

# Governing the Corporation



# Corporations

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graph TD; A[Corporations] --> B["Stock corporations or 'Aktiengesellschaften' ('AG')"]; A --> C["Private limited companies ('Gesellschaften mit beschränkter Haftung' or 'GmbH')"]; B --> D["The Aktiengesetz (Stock Corporation Act) of 1965"]; C --> E["The GmbH-Gesetz (Limited Liability Companies Act)"]; D --> F["+"]; F --> G["The Co-determination Act of 1976"];
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Stock corporations or  
"Aktiengesellschaften" ("AG")

The Aktiengesetz (Stock Corporation Act)  
of 1965



The Co-determination Act of 1976

Private limited companies  
("Gesellschaften mit beschränkter  
Haftung" or "GmbH")

The GmbH-Gesetz (Limited Liability  
Companies Act)

# The Management Board

## Appointment

- The SB appoints the members;
- Period should not exceed five years;
- Appointment may be renewed;
- The SB may appoint one member as chairman;
- The SB may revoke the appointment for cause;
- If the MB does not have the required number of members, the court makes the necessary appointments.

## Remuneration

- Remuneration bears a reasonable relationship to the duties and performance, does not exceed standard remuneration without any particular reasons;
- If the situation of the company deteriorates remuneration can be reduced to a reasonable level.

# The Management Board

## Members

- The articles shall determine the number;
- The MB may comprise one or more persons;
- Only a natural person with full legal capacity may be a member of the MB

## Prohibition of Competition

- Members of the MB may neither engage in any trade nor enter into any transaction in the company's line of business on their own behalf;
- They may be neither a member of the MB, nor a manager or general partner of another commercial enterprise

# The Management Board

## Management and Representation

- The MB have direct responsibility for the management;
- Members manage the company jointly;
- One or more members may not resolve differences of opinion against the majority of members;
- The MB may issue by-laws;
  
- The MB represent the company in and out of court. The authority of the MB to represent the company may not be restricted;
- Particular members of the MB may represent the company;
- The MB obligated to execute any resolution adopted by the shareholders' meeting;
- The MB shall report to the SB.

# The Management Board

## Responsibility

- The members of the MB employ the care of a diligent and conscientious manager;
- They do not disclose confidential information and secrets of the company;
- Members of the MB who violate their duties are jointly and severally liable to the company for any resulting damage;
- They bear the burden of proof whether or not they have employed the care of a diligent and conscientious manager;
- The members of the MB shall not be liable for damages if they acted pursuant to a lawful resolution of the shareholders' meeting.

# Supervisory board

## Members:

- shall comprise three members (or a specified higher number stated by Article);
- number shall be divisible by three;
- the maximum number of members of the SB:

Share capital	number
Up to 1 500 000 euros	9
More than 1 500 000 euros	15
More than 10 000 000 euros	21

- Only a natural person with full legal capacity;
- Cannot be members who :
  - Is already a member of the SB in ten commercial enterprises;
  - is the legal representative of a controlled enterprise of the company;
  - is the legal representative of another corporation whose SB includes a member of the MB of the company.

# Supervisory board

## **Appointment:**

- Elected by shareholders' meeting;
- ½ (?) should be appointed as representatives of the employees to The Co-determination Act;
- The right to appoint members may be granted by The Article to specific shareholders;
- For each member of the supervisory board a substitute member may be appointed;

## **Appointment by the Court:**

- For a period of more than three months number of members less than it is required;
- motion by the MB, a member of the SB or a shareholder (quick, prior to the next meeting of the supervisory board);
- the court shall restore the number
- term of office of such member shall expire in any event as soon as the deficiency in the composition of the SB has been rectified.



# Supervisory board

## Removal

*If they were appointed by nomination or by article:*

- Motion could be claimed by:
  - The SB (resolve on such motion by simple vote);
  - Shareholders whose aggregate holding amounts to  $\frac{1}{3}$  of the share capital;
- may be removed pursuant to resolution of the shareholders' meeting prior to the expiration of their term of office (a majority of not less than  $\frac{3}{4}$  of the votes cast);

# Supervisory board

## Composition:

- The supervisory board members + the shareholders + the employees (in general cases);

The supervisory board does not comply with applicable statutory provisions

- The management board announce such fact in the company's journals
- Make motion to the court
- The new supervisory board shall be composed in accordance with the statutory provisions specified + the previous members of the supervisory board shall expire.

# Supervisory board

## **Interference with MB:**

- appoint of certain SB' members as deputies for MB' members for 1 year
- not exercising of its functions as SB' member during the exercising functions as MB' member
- representation of the company both in and out of court as against the management board

# Supervisory board

## **Internal organization:**

- may appoint from among its members one or more committees
- in particular, an internal audit committee

## **Resolutions:**

- quorum can be determined by the articles or not
- at least one-half of the number of SB's member is required

# Supervisory board

## **Duties and Rights:**

- examination of the books, records and assets of the company
- commission of individual members
- call of a shareholder's meeting

## **Remuneration:**

- remuneration may be determined in the articles or set by the shareholders' meeting

# General Meeting

- general shareholders' meeting is an independent body in the German stock corporation
- the function of GM is internal decision making

# How GM can be convened?

- By the management board and supervisory board in the cases determined by law or the articles of incorporation or if the well-being of the company so demands (§ 121 (1) AktG):
- **by the management board** (normal case) **and/or by the supervisory board** by a simple majority (§ 121 (2), § 111 (3)),
- – **by the shareholders**, if their shares together amount to 5% of capital (§ 122 (1)),
- or
- – **by the management board**, if the annual financial statements or the interim financial statements indicate a loss of half of total capital (§ 92 (1)).

# Powers of GM

- GM shall resolve on matters listed in § 119 AktG and can only decide about management problems if the management board has authorized it to do so.
- GM may not decide on other matters.



# Powers of GM

GM shall resolve on all matters listed in Aktiengesetz, 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
- 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.

# Shareholders' meeting

## Principle of Simple Majority of Votes

- 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.
- The articles may provide for different rules in respect of elections.

## Voting Rights

- Voting rights shall be exercised **in proportion to the par value of shares.**
- 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.
- Voting rights shall arise as from the date on which contributions have been made in full.

# Shareholders' meeting

## Voting Rights

- Voting rights may be exercised by a proxy holder.
- The listed company at least has to offer to transmit such proof by electronic communication. If proxy holders are authorised by the company, the authorisations are to be kept by the company for review for three years; shall apply analogously.
- The method of exercising the voting rights shall be determined by the articles.

# Shareholders' meeting

## "One share, one vote"

- According to the KonTraG German stock corporations may **no longer create multiple voting stock or caps on voting rights**. There is a grandfather clause for existing caps and multiple voting stock.
- The main objective of such provisions has been the prevention of hostile takeovers.

# Areas reserved for shareholder approval

- Areas reserved for shareholder approval
- removal of supervisory board members elected by the general meeting
- give a vote of no confidence against a member of the management board at a general meeting, which may lead to the removal of that member by the supervisory board
- approval of the annual financial statements, to the extent that this does not lie within the competence of the management board and the supervisory board
- appropriation of distributable profits

# Areas reserved for shareholder approval

- amendments to the Articles
- consent to any transformation of the AG pursuant to the Transformation Act, such as mergers and consolidations, or any change of legal form
- consent to the integration of the AG into another stock corporation and of the termination of the integration (§§ 319 para 1 and 2, 320 para 1, 327 para 1 no 1 AktG)
- authorisation to acquire, to sell and to redeem own shares (§ 71 para 1 no 7 and 8 AktG)
- establishing internal rules of procedure for the preparation and execution of the general meeting