free of charge a copy of the documents referred to in sentence 1. <sup>3</sup>The duties in sentences 1 to 2 shall not arise if the documents referred to in sentence 1 are accessible on the future principal company's Internet page for the same period of time. <sup>4</sup>These documents shall be made accessible in the shareholders' meeting. <sup>5</sup>Each shareholder shall upon request also receive in the shareholders' meeting information about all matters relating to the company to be integrated that are relevant in the context of the integration.

- (4) <sup>1</sup>The management board of the company to be integrated shall file the integration and the name of the principal company for registration in the commercial register. <sup>2</sup>The minutes of the resolutions of the shareholders' meeting and the appendices thereto shall be appended to such filing in duplicate or officially certified copy.
- (5) <sup>1</sup>In the registration according to 4, the management board must declare that an action against the effectiveness of the resolution of the shareholders' meeting has not been raised or has not been raised within the time limits or that such an action has been denied finally and without recourse to appeal or that such an action has been withdrawn; the management board must also inform the registration court of such actions after the registration. <sup>2</sup>If the declaration is not made, then the integration shall not be registered unless, through declarations certified by a notary, those shareholders with standing forfeit the action against the effectiveness of the resolution of the shareholders' meeting.



(6) <sup>1</sup>The declaration according to 5 sentence 1 is not necessary if, after the raising of an action against the effectiveness of the resolution by shareholders' meeting, the court holds, on application of the company against whose shareholders' meeting resolution the action is directed, that the raising of the action does not prevent the registration. <sup>2</sup>§ 247, §§ 82, 83 (1) and § 84 of the Code of Civil Procedure as well as the provisions of the Code of Civil Procedure applicable with regard to proceedings at first instance before regional courts shall be applied to the proceedings unless stated otherwise. <sup>3</sup>The order according to sentence 1 shall be issued if

1. the action is inadmissible or manifestly unfounded,
2. the claimant has not provided deeds within one week after service of the application which prove that he has been holding a proportionate amount of not less than 1,000 euros since notification of the meeting; or
3. it appears preferable that the resolution of the shareholders' meeting takes effect immediately, because the material disadvantages for the company and the shareholders as set forth by the stock corporation outweigh, in the court's opinion, the disadvantages for the opponent, unless the infringement is particularly severe.

<sup>4</sup>In urgent cases, the order can be issued without oral hearing. <sup>5</sup>The decision should be rendered no later than three months following the petition; delays in rendering the decision must be explained in a non-appealable decision. <sup>6</sup>The alleged facts according to which the order can be issued according to sentence 3 must be made credible. <sup>7</sup>The senate of the higher regional court of the stock corporation's registered seat shall decide on such petition. <sup>8</sup>A transfer of such power to decide to a single judge shall be excluded; conciliatory hearings shall not be required. <sup>9</sup>The decision is not subject to a contesting action. <sup>10</sup>If the action proves to be founded, then the company that caused issue of the order must compensate the opponent of the application for the loss incurred due to the registration based on the order. <sup>11</sup>Any deficiencies concerning the resolution shall not affect its implementation after registration; it is not possible to demand as compensation that this effect of the registration be eliminated.

(7) The integration of the company into the principal company shall become effective upon registration of the integration in the commercial register of the integrated company's domicile.

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## § 320 Integration by Majority Resolution

(1) <sup>1</sup>The shareholders' meeting of a stock corporation may also resolve to integrate the company into another stock corporation with domicile in Germany if the prospective principal company holds shares of the company representing in aggregate ninety-five per cent of the share capital. <sup>2</sup>Own shares and shares held by another person on behalf of such company shall be deducted from the share capital. <sup>3</sup>(2) to (4) shall, in addition to § 319 (1) sentence 2, (2) to (7), apply to the integration.

(2) <sup>1</sup> The announcement of the integration as an item on the agenda shall only be deemed duly made if:

1. such announcement includes the business name and domicile of the prospective principal company;

2. a statement of the prospective principal company has been appended to such announcement in which such prospective principal company offers own shares to shareholders of the company to be integrated as compensation for their shares, and, in the case of § 320b (1) sentence 3, an additional cash payment.

<sup>2</sup>Sentence 1 No. 2 shall also apply to the announcement of the prospective principal company.

- (3) <sup>1</sup>The integration shall be audited by expert auditors (integration auditors). <sup>2</sup>Such auditors shall be selected and appointed by the court upon petition of the management board of the prospective principal company. <sup>3</sup>§ 293a (3), §§ 293c to 293e shall apply accordingly.
- (4) <sup>1</sup>The documents referred to in § 319 (3) sentence 1 and the audit report according to (3) shall be presented in the business premises of the company to be integrated and the prospective principal company for review by the shareholders as of the convocation of the shareholders' meeting that is to resolve the approval of the integration. <sup>2</sup>The integration report shall explain and justify legally and economically the nature and level of the settlement according to § 320b; it shall indicate special difficulties in assessing the participating companies and the consequences for the holdings of the shareholders. <sup>3</sup>§ 319 (3) sentences 2 to 5 applies accordingly for shareholders of both companies.

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### § 320a Effects of the Integration

<sup>1</sup>Upon registration in the commercial register, all shares that are not held by the principal company are transferred to it. <sup>2</sup>Any Certificates issued for these shares shall only guarantee the entitlement to settlement until their delivery to the principal company.

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### § 320b Settlement for the Former Shareholders

- (1) <sup>1</sup>The former shareholders of the integrated company are entitled to an adequate settlement. <sup>2</sup>They shall be granted own shares of the principal company as settlement. <sup>3</sup>If the principal company is a dependent company, then the former shareholders shall be granted at their election own shares of the principal company or an appropriate cash settlement. <sup>4</sup>If shares in the principal company are granted as settlement, the settlement shall be deemed adequate if the shares are issued in the proportion in which upon a merger a share of the company would be granted shares in the principal company, whereby fractional amounts can be compensated by additional cash payments. <sup>5</sup>The cash settlement must take into account the condition of the company at the time of its shareholders' meeting resolving the integration. <sup>6</sup>The cash settlement and additional cash payments shall accrue interest at the annual rate of five per centage points over the basic rate according to § 247 of the Civil Code from the end of the day on which the registration of the integration is published; claims for further damages are not excluded.
  - (2) <sup>1</sup>The challenge of the resolution by which the shareholders' meeting of the integrated company resolved the integration cannot be based on § 243 (2) or that the settlement offered by the principal company according to § 320 (2) No. 2 is not adequate. <sup>2</sup>If the settlement offered is not adequate then the court determined by § 2 Corporate Proceedings Act shall on application determine the adequate settlement. <sup>3</sup>The same applies if the principal company has not or has not duly offered a settlement and an action has not been raised within the time limits for a challenge, has been withdrawn or denied finally and without recourse to appeal.
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### § 321 Protection of Creditors

- (1) <sup>1</sup>Creditors of the integrated company whose claims arose prior to the registration of the integration in the commercial register shall be provided with security insofar as they are not able to demand satisfaction, provided that they have made application for this purpose within six months after the date of such announcement. <sup>2</sup>In the announcement of registration, the creditors shall be advised of such right.
- (2) Creditors shall not be entitled to demand provision of security if they have a right to preferential satisfaction in the case of insolvency from a fund which has been created for their protection pursuant to statutory provisions and which is subject to governmental supervision.

### § 322 Liability of the Principal Company

- (1) <sup>1</sup>The principal company shall be liable to the creditors of the integrated company as joint and several debtor for the obligations of such company that have been incurred prior to such date. <sup>2</sup>The principal company shall also be liable for all obligations of the integrated company that have been incurred after the integration. <sup>3</sup>Any agreement to the contrary shall be ineffective towards third parties.
- (2) If a claim is made against the principal company regarding an obligation of the integrated company, such principal company may raise defences other than those it has in its own right only if such defences may be raised by the integrated company.
- (3) <sup>1</sup>The principal company may refuse to satisfy a creditor for as long as the integrated company has the right to rescind the transaction giving rise to such obligation. <sup>2</sup>The principal company shall have the same right for as long as the creditor may obtain satisfaction by setting off against a claim of the integrated company that is due.
- (4) A judgment or other judicial decision which is enforceable against the integrated company may not be enforced against the principal company.

### § 323 Principal Company's Power to Direct and Management Board Members' Liability

- (1) <sup>1</sup>The principal company shall be entitled to issue instructions to the management board of the integrated company regarding the management of the company. <sup>2</sup>§ 308 (2) sentence 1, (3) §§ 309, 310 shall apply accordingly. <sup>3</sup>§§ 311 to 318 shall not apply.
- (2) Payments and other forms of consideration given by the integrated company to the principal company shall not be deemed to constitute a violation of §§ 57, 58 and 60.

### § 324 Legal Reserve, Profit Transfer, Assumption of Losses

- (1) The statutory provisions governing the creation of a legal reserve, the use thereof and the transfer of amounts to the legal reserve shall not apply to integrated companies.
- (2) <sup>1</sup>§§ 293 to 296, 298 to 303 shall not apply to a profit transfer agreement, a profit sharing arrangement or an agreement to transfer a share of profits between an integrated company and the principal company. <sup>2</sup>The agreement, any amendments thereto and the

cancellation thereof shall be in writing and duly signed.<sup>3</sup>The amount to be transferred as profit may not exceed the distributable profit accruing prior to the profit transfer.<sup>4</sup>The agreement shall expire not later than at the end of the fiscal year in which the integration terminates.

- (3) The principal company shall be obligated to compensate any accumulated loss of the integrated company that may otherwise arise insofar as such loss exceeds the amount of the capital reserves and profit reserves.
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### **§ 325 [repealed]**

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### **§ 326 Right of the Principal Company's Shareholders to Information**

Each shareholder of the principal company shall be entitled to be provided with information regarding matters relating to the integrated company to the same extent he is entitled to be provided with information regarding matters relating to the principal company.

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### **§ 327 Termination of Integration**

- (1) Integration shall terminate:
1. upon resolution of the shareholders' meeting of the integrated company.
  2. if the principal company is no longer a stock corporation with domicile in Germany;
  3. if the principal company no longer holds all shares of the integrated company;
  4. upon dissolution of the principal company.
- (2) If the principal company no longer holds all shares of the integrated company, the principal company shall promptly advise the integrated company thereof in writing.
- (3) The management board of the previously integrated company shall promptly file the termination of integration, the reason for this and the date thereof for registration in the commercial register of such company's domicile.
- (4) <sup>1</sup>If the integration is terminated, the former principal company shall be liable for all liabilities the formerly integrated stock corporation has incurred until then, provided that the liabilities become due prior to the expiration of five years after the integration has been terminated and the claims against the former principal company are established in a manner as set forth in § 197(1) numbers 3 to 5 of the Civil Code or the court or an authority enforces such claims or applies for their enforcement; in the case of public liabilities an administrative decision shall suffice. <sup>2</sup>The statute of limitation shall begin running from the date on which notice of registration of the termination of the integration has been given pursuant to § 10 of the Commercial Code. <sup>3</sup>For the statute of limitation, §§ 204, 206, 210, 211 and § 212 (2) and (3) of the Civil Code shall apply accordingly. <sup>4</sup>An establishment of the claim in respect of § 197(1) numbers 3 to 5 of the Civil Code is not necessary if the former principal company acknowledges the claim in writing.
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## Division Four. Squeeze-out of Minority Shareholders

### § 327a Transfer of Shares for Cash Compensation

- (1) <sup>1</sup>The shareholders meeting of a stock corporation or of partnership limited by shares may resolve upon request of a shareholder holding 95 per cent of the share capital (principal shareholder) the transfer of the other shareholders' (minority shareholders') shares to the principal shareholder against the payment of adequate cash compensation. <sup>2</sup>§ 285 (2) sentence 1 shall not apply.
- (2) For the determination of whether the principal shareholder holds 95 per cent of the share capital, § 16 (2) and (4) shall apply.

### § 327b Cash Compensation

- (1) <sup>1</sup>The principal shareholder sets the amount of the cash compensation; it must reflect the circumstances of the corporation at the time the resolution is adopted. <sup>2</sup>The management board shall make available to the principal shareholder all necessary documents and supply information to this end.
- (2) Interest shall accrue on the cash compensation at the rate of five per centage points over the applicable base rate according to § 247 of the Civil Code from the publication of the transfer resolution's registration in the commercial register; the assertion of further claims for damage is not excluded.
- (3) Before the shareholders meeting is convened, the principal shareholder must deliver to the management board the declaration of a credit institution authorised to operate within the territorial scope of this law by which the credit institution guarantees the performance of the principal shareholder's obligation to pay the minority shareholders the set cash compensation for the transferred shares immediately after registration of the transfer resolution.

### § 327c Preparation of the Shareholders' Meeting

- (1) Notice of the transfer as an item on the agenda must contain the following information:
  1. business name and domicile of the principal shareholder, in the case of natural persons name and address;
  2. the cash compensation set by the principal shareholder.
- (2) <sup>1</sup>The principal shareholder must provide the shareholders' meeting with a written report that sets out the preconditions for the transfer and explains and justifies the adequacy of the cash compensation. <sup>2</sup>The adequacy of the cash compensation shall be reviewed by one or more expert auditors. <sup>3</sup>These shall be selected and appointed by the court on application of the principal shareholder. <sup>4</sup>§ 293a (2) and (3), § 293c (1) sentence 3 to 5, (2) and §§ 293d and 293e shall apply accordingly.

- (3) From the convocation of the shareholders' meeting onward the following must be made available in the company's office for inspection by the shareholders:
1. the draft of the transfer resolution;
  2. the annual financial statements and management reports for the last three business years;
  3. the report made by the principal shareholder according to (2) sentence 1;
  4. the audit report made according to (2) sentence 2 to 4.
- (4) On request, each shareholder shall without undue delay and free of charge be given a copy of the documents listed in (3).
- (5) The duties in (3) and (4) shall not arise if the documents referred to in (3) are accessible on the company's Internet page for the same period of time.
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### **§ 327d Conduct of the Shareholders' Meeting**

<sup>1</sup>In the shareholders' meeting, the documents described in § 327c (3) shall be made accessible. The management board may give the principal shareholder opportunity to orally explain the draft of the transfer resolution and the setting of the amount of the cash compensation at the beginning of the meeting.

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### **§ 327e Registration of the Transfer Resolution**

- (1) <sup>1</sup>The management board shall file the transfer resolution for registration in the commercial register. <sup>2</sup>The filing shall be accompanied by the written transfer resolution and its appendices in authentic original or notarized copy.
- (2) § 319 (5) and (6) shall apply accordingly.
- (3) <sup>1</sup>Upon registration of the transfer resolution in the commercial register, all shares of the minority shareholders shall be transferred to the principal shareholder. <sup>2</sup>Any share certificates issued for these shares only attest to the claim for cash compensation until their delivery to the principal shareholder.
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### **§ 327f Judicial Review of the Compensation**

<sup>1</sup>The challenging of the transfer resolution cannot be based on § 243 (2) or on the fact that the cash compensation set by the principal shareholder is inadequate. <sup>2</sup>If the cash compensation is inadequate, the court determined by § 2 of the Corporate Proceedings Act shall set the adequate cash compensation. <sup>3</sup>The same applies if the principal shareholder has not or not duly offered a cash compensation and within the period for challenge a challenge was not raised, withdrawn or finally denied without recourse to appeal.

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## Division Five. Enterprises with Cross-Shareholdings

### § 328 Limitation of Rights

- (1) <sup>1</sup>If a stock corporation or partnership limited by shares and another enterprise constitute enterprises with cross-shareholdings, rights arising from shares which are held by any such enterprise in the other enterprise may not be exercised with respect to more than one-fourth of all shares of such other enterprise as from the date on which such other enterprise has received knowledge of the existence of such cross-shareholding or the other enterprise has given notice to such enterprise pursuant to § 20 (3) or § 21 (1). <sup>2</sup>The foregoing shall not apply to the right to new shares in the case of a capital increase from the company's reserves. <sup>3</sup>§ 16 (4) shall apply.
- (2) The restriction on exercise of rights pursuant to (1) shall not apply if such enterprise has given notice to the other enterprise pursuant to § 20 (3) or § 21 (1) prior to receiving such notice from the other enterprise and prior to having gained knowledge of the cross-shareholding.
- (3) In the shareholders' meeting of a listed company, an enterprise that is aware of a cross-shareholding according to (1) may not exercise its voting rights to elect members of the supervisory board.
- (4) If a stock corporation or partnership limited by shares and another enterprise constitute enterprises with cross shareholdings, such enterprises shall promptly give notice in writing to one another of the amount of such holding and any change therein.

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## Division Six. Group Statement of Accounts

### §§ 329, -393 [repealed]

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### § 329 [repealed]

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### § 330 [repealed]

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### § 331 [repealed]

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### § 332 [repealed]

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### § 333 [repealed]

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### § 334 [repealed]

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### § 335 [repealed]

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### § 336 [repealed]

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§ 337 [repealed]

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§ 338 [repealed]

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§ 339 [repealed]

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§ 340 [repealed]

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§ 341 [repealed]

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§ 342 [repealed]

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§ 343 [repealed]

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§ 344 [repealed]

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§ 345 [repealed]

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§ 359 [repealed]

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§ 360 [repealed]

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§ 361 [repealed]

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§ 362 [repealed]

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§ 363 [repealed]

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§ 365 [repealed]

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§ 366 [repealed]

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§ 367 [repealed]

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§ 368 [repealed]

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§ 369 [repealed]

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§ 370 [repealed]

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§ 371 [repealed]

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§ 372 [repealed]

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**§ 373 [repealed]**

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**§ 377 [repealed]**

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**§ 379 [repealed]**

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**§ 380 [repealed]**

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**§ 381 [repealed]**

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**§ 382 [repealed]**

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**§ 383 [repealed]**

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**§ 386 [repealed]**

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**§ 387 [repealed]**

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**§ 388 [repealed]**

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**§ 389 [repealed]**

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**§ 390 [repealed]**

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## § 391 [repealed]

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## § 392 [repealed]

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## § 393 [repealed]

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### Book Four. Special, Penal and Final Provisions Division One. Special Provisions in Case of Participations of Local and Regional Authorities

## § 394 Reports of the Members of the Supervisory Board

<sup>1</sup>Persons who have been elected or delegated to the supervisory board by a local or regional authority shall not be bound by a duty of secrecy with respect to reports that they are required to make to the local or regional authority. <sup>2</sup>The foregoing shall not apply to confidential information and secrets of the company, in particular trade and business secrets, if knowledge thereof is not material in the context of such reports. <sup>3</sup>The duty to report pursuant to sentence 1 may be based on law, the articles or a legal transaction notified to the supervisory board in writing.

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## § 395 Duty of Secrecy

- (1) Persons who are charged with administering the participations of a local or regional authority or auditing on behalf of a local or regional authority the company, the activities of the municipality in its capacity as shareholder or the activities of members in the supervisory board who have been elected or delegated by the municipality, shall not disclose any confidential information or secrets of the company, in particular trade or business secrets which have become known to them in connection with reports pursuant to § 394; the foregoing shall not apply to internal governmental communications.
  - (2) Confidential information and secrets of the company, in particular trade and business secrets, may not be disclosed when the findings of audits are published.
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### Division Two. Judicial Dissolution

## § 396 Requirements

- (1) <sup>1</sup>If a stock corporation or a partnership limited by shares endangers the common good as a result of unlawful conduct of its board members and the supervisory board or the shareholders' meeting do not arrange for the dismissal of such board members, the company may be dissolved by judicial decree upon motion by the appropriate highest authority of the state in which the company is domiciled. <sup>2</sup>The regional court of the district in which the company is domiciled shall have exclusive jurisdiction with respect to any such action.
  - (2) <sup>1</sup>After dissolution, the company shall be liquidated pursuant to §§ 264 to 273. <sup>2</sup>A motion to dismiss or appoint liquidators for cause may also be made by the authority designated in (1) sentence 1.
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## § 397 Court Orders in Connection with Dissolution

If an action for dissolution has been brought, the court may upon motion by the authority designated in § 396 (1) sentence 1 issue any necessary orders by preliminary injunction.

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## § 398 Registration

<sup>1</sup>The decisions of the court shall be communicated to the court maintaining the commercial register. <sup>2</sup>Such court shall enter such decisions in the commercial register to the extent that they concern legal relations requiring registration.

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## Division Three. Provisions as to Punishments and Fines, Final Provisions

### § 399 False Statements

(1) Whoever makes false statements or fails to disclose material facts:

1. as founder or member of the management board or supervisory board for the purpose of registration of the company or an agreement according to § 52 (1) sentence 1, with respect to the acquisition of shares, payment of contributions, appropriation of contributions, the share issue price, special benefits, formation expenses, Contributions in kind and acquisitions of assets or in the statement to be made pursuant to § 37a (2), also in connection with § 52 (6) sentence 3;
2. as founder or member of the management board or supervisory board in the formation report, the report on post-formation acquisition or the audit report;
3. in the official announcement pursuant to § 47 No. 3;
4. as a member of the management board or a supervisory board, for purposes of registration of a share capital increase (§§ 182 to 206), with respect to contributions to the previously existing capital, subscription or contribution of the new capital, the share issue price, the issuance of new shares, Contributions in kind, in the announcement pursuant to § 183a (2) sentence 1 in connection with § 37a (2) or in the statement to be made pursuant to § 184 (1) sentence 3;
5. a liquidator, for purposes of registration of the continuation of the company, in connection with the proof to be furnished pursuant to § 274 (3); or
6. as a member of the management board of a stock corporation or the managing body of a foreign legal entity, in the statement to be made pursuant to § 37 (2) sentence 1 or § 81 (3) sentence 1 or as liquidator in the statement to be made pursuant to § 266 (3) sentence 1

shall be punished by imprisonment of up to three years or by fine.

(2) Whoever, as member of the management board or the supervisory board, makes a false statement for purposes of registration of a share capital increase with respect to the statement required pursuant to § 210 (1) sentence 2 shall be punished in the same manner.

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## **§ 400 Misrepresentation**

- (1) Whoever as a member of the management board or of the supervisory board or as liquidator:
1. misrepresents or conceals the condition of the company, including its relations with affiliated enterprises, in presentations or summaries on the financial condition of the company, statements or information provided at the shareholders' meeting, unless such act constitutes a criminal offence pursuant to § 331 No. 1 or 1a of the Commercial Code, or
  2. makes false statements or misrepresents or conceals the condition of the company in disclosures or statements which are required to be made to an auditor of the company or an affiliated enterprise pursuant to the provisions of this Act, unless such act constitutes a criminal offence pursuant to § 331 No. 4 of the Commercial Code
- shall be punished by imprisonment of up to three years or by fine.
- (2) Whoever, as founder or shareholder, makes false statement or conceals material facts in disclosures or evidence which are required to be made to a formation auditor or other auditor pursuant to the provisions of this Act, shall be punished in the same manner.
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## **§ 401 Violation of Duty in the Event of Loss of Capital, Overindebtedness or Insolvency**

- (1) Whoever, as member of the management board, in violation of § 92 (1) fails to call a shareholders' meeting and to disclose at such meeting a loss equal to or exceeding one-half of the share capital shall be punished by imprisonment of up to three years or by a fine.
- (2) If the offender acts negligently, the punishment shall be imprisonment up to one year or a fine.
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## **§ 402 False Issuance of Certificates Confirming the Right to Vote**

- (1) Whoever issues falsely or falsifies certificates which are to serve as proof at a shareholders' meeting or separate meeting, shall be punished by imprisonment of up to three years or by fine, unless such act is subject to a more severe punishment in other criminal provisions concerning documents.
- (2) Whoever makes use of a false or falsified certificate of the kind specified in (1) for the purpose of exercising voting rights shall be punished in the same manner.
- (3) The attempt shall also be punishable.
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## **§ 403 Violation of Duty to Report**

- (1) Whoever as auditor or assistant to an auditor renders a false report on findings of an audit or fails to disclose material facts in such report shall be punished by imprisonment up to three years or by fine.
- (2) If the offender acted for remuneration or with the intent to enrich himself or another person or causing damage to another person, the punishment shall be imprisonment up to five years or a fine.
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## § 404 Violation of the Duty of Confidentiality

(1) Whoever without authorisation discloses a secret of the company, in particular a trade or business secret, shall be punished by imprisonment of up to one year, in case of a listed company up to two years, or by fine if such secret became known to him in his capacity as

1. a member of the management board or supervisory board or a liquidator;
2. auditor or assistant to an auditor

in the case of number 2, however, only if such act does not constitute a criminal offence pursuant to § 333 of the Commercial Code.

(2) <sup>1</sup>If such offender acted for remuneration or with the intent to enrich himself or another person or causing damage to another person, the punishment shall be imprisonment of up to two years, in case of a listed company up to three years, or a fine. <sup>2</sup>Whoever unlawfully uses a secret of the kind specified in (1), in particular a trade or business secret, which has become known to him under the circumstances of (1) shall be punished in the same manner.

(3) <sup>1</sup>Such act shall be prosecuted only upon complaint by the company. <sup>2</sup>Such complaint may be made by the supervisory board if a member of the management board or liquidator committed such act; such complaint may be made by the management board or the liquidators if a member of the supervisory board committed such act.

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## § 404a Violation of duties in case of audits

Anyone who, as a member of the supervisory board or as a member of an audit committee of a company which is capital-market oriented within the meaning of § 264d of the Commercial Code, a CRR credit institution within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or an insurance undertaking within the meaning of Article 2 (1) of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (Official Journal L 374 of 31 December 1991, p. 7) as last amended by Directive 2006/46/EC (Official Journal L 224 of 16 August 2006, p. 1),

1. commits any of the acts specified in § 405 (3b), (3c) or (3d) and gains a pecuniary advantage for it or accepts the promise of such advantage; or
2. persistently repeats any of the acts specified in § 405 (3b), (3c) or (3d) shall be punished by a term of imprisonment of up to one year or a fine.

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## § 405 Administrative Offences

(1) Any member of the management board or management board or liquidator who

1. issues registered share certificates in which the amount of partial contributions is not stated or issues bearer shares prior to contribution in full of the issue price;
2. issues share certificates or interim certificates prior to registration of the company or, in the case of a capital increase, the completion of the share capital increase, or, in the case of a conditional capital increase or a capital increase from the company's reserves, the resolution on the conditional capital increase or the capital increase from the company's reserves;

3. issues share certificates or interim certificates which have a par value less than the minimum par value pursuant to § 8 (2) sentence 1 or which, in case of a company with no-par value shares, represent a lower par value than permitted as minimum amount pursuant to § 8 (3) sentence 3, or
4. a) acquires own shares in violation of § 71 (1) No. 1 to 4 or (2) or, in connection with § 71e (1), takes a pledge on such shares;
  - b) fails to offer own shares which are to be disposed of (§ 71c (1) and (2));
  - c) fails to take measures necessary for preparation of a resolution on the cancellation of own shares (§ 71c (3));
5. [repealed]

shall be guilty of an administrative offence.

(2) Whoever as shareholder or proxy fails to provide or provides incorrectly the information to be included in the list pursuant to § 129 shall also be guilty of an administrative offence.

(2a) Whoever contrary to § 67 (4) sentence 2, also in connection with sentence 3, fails to make a notice or does so incorrectly commits an offence.

(3) Whoever:

1. uses shares of another person, without authorisation to act as proxy and without the approval of such other person, to exercise rights at a shareholders' meeting or a separate meeting;
2. uses shares of another person which he has acquired by granting or promising special benefits to exercise rights at a shareholders' meeting or a separate meeting;
3. permits the use of shares to another person for the purpose specified in No. 2 against the grant or promise of special benefits;
4. uses another person's shares for which neither he nor the other person represented by him may exercise voting rights pursuant to § 135 to exercise voting rights;
5. permits the use of shares or uses such shares to exercise voting rights which neither he nor the other person represented by him may exercise pursuant to § 20 (7), § 21 (4), §§ 71b, 71d sentence 4, § 134 (1), §§ 135, 136, 142 (1) sentence 2 and § 285 (1);
6. demands special benefits, or demands a promise for or accepts such special benefits, as consideration for voting or refraining from voting in a prescribed manner at a shareholders' meeting or a separate meeting; or
7. offers, promises or grants special benefits as consideration to another person for voting or refraining from voting in a prescribed manner at a shareholders' meeting or a separate meeting shall be guilty of an administrative offence.

(3a) Whoever

1. contrary to § 121 (4a) sentence 1, also in connection with § 124 (1) sentence 3, intentionally or recklessly fails to serve the notice or serves it incorrectly, incompletely or not in time; or
2. contrary to § 124a intentionally or recklessly fails to make statements accessible or makes them accessible incorrectly or incompletely

commits an administrative offence.

(3b) An administrative offence is committed by any person who, as a member of the supervisory board or as a member of an audit committee of a company which is capital-market oriented within the meaning of § 264d of the Commercial Code, a CRR credit institution within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos. 1 and 2 of the Banking Act, or an insurance undertaking within the meaning of Article 2 (1) of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings (Official Journal L 374 of 31 December 1991, p. 7) as last amended by Directive 2006/46/EC (Official Journal L 224 of 16 August 2006, p. 1),

1. does not supervise the independence of the auditor or the audit firm in accordance with Article 4 (3) sub-paragraph 2, Article 5 (4) sub-paragraph 1 sentence 1 or Article 6 (2) of Regulation (EU) No. 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC (Official Journal L 158 of 27 May 2014, p. 77, L 170 of 11 June 2014, p. 66); or
2. submits a recommendation for the appointment of an auditor or an audit firm which does not comply with the requirements laid down in Article 16 (2) sub-paragraphs 2 or 3 of Regulation (EU) No. 537/2014 or which was not preceded by a selection procedure pursuant to Article 16 (3) sub-paragraph 1 of Regulation (EU) No. 537/2014.

(3c) An administrative offence is committed by any person who, as a member of a supervisory board of a company specified in (3b) which has not appointed an audit committee, submits to the shareholders' meeting a proposal for the appointment of an auditor or an audit firm which does not comply with the requirements laid down in Article 16 (5) sub-paragraph 1 of Regulation (EU) No. 537/2014.

(3d) An administrative offence is committed by any person who, as a member of a supervisory board of a company specified in (3b) which has appointed an audit committee, submits to the shareholders' meeting a proposal for the appointment of an auditor or an audit firm which does not comply with the requirements laid down in Article 16 (5) sub-paragraph 1 or sub-paragraph 2 sentence 1 or sentence 2 of Regulation (EU) No. 537/2014.

(4) In the cases of (3b) to (3d), an administrative offence may be punished by imposing a fine of up to fifty thousand euros and, in the other cases, by imposing a fine of up to twenty-five thousand euros.

(5) In the cases of (3b) to (3d), the administrative authority within the meaning of § 36 (1) No. 1 of the Administrative Offences Act for CRR credit institutions within the meaning of § 1 (3d) sentence 1 of the Banking Act, except for the institutions specified in § 2 (1) Nos.



1 and 2 of the Banking Act, and for insurance undertakings within the meaning of Article 2 (1) of Directive 91/674/EEC is the Federal Financial Supervisory Authority, and in any other cases it is the Federal Office of Justice.

## § 406 [repealed]

## § 407 Compliance Fines

- (1) <sup>1</sup>The court maintaining the commercial register shall threaten to impose fines in order to insure compliance by members of the management board and liquidators who fail to comply with § 52 (2) sentences 2 to 4, § 71c, § 73 (3) sentence 2, §§ 80, 90, 104 (1), § 111 (2), § 145, §§ 170, 171 (3) or (4) sentence 1 in connection with (3), §§ 175, 179a (2) sentence 1 to 3, § 214 (1), § 246 (4), §§ 248a, 259 (5), § 268 (4), §§ 270 (1), § 273 (2), § 293f, § 293g (1), § 312 (1), § 313 (1), § 314 (1); § 14 of the Commercial Code shall remain unaffected. <sup>2</sup>Each such fine may not exceed five thousand euros.
- (2) Filings to the commercial register for registration pursuant to §§ 36, 45, 52, 181 (1), §§ 184, 188, 195, 210, 223, 237 (4), §§ 274, 294 (1), § 319 (3) may not be compelled by the setting of fines.

## § 407a Notifications to the Auditor Oversight Body

- (1) The administrative authority which is competent pursuant to § 405 (5) shall submit to the Auditor Oversight Body at the Federal Office for Economic Affairs and Export Control all decisions imposing fines pursuant to § 405 (3b) to (3d).
- (2) <sup>1</sup>In criminal proceedings involving a criminal offence pursuant to § 404a, the public prosecutor's office shall, if public prosecution is initiated, submit to the Auditor Oversight Body the decision which ends the proceedings. <sup>2</sup>If an appeal has been lodged against the decision, reference to such appeal shall be made when submitting the decision.

## § 408 Criminal Liability of General Partners of a Partnership Limited by Shares

<sup>1</sup>§§ 399 to 407 shall apply accordingly to partnerships limited by shares. <sup>2</sup>Insofar as such provisions refer to members of the management board, such provisions shall in the case of a partnership limited by shares apply to the general partners.

## § 409 Berlin Clause

[vitiating]

## § 410 Entry into Force

This Act shall enter into force on January 1, 1966.

## **Disclaimer**

The present translation is for convenience purposes only and intended to facilitate the understanding of the German law. Any liability with regard to the completeness and correctness of the contents shall be explicitly excluded. This document is not intended to give legal advice and, accordingly, it should not be relied upon. It should not be regarded as a comprehensive statement of the law and practice in this area. Readers must take specific legal advice on any particular matter which concerns them. If you require any advice or information, please speak to your usual contact at Norton Rose Fulbright.

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