Corporate Governance 2019

Contributing editor
Holly J Gregory

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

First published 2002
Eighteenth edition
ISBN 978-1-83862-119-3

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Corporate Governance

2019

Contributing editor
Holly J Gregory
Sidley Austin LLP

Lexology Getting The Deal Through is delighted to publish the eighteenth edition of *Corporate Governance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on China, Korea and the Netherlands.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Holly J Gregory, of Sidley Austin LLP, for her continued assistance with this volume.

LEXOLOGY®
Getting The Deal Through

London
May 2019

Reproduced with permission from Law Business Research Ltd
This article was first published in June 2019
For further information please contact editorial@gettingthedealthrough.com

Contents

Germany

Eva Nase and Georg Greitemann
P+P Pöllath + Partners

SOURCES OF CORPORATE GOVERNANCE RULES AND PRACTICES

Primary sources of law, regulation and practice

1 What are the primary sources of law, regulation and practice relating to corporate governance? Is it mandatory for listed companies to comply with listing rules or do they apply on a 'comply or explain' basis?

The primary sources for capital companies in Germany (GmbH, AG, KGaA, SE) are the German Limited Liability Companies Act (GmbHG), the German Stock Corporation Act (AktG), the European and German acts on European stock corporations (Societas Europaea, SE), the German Commercial Code (HGB), the Reorganisation of Companies Act (UmwG), the Takeover Act (WpÜG), the Securities Trade Act (WpHG), the Anti-Money Laundering Act (GwG), the applicable listing rules and the German Corporate Governance Code (DCGK), which differentiates between recommendations, which must either be complied with or deviations from which must be explained (comply or explain), and proposals, from which deviations are allowed without disclosure.

Responsible entities

2 What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder groups or proxy advisory firms whose views are often considered?

The primary government agencies are the federal parliament and, to a growing extent, the EU legislators. The German Corporate Governance Code and its amendments are prepared and issued by the Government Commission for the German Corporate Governance Code. The listing rules are usually set by the stock exchanges or other listing entities.

THE RIGHTS AND EQUITABLE TREATMENT OF SHAREHOLDERS

Shareholder powers

3 What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect or remove directors?

The two most popular legal company forms are the stock corporation (AG) and the company with limited liability (GmbH).

As regards the AG, the members of the supervisory board (non-executive directors) are elected by the shareholders (general meeting). The members of the management board (executive directors) are appointed by the supervisory board and not by the shareholders. This basic structure cannot be altered. Unless the articles of association provide otherwise, members of the supervisory board are elected by the simple majority of votes and can be removed with a 75 per cent majority of the votes. Unless the AG has entered into a control agreement with its parent company, the supervisory board and the management board act independently and cannot be required by the shareholders to pursue a particular course of action.

Unless the articles stipulate otherwise, the GmbH only has managing directors and no supervisory board. The managing directors are appointed and removed by the shareholders (shareholders' meeting) with a simple majority. The shareholders' meeting can require the managing directors to pursue a particular course of action.

The legal forms of a European stock corporation (SE) and a partnership limited by shares (KGaA) are, to a great extent, comparable to an AG.

Shareholder decisions

4 What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

The following selected decisions are reserved by law for the shareholders of an AG:

- election and removal of the supervisory board members;
- appointment of the auditor;
- appropriation of profits;
- formal approval of action for members of both the management board and supervisory board; and
- fundamental decisions, in particular amendments to the articles of association, liquidation of the corporation, merger, demerger, change of legal form, sale of substantially all the corporation's assets, and conclusion of corporate agreements (control agreements, profit and loss pooling agreements).

The following decisions are reserved by law for the shareholders of a GmbH:

- election and removal of the managing directors and conclusion of their service agreements;
- approval of the annual accounts;
- appointment of the auditor;
- appropriation of profits;
- formal approval of action for managing directors;
- fundamental decisions, in particular amendments to the articles of association, liquidation of the corporation, merger, demerger, change of legal form, sale of substantially all of the corporation's assets, and conclusion of corporate agreements (control agreements, profit and loss pooling agreements); and
- instructions to the managing directors.

Matters that are subject to a non-binding shareholder vote are rather uncommon in German law, except for resolutions on say-on-pay (see question 37).

Disproportionate voting rights

5 To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

In an AG, one share cannot carry more than one vote per share (in case of shares without nominal value) or one vote per euro of nominal value (in case of shares with a nominal value). The articles of association of a non-listed AG can provide for limits on the exercise of voting rights.

In a GmbH, disproportionate voting rights or limits on the exercise of voting rights are allowed.

Shareholders' meetings and voting

6 Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting? Are virtual meetings of shareholders permitted?

In an AG, an SE and a KGaA, shareholders cannot act by way of written consent without a meeting. Semi-virtual meetings of shareholders are permitted. The articles of association can provide for the requirement to register within a time frame of at least six days prior to the general meeting. In case of listed companies, such registration must be made by way of a specific depositary statement referring to the shareholding on the 21st day prior to the general meeting.

In a GmbH, shareholders can act by way of written consent without a meeting. Virtual meetings of shareholders are permitted.

Shareholders and the board

7 Are shareholders able to require meetings of shareholders to be convened, resolutions and director nominations to be put to a shareholder vote against the wishes of the board, or the board to circulate statements by dissident shareholders?

In an AG, an SE and a KGaA:

- shareholders holding at least 5 per cent of the registered share capital can require meetings of shareholders to be convened; and
- shareholders holding at least 5 per cent of the registered share capital or shares with a nominal amount of at least €500,000 can require resolutions to be put to a shareholder vote against the wishes of the supervisory board or management board, if this request is received by the company 24 days prior to the general meeting and, in case of a listed company, 30 days prior to the meeting.

Shareholders' requests to add to the meeting agenda must be published, potentially together with a statement from the management and supervisory board.

Counterproposals made by shareholders to the resolution proposals made by the management and supervisory board must be submitted to the shareholders, also potentially together with a statement of the management and supervisory board. In the case of listed companies, counterproposals and the company's statements thereto must be published on the company website.

In a GmbH, shareholders holding at least 10 per cent of the registered share capital can require meetings of shareholders to be convened or require resolutions to be put to a shareholder vote against the wishes of the managing directors.

Controlling shareholders' duties

8 Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action be brought against controlling shareholders for breach of these duties?

All shareholders have a fiduciary duty towards the company and towards the other shareholders. The fiduciary duty of controlling shareholders is more intense than the fiduciary duty of non-controlling shareholders. In an AG with a controlling shareholder, the controlling shareholder and its boards are subject to certain additional statutory duties. Enforcement actions can be brought against controlling shareholders and, under certain circumstances, their representatives for breach of these duties.

Shareholder responsibility

9 Can shareholders ever be held responsible for the acts or omissions of the company?

Based on corporate law, shareholders can be held responsible for the acts or omissions of the company only under exceptional circumstances. This may happen where the company acts through its shareholders. For example, if the GmbH has no managing directors, the shareholders are obliged to file for insolvency if the company is insolvent. Failure to do so will result in liability of the shareholder.

There are certain other areas of law that provide for responsibility of shareholders for acts or omissions of the company, including without limitation antitrust law, data protection law and criminal law.

CORPORATE CONTROL

Anti-takeover devices

10 Are anti-takeover devices permitted?

In public takeover bids, the management board is allowed to take pre-bid and certain post-bid defensive measures in accordance with the Takeover Act.

Pre-bid defences

The target's shareholders' meeting can authorise the management board to take action to prevent the success of any takeover bid, subject to approval of a defensive action (if and when taken) by the supervisory board. This authorisation is valid for 18 months and requires a qualified majority (75 per cent of the share capital represented at the general meeting). Furthermore, the shareholders' meeting can decide on capital measures or it can authorise the management board to acquire the company's own shares or to issue convertible bonds. The fact that payments for early termination of the contract of members of the management board should not exceed twice the annual remuneration (see question 28) limits the defensive effect of possible compensation claims, the 'golden parachute' defence.

Post-bid defences

After the takeover announcement, the management board must refrain from any frustrating action. However, the management board can seek alternative bids (white knight defence) or take actions that a prudent and conscientious director of a company not subject to a public takeover bid would have taken. Moreover, it can take defensive actions approved by the target's supervisory board, respectively approved by the shareholders' meeting (see above), or call a shareholders' meeting following the takeover announcement to vote on the defensive action. The notice periods are significantly shorter than with regard to ordinary shareholders' meetings. If this meeting is convened, the offer period is extended to 10 weeks to allow the shareholders' meeting to take place

before the offer expires. Finally, the boards can influence the shareholders to refuse a hostile takeover bid when giving their reasoned opinion. In this respect, the management board and the supervisory board must consider the transparency principle and avoid misleading statements.

European opt-in

A German listed company can opt out of the German rules for defensive action and opt in to the rules set out in the Takeover Directive (Directive 2004/25/EC) and implemented in the Takeover Act by amending the company's articles of association. By disapplying the opt-in, the target is automatically subject to the rules of the Takeover Act on defensive actions.

Breakthrough

Also, the articles of association of a German listed company may apply the 'breakthrough clause' of the Takeover Directive as implemented in the Takeover Act, under which certain transfer restrictions and restrictions on exercising voting rights in certain contracts do not apply under certain circumstances.

Publication of defence measures

All listed German companies must give detailed information on all existing defence mechanics in the management report that forms part of the company's annual financial statements. The supervisory board must comment on this information in its own statement for the annual general meeting.

Issuance of new shares

11 | May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

The general meeting of an AG, an SE and a KGaA can authorise the management board, subject to the approval of the supervisory board, to issue new shares (authorised capital). Authorised capital may not exceed 50 per cent of the registered share capital. Statutorily, shareholders do have pre-emptive rights. With a 75 per cent majority pre-emptive rights can be excluded, even in a management board's authorisations to issue new shares. Yet, proxy voters only approve such authorisations for exclusions of pre-emptive rights under certain requirements and to a certain percentage of the authorised capital (often 20 per cent).

Similarly, the shareholders' meeting of a GmbH can authorise the managing directors to issue new shares (authorised capital). Authorised capital may not exceed 50 per cent of the registered share capital. Under applicable case law, shareholders of a GmbH have pre-emptive rights to acquire newly issued shares, subject to certain exceptions and exclusion mechanisms.

Restrictions on the transfer of fully paid shares

12 | Are restrictions on the transfer of fully paid shares permitted and, if so, what restrictions are commonly adopted?

Restrictions on the transfer of fully paid shares in listed stock corporations (AG, SE or KGaA) are not permitted. Restrictions on the transfer of fully paid shares in non-listed companies are permitted and customary. In closed companies, the transfer of shares is usually subject to the prior approval of the supervisory board, shareholders' meeting or general meeting. Other customary restrictions include a right of first refusal or a tag-along right.

Compulsory repurchase rules

13 | Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

Compulsory share repurchases are not common in German law and practice. They may be allowed in certain exceptional cases.

Dissenters' rights

14 | Do shareholders have appraisal rights?

Shareholders have the right to sell their shares to the company at a fair value (valuation based on IDW S1 required) in case of certain types of mergers or similar transactions (eg, entering into a domination or profit and loss pooling agreement, change of legal form, squeeze-out, delisting, etc).

THE RESPONSIBILITIES OF THE BOARD (SUPERVISORY)

Board structure

15 | Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The predominant board structure of an AG, an SE and a KGaA follows the two-tier system with a management board, managing and representing the company, and a supervisory board supervising the management board. A one-tier system with one board consisting of executive and non-executive board members is only allowed in Germany within an SE.

Most GmbHs only have managing directors, which are all executive directors. They can have a supervisory board or advisory board, resulting in a two-tier structure. In cases of co-determination, a supervisory board is compulsory in a GmbH. A GmbH cannot have a one-tier board that includes executive and non-executive directors.

Board's legal responsibilities

16 | What are the board's primary legal responsibilities?

The supervisory board has the power to appoint and dismiss members of the management board, as well as the responsibility to supervise the management board's activities. So far, the supervisory board is entitled to request – regularly and irregularly – reports from the management board and to define certain transactions and measures in the articles of association of the company, the rules of procedure of the management board or in individual cases that are subject to the supervisory board's approval. However, such approval does not have any effect on the transactions or measures with regard to third parties, but only on the internal relationship between the two bodies.

Board obligees

17 | Whom does the board represent and to whom does it owe legal duties?

The supervisory board does not represent anybody in fulfilling its own legal duties. The supervisory board shall rather be independent to a great extent, according to the DCGK, in case of listed companies the supervisory board shall in its opinion propose a reasonable number of independent members. Supervisory board members, who may be delegated or elected from a certain shareholder majority, are not allowed to pass on any information received in their function as members of the supervisory board to the respective shareholder. Consequently, supervisory board members must always act in the best interest of the company, which itself is defined by the 'stakeholder model' (the opposite of the Anglo-Saxon shareholder model with a respective acting in the best interest of a shareholder).

Enforcement action against directors

18 | Can an enforcement action against directors be brought by, or on behalf of, those to whom duties are owed?

Managing directors of a GmbH may be instructed to take or to refrain from taking certain measures by way of a shareholder resolution (see question 3). Management board members of an AG and an SE are, conversely, entitled to manage the company in their own discretion. Consequently, neither the general meeting nor the supervisory board is allowed to adopt management decisions and to bring forward enforcement action against members of the management board. However, the supervisory board is entitled and, according to case law, obliged to assert liability claims against the management board, if the company suffered damages owing to breach of tasks and duties by the management board.

Care and prudence

19 | Do the board's duties include a care or prudence element?

Managing directors of a GmbH and management board members of an AG, an SE and a KGaA do have to apply the care of a prudent and diligent businessperson. Also, in supervising the management board of an AG or SE, the supervisory board has to follow this principle.

Board member duties

20 | To what extent do the duties of individual members of the board differ?

Generally, supervisory board members have the same rights and duties. However, applicable law and the DCGK provide for the requirement of appointing individual members with certain skills, for example financing, reporting and auditing expertise. Thus, these members' duties differ from the other members' duties. Hence, the differences in duties do not reflect a higher liability exposure.

Delegation of board responsibilities

21 | To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

The supervisory board is not allowed to assume management responsibilities and nor is it allowed to delegate supervising functions to the management board or to other persons. The supervisory board is, however, entitled to implement committees from its midst. In some instances, such as with respect to the management board members' service agreements, the committees are statutorily not entitled to resolve on such matters instead of the supervisory board, but only to prepare the respective resolutions of the supervisory board and to supervise their execution. Also, the board may ask a board member to prepare a certain topic. Yet, the responsibility to decide upon such topic remains in any instance with the supervisory board.

Non-executive and independent directors

22 | Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

In the case of a one-tier system within an SE (see question 15), applicable law requires that the majority of the members of the board must be non-executive. Members are non-executive if they are not registered as managing directors of the SE with the commercial register. If they are registered as managing directors, they have the power to manage and represent the company. Non-executive members are not allowed to do so, but are only entitled to supervise the executive directors (ie, the managing directors) within the internal relationship.

Board size and composition

23 | How is the size of the board determined? Are there minimum and maximum numbers of seats on the board? Who is authorised to make appointments to fill vacancies on the board or newly created directorships? Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition?

The supervisory board of an AG,an SE and a KGaA must have at least three members. Unless the stock corporation is co-determined (meaning that one-third or half of the board members are elected by the employees, see question 33), the supervisory board may also consist of any statutorily higher number of members, up to 9, 15 or 21 members, depending on the registered share capital of the corporation. In case of statutory co-determination, the number of members must be divisible by three. In case of equal co-determination, the total number of supervisory board members is dependent on the total number of German employees.

Shareholder representatives on the supervisory board are generally appointed by the general meeting; employee representatives in cases of co-determination generally by employee elections. In case of vacancies, under certain circumstances, members can, upon filing, also be appointed by a court.

In AGs, SEs and KGaAs that are co-determined and listed on a stock exchange, the supervisory board (in case of a one-tier system SE the administrative board) shall be composed of at least 30 per cent of women and at least 30 per cent of men. The minimum percentage shall be complied with by the supervisory board in its entirety.

Furthermore, corporations that need to fulfil the aforementioned gender criteria for their boards have to include a declaration on corporate governance in their management report. This declaration has to include information on whether the company has complied with the portion requirements for the appointment of women and men as supervisory board members.

Board leadership

24 | Is there any law, regulation, listing requirement or practice that requires the separation of the functions of board chair and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

In the German two-tier-system, the CEO (and other members of the management board), managing and representing the company, is strictly separated from the supervising function of the supervisory board. Neither body is allowed to assume functions of the respective other body (see questions 21 and 22). In case of a one-tier-system, within an SE the CEO and chair of the board may be the same person without any separation requirement.

Board committees

25 | What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

The supervisory board is entitled to establish committees from its midst. In some instances, the committees are statutorily not entitled to

resolve on matters instead of the supervisory board, but only to prepare resolutions of the supervisory board and to supervise their execution. According to the DCGK, an AG, an SE and a KGaA need to implement an audit committee and a nomination committee for nominating the candidates for election to the supervisory board.

Board meetings

26 | Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

Supervisory boards of listed companies are statutorily required to hold at least four meetings a year. Supervisory boards of non-listed companies are entitled to resolve on the holding of only two meetings per year. In any case, the supervisory board has to report on the number and main topics of its meetings in its annual report to the general meeting.

Board practices

27 | Is disclosure of board practices required by law, regulation or listing requirement?

As mentioned in the answer to question 26, the board is statutorily obliged to report on its constitution, its meetings, the attendance thereof and its supervising activities in its yearly report to the general meeting. The same applies to the work of its committees.

Remuneration of directors

28 | How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions or compensatory arrangements between the company and any director?

The AktG and the DCGK provide for specific rules, to which the supervisory board has to adhere when resolving upon fixed and variable remuneration of the management board members – the latter is differentiated between short-term and long-term incentives – as well as on loans or other compensatory arrangements (eg, stock options). Also, the general meeting is legally entitled to resolve on the management boards' remuneration (say-on-pay). However, this resolution is of a declaratory nature only (ie, the supervisory board's responsibility to decide upon the remuneration remains unaffected thereby). Service contracts may be entered into for five years at the most, with a right of renewal. According to the DCGK, the service contracts of management board members shall provide that payments, including fringe benefits, made to a management board member in the case of an early termination of the contract do not exceed twice the annual remuneration (severance cap) and do not constitute remuneration for more than the remaining term of the employment contract. As regards amendments to the AktG and the DCGK on remuneration of directors currently under discussion, see question 37 and 43'.

Remuneration of senior management

29 | How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions or compensatory arrangements between the company and senior managers?

The responsibility to decide upon senior management's cash compensation is statutorily addressed to the management board. The supervisory board can, however, foresee approval requirements with respect to cash compensation and other advantages, like granting of cars. According to applicable law, the granting of stock options to senior management requires a resolution of the general meeting, which has to fulfil certain statutory requirements, and the approval of the supervisory board.

D&O liability insurance

30 | Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

D&O liability insurances are permitted and common practice for management and supervisory board members in listed companies. Yet, they are also becoming more popular in non-listed companies. Premiums are generally paid by the company. However, members of the management board of a stock corporation are obliged to bear a deduction between 10 per cent of the damage and one-and-a-half times his or her fixed salary. With respect to supervisory board members, a respective deduction is recommended by the DCGK.

Indemnification of directors and officers

31 | Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

Besides the granting of D&O insurance coverage, indemnifications by an AG, an SE and a KGaA are not permitted, as the company is only allowed to waive or settle on liability claims against management board members three years following their accrual and only subject to a general meeting's approval without an objection of a shareholder minority jointly representing 10 per cent of the registered share capital.

In a GmbH, as German law follows the stakeholder model, according to which managing directors have to act in the best interest of the company (and not the shareholder or the majority of shareholders), indemnification agreements are subject to fiduciary duties' constraints. Also, indemnifications by a GmbH are not allowed, if and to the extent that the managing directors have breached capital protection rules.

Exculpation of directors and officers

32 | To what extent may companies or shareholders preclude or limit the liability of directors and officers?

A preclusion is not allowed within an AG, an SE and a KGaA. The supervisory board is responsible and, according to case law, obliged to assert liability claims against management board members (see question 31).

Employees

33 | What role do employees have in corporate governance?

The management board is obliged to implement proper corporate governance and to continuously supervise its functionality. Employees have a role in the following areas. The management board is allowed to deploy employees by way of vertical instruction and is thus dependent on the fulfilment of the employees' tasks and duties. This fulfilment is itself subject to supervision by the management board. In addition, section 4.1.3 of the German Corporate Governance Code recommends the establishment of a whistle-blower system. This should enable employees to give anonymous reports of legal violations in the company. If an AG, a KGaA or a GmbH exceeds the threshold of generally 500 German employees, one-third of the supervisory board members of the company must be employee representatives (One-Third-Participation Act). If it exceeds 2,000 German employees, the supervisory board must consist of 50 per cent employee representatives (Co-Determination Act) (see question 23).

Board and director evaluations

34 Is there any law, regulation, listing requirement or practice that requires evaluation of the board, its committees or individual directors? How regularly are such evaluations conducted and by whom? What do companies disclose in relation to such evaluations?

No such evaluations are provided for, either statutorily or according to regulation or listing requirements. This applies to both management and supervisory board.

DISCLOSURE AND TRANSPARENCY

Corporate charter and by-laws

35 Are the corporate charter and by-laws of companies publicly available? If so, where?

The deed of incorporation and the articles of association of German companies are publicly available. They are available through the commercial register, which is administered and managed by the local courts. The online commercial register (www.handelsregister.de) includes and allows downloading of all commercial register documents submitted since 2007. The articles of association of listed companies are generally also available through their websites.

The by-laws of companies (meaning rules of procedure for the supervisory board, supervisory board committees, the management board or the managing directors) are generally not publicly available. Some listed companies publish their by-laws on their websites.

Company information

36 What information must companies publicly disclose? How often must disclosure be made?

Companies must publicly disclose their annual accounts. Listed companies may be required to disclose more financial documents, such as half-year or quarterly reports.

Companies must publicly disclose certain information regarding changes to their shareholder structure and certain other information (eg, capital increases).

Companies must file certain information and documents with the commercial register, which can be accessed by the public. In addition, companies whose shares are listed in an organised market must disclose:

- insider information through ad hoc notifications;
- subject to receiving such information from shareholders, the increase and decrease of their shareholdings (3, 5, 10, 15, 20, 25, 30, 50 and 75 per cent), and the increase and decrease of positions in financial instruments with the same percentage rates except for the 3 per cent threshold;
- subject to receiving director's dealings notifications, information thereupon; and
- an annual statement on compliance with the German Corporate Governance Code (comply or explain, see question 1).

Under the recently amended German Money Laundering Act (GwG), legal persons organised under private law and registered partnerships have to collect, retain and keep up-to-date information on its beneficial owners and notify this information electronically to the German transparency register. There are, however, exceptions to this obligation in the case that the identity of the beneficial owner can already be discerned from other publicly available information or publicly available registers.

HOT TOPICS

Say-on-pay

37 Do shareholders have an advisory or other vote regarding remuneration of directors and senior management? How frequently may they vote?

The general meeting of a listed AG, SE and KGaA has an advisory vote on the remuneration of the members of the management board (see question 28). However, this does not affect the remuneration of senior management. The management board and the supervisory board resolve upon the resolution proposal to the general meeting; they are free to decide whether and how often the general meeting will vote. This will, however, change in 2019 owing to the implementation of the amended EU Shareholders' Rights Directive, which is currently in the legislative procedure and will become effective on 10 June 2019 at the latest. According to the current draft implementation act, the annual general meeting must vote on any material change to the remuneration policy, at least every four years. If the general meeting dismisses the resolution proposal upon remuneration, the next annual general meeting has to resolve upon a reviewed remuneration policy again. The resolution has to be published online for the period of the application of the remuneration system, at least for 10 years. The annual general meeting has to also resolve upon the approval of the remuneration report for the previous financial year, with the exception of small and medium-sized corporations within the meaning of section 267(1) and (2) of the German Commercial Code, if the remuneration report is presented as a separate item on the agenda of the annual general meeting. This vote or resolution cannot be objected to by means of a contesting action or action for annulment.

Shareholder-nominated directors

38 Do shareholders have the ability to nominate directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense?

As the members of the management board of an AG, an SE and a KGaA are not elected by the shareholders' meeting, shareholders of a stock corporation do not have the ability to nominate members of the management board. As regards members of the supervisory board, candidates are to be proposed to the general meeting by the supervisory board. However, shareholders are entitled to make counterproposals to the resolution proposals made by the supervisory board (see question 7). Apart from this, the model of a shareholder-nominated director is not provided for in German law and regulations.

Shareholders of a GmbH have the ability to nominate managing directors and have them included in shareholder meeting materials that are prepared and distributed at the company's expense.

Shareholder engagement

39 Do companies engage with shareholders? If so, who typically participates in the company's engagement efforts and when does engagement typically occur?

Listed companies generally do not engage with their shareholders, in particular not outside the ordinary or extraordinary general meetings. In preparing such meetings, the CEO has calls with shareholder representatives and potential proxy voters. However, the CEO abstains from providing them with any information that the CEO has not already disclosed in the invitation to or does not intend to disclose in general meeting to all other shareholders.

However, the DCGK provides that the chair of the supervisory board should, to an appropriate extent, be in regular conversation with

investors on supervisory board issues. If a listed company chooses not to follow this proposal, it does not have to explain its choice or its reasons (see question 1).

Closed companies typically engage with their shareholders, as is the case in the majority of jurisdictions.

Sustainability disclosure

40 | Are companies required to provide disclosure with respect to corporate social responsibility matters?

Under the HGB, companies that meet certain criteria concerning their size are under the duty to issue a non-financial statement that expands their management report. This statement has to briefly describe the business model of the company. Moreover, it has to refer to other aspects of corporate social responsibility, at least to environment-related matters, employee-related matters, social matters, respect for human rights and fight against corruption and bribery.

As regards disclosure requirements for corporations that need to fulfil certain gender criteria for their boards, see question 23.

Companies with limited liability and employee co-determined supervisory boards have to include in their annual report information on the achievement of their gender diversity targets.

CEO pay ratio disclosure

41 | Are companies required to disclose the 'pay ratio' between the CEO's annual total compensation and the annual total compensation of other workers?

There is no requirement to disclose this pay ratio. Nevertheless, companies do have to add a note to their profit and loss statement stating the total remuneration granted to each of the following bodies, the management board, the supervisory board, an advisory board or a similar body.

Gender pay gap disclosure

42 | Are companies required to disclose 'gender pay gap' information? If so, how is the gender pay gap measured?

There is no requirement to disclose information concerning the gender pay gap. However, companies with generally more than 200 employees are obliged upon an employee's request to supply information on the average payment for comparable work, and if comparable work is predominantly done by women or men. Furthermore, companies with more than 500 employees that are under a duty to publish a management report are, according to the Payment Transparency Act, obliged to publish a report that states their measures concerning the promotion of gender equality and equal pay.

UPDATE AND TRENDS

Recent developments

43 | Identify any new developments in corporate governance over the past year. Identify any significant trends in the issues that have been the focus of shareholder interest or activism over the past year.

The commission overseeing the draft amendment of the DCGK has proposed an amended version of the DCGK. While many of the DCGK's provisions will be deleted following the draft, as these provisions are repeating applicable law rather than setting additional standards, the draft introduces the concept of principles preceding individual recommendations and outlining the essence of the most important legal rules and concepts. Analogous to the comply-or-explain concept with respect to the recommendations, companies are to be asked to explain how they have implemented the principles set out in the DCGK ('apply and explain'). In addition, the commission has introduced new recommendations regarding the remuneration of the management board seeking, among other goals, greater transparency, social acceptance of the compensation of the management board and to incentivise certain behaviours of the management board. The third aspect that has been heavily modified concerns the rules relating to the supervisory board, especially the indicators on when a member of the supervisory board is to be considered independent. Some other recommendations have been added. For example, a maximum of five supervisory board mandates per individual has been recommended.

While consultation on the draft DCGK amendment has ended, a revised version of the DCGK has yet to be resolved by the commission. The commission planned to submit a revised version of the draft to the Ministry of Justice in April 2019, to be published shortly after the implementation of the amended EU Shareholders' Rights Directive. However, as the draft has not yet been submitted, it cannot yet be foreseen when the amended version of the DCGK will be enacted and to what extent the amendments currently proposed will become effective.

P+P Pöllath + Partners
Attorneys-at-Law | Tax Advisors

Eva Nase
eva.nase@pplaw.com

Georg Greitemann
georg.greitemann@pplaw.com

Hofstatt 1, Entrance Färbergraben 16
80331 Munich
Germany
Tel: +49 89 24 240 0
Fax: +49 89 24 240 999

An der Welle 3
60322 Frankfurt/Main
Germany
Tel: +49 69 247 047 0
Fax: +49 69 247 047 30

www.pplaw.com

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

ISBN 978-1-83862-119-3