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Company Law Reform in Germany

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I. Background

Since the introduction of corporation laws in the individual German states during the first half of the 19th Century, Germany has repeatedly amended and reformed its company law. Such reforms and amendments were prompted in part by stock exchange fraud and the collapse of large corporations, but also by a routine adjustment of law to changing commercial and societal conditions. During the last ten years, a series of significant changes to German company law led one commentator to speak from a "company law in permanent reform." Two years ago, the German Federal Chancellor established a *Regierungskommission Corporate Governance* ("Government Commission on Corporate Governance") and instructed it to examine the German Corporate Governance system and German company law as a whole, and formulate recommendations for reform.

What are the causes for the current round of reforms in German company law, and what are the goals of these reforms?

- First, in recent years there have been a number of cases in which large companies have collapsed in connection with criminal behavior on the part of their management or because of failures in the corporate governance system used in these companies;
- Second, German companies that are listed both at home and on the exchanges of foreign countries are confronted with the requirements that apply in such countries. And from the other direction, multinational institutional investors often include German companies in their portfolios and thus bring their international market expectations into the German market. This internationalization of the supply and demand of capital serves to level country-specific differences in corporate governance rules.
- Germany is reforming its pension system toward a model that is partly based on institutional investors managing privately invested capital. This development will bring significant changes into the German capital markets, broaden the range of participating investors, and demand further reform of the regulatory environment.
- A "competition of regulators" in Europe is becoming increasingly important. This includes the development of a company law that meets the needs of the market.

- Companies that are financed by venture capital require a more flexible company law.

II. The Report of the Government Commission on Corporate Governance: Drafting and Implementation

In July of 2001, the Commission submitted a report to the Government containing about 150 recommendations on how the German system of corporate governance should be improved and how company law should be amended to implement the recommended measures[1]. The Commission collected information for the preparation of its report through a detailed questionnaire that it prepared and dispatched to various company law and business experts and trade associations, both in Germany and abroad. The Commission studied the answers to these questionnaires and supplemented them with the responses to follow-up discussions with experts and associations. The Commission both prepared and solicited the preparation of numerous memoranda on solutions that foreign law offered to individual problems. In particular, the Commission studied the planned reform of English company law, and to this end a group of the Commission's members established contact with the English Reform Commission at the DTI.

The Commission's report was welcomed by both the current government and the opposition party, so it is reasonable to assume that its main recommendations will be implemented into German law, even if there is a change of government following the elections to be held this autumn. Implementation should take place in three steps:

1. The Code of Best Practice

The first step, drafting a Code of Best Practice, is now complete[2]. In the past, a number of private initiatives by market participants in Germany had developed codes along these lines. The Government Commission recommended that a commission be appointed to study the existing codes and develop a single, uniform Code of Best Practice. A former chairman of the management board of Thyssen-Krupp, Mr. Gerhard Cromme, was named to chair the Code Commission, and the Code was published in February of 2002. The Code applies to listed companies, but is not mandatory, and rather operates on a "comply or explain" basis.

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[1] Cf. the translation of the summary of recommendations sub VII, below.
[2] Cf. German Corporate Governance Code (www.corporate-governance-code.de/index-e.html)

2. Initial Implementing Legislation

The second step, implementation of our recommendations into German law, has also been completed. Promptly after the Commission's report was submitted, the Government prepared draft legislation amending the German Stock Corporation Act (*Aktiengesetz*), in the form of a "Law for the Further Reform of Corporation Law, Accounting Law, and of Transparency and Publicity" (*Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität*[3]). This legislation was recently approved by the German Parliament and will enter into force in August of this year. This reform of company law essentially has two elements:

- first, the legislation implements a "comply or explain" principle. That is, the management and supervisory organs of all listed companies must state in their annual financial statements that are released to the markets whether they have complied and intend to comply with the Code of Best Practice, or explain why they do not or intend not to comply with individual provisions of the Code; and
- second, the legislation addresses certain of the Commission's recommendations, that as a matter of law and policy, can be carried into law before the end of the legislative term.

3. Comprehensive Reform of Company law

It will not be possible to realize the third step of implementation until after the beginning of the next legislative term. This third step will be a comprehensive reform of German company law based on the recommendations of the Commission. The following sections address the main aspects of this reform.

III. National versus European Regulation

The Government Commission's report does not contain express statements regarding the relationship between national and supranational (European Community) legal systems. However, because the Commission prepared recommendations for the national legislator, and because such recommendations were to be implemented through national legislation, the Commission's position in this regard was clear.

[3] Bundesrat-Drucksache 450/2 (31.05.2002).

It is not necessary at this time for me to repeat the many reasons why a continued harmonization of European company law should not be pursued. Recently, the Bolkestein commission has requested a group of company law experts to prepare a questionnaire focusing directly on the development of company law in Europe[4]. Hopefully this group of company law experts will take a position in clear contrast to the policy of harmonization that was previously pursued in Europe, and focus on those aspects of company law that are genuinely transnational.

IV. The Two-Tier System

As early as 1870, Germany traded in the board model – or one-tier system – for a two tier arrangement of corporate management and supervisory organs. The original idea was to give shareholders, who are hampered, as is well known, by collective action dilemmas, a representative body (*Aufsichtsrat* – supervisory board) to protect their interests against the management board (*Vorstand*), thereby ameliorating the potential conflicts in the principal-agent relationship between investor and manager. This supervisory board model was later amended to include another stakeholder – i.e., employees – and to give them rights to exercise control within the company and participate in deliberations.

The division between a management board (*Vorstand*) on the one side and a supervisory board (*Aufsichtsrat*) on the other corresponds to the division between "inside" directors and "outside" directors as used in the one-tier model. Whether these two functions are placed in a single, or in two separate bodies is only of secondary significance. The Government Commission saw no convincing reason to deviate from the traditional German model. In practice, a certain degree of convergence of the two systems is visible. In the one-tier system, there in an increasing tendency to divide the functions of the chairman from those of the chief executive officer ("CEO"), board subcommittees are being staffed with a majority of outside directors, and there is an insistence that outside directors be adequately "independent". In the spirit of this convergence movement, the Government Commission attempted to improve the information available to the supervisory board, give it positve and negative incentives in order to improve the efficiency of its work, and thus increase the quality of a company's strategic direction and supervision of management. However, there appear to be limits to just how far this

[4] „A Modern Regulatory Framework for Company Law in Europe: A Consultative Document of the High Level Group of Company Law Experts“, Brussels (2002).

convergence movement can go, and one such limit is found in employee co-determination, a topic that I address in detail below.

The Government Commission did discuss whether it should recommend giving companies the option of choosing between a one and a two-tier structure, as is done in France. Giving companies such a choice appeared to be an attractive solution. However, the Commission decided not to make such a recommendation, both because an optional choice of this kind would require significant and technically difficult changes to the Stock Corporation law and also because the question must in any case be reconsidered in light of the possibility of establishing a European Company under the Council's recently adopted Regulation.

V. Co-Determination

Austria, Germany, Sweden, and The Netherlands have co-determination systems that while broadly similar, present significant differences in their details (the French system is again optional). To date, there have been no undisputed econometric studies on the (negative or positive) correlation between co-determination and company performance. For this reason, and because the institution of co-determination is generally accepted in Germany as an effective social compromise, any suggestion to eliminate co-determination in Germany would have to be approached with care.

The Government Commission placed the question of co-determination in brackets simply as a working compromise because of the time the question would have demanded – not because it thought that no changes were necessary. Indeed, the opposite is the case. The co-determination laws arose in a completely different economic and political environment. For example, when parity co-determination (i.e., half of the supervisory board of a company with more than 2,000 employees is filled by representatives of the employees) was introduced in 1976, Deutsche Bank AG was still a "German" bank in the true sense of the word: the great majority of its employees were employed in Germany, and the banks revenues were generated primarily in Germany. Today, Deutsche Bank employs as many persons in each of New York and London as it does in Frankfurt, and the bulk of its revenues are generated abroad. Regardless of this situation, only the employees in Germany have a right to elect representatives to the supervisory board. It is clear that this is not an acceptable model for an international holding company in the long run.

International holding companies with their registered offices in The Netherlands are exempted from the Dutch co-determination law. This is an example of a solution that should be studied carefully for possible application in Germany. In the long run, the markets will not tolerate that national interests are a relevant factor in decisions such as the opening or closing of a manufacturing unit of an internationally operative company.

VI. Selected Recommendations

1. The Management Board

a) Stock Options and Similar Programs

It is perhaps interesting for an international audience for me to shed some light on the German law treatment of executive management compensation, in particular, stock option and long-term incentive plans. In recent years, publicly listed companies in Germany have greatly inflated the amounts of compensation paid to executive management and changed the existing structures of compensation (fixed, performance-linked salaries and bonuses, and long-term incentive plans), and they have done so refering to a need to meet (questionable) international standards. Regretfully, these German companies have not felt a like urgency to meet international transparency standards. Under German law, shareholder approval is not necessary for the creation of a stock option plan, but it is necessary for an increase in capital to create new shares or the repurchase of outstanding shares that will be used for the option plan. In this context, one would expect that it would be required to disclose the value, value range, or potential value of the plan to the shareholders so they could understand the degree of dilution that their equity holdings could suffer as a result of the plan's adoption. However, this is not the case. To this end, the Government Commission recommended that the Code of Best Practices require the drafting of a report on the value of any proposed plan and its submission to the shareholders' meeting. I regret to say that the Code Commission did not accept this recommendation.

It would also be useful to disclose the structure and value of stock option plans on an annual basis in the notes to the annual financial statements or business report. The Government Commission recommended this measure as well, but also on this point the Code Commission decided to include only a vague requirement:

> "The concrete details of a stock option plan shall be disclosed in a suitable form" (No. 4.2.3 Code of Best Practices). "The compensation of the members

of the management board shall be reported in the notes to the consolidated financial statements, broken down into their fixed, performance-linked, and long-term incentive components. The figures should be presented on an individual basis" (No. 4.2.4 Code of Best Practices).

Another, related topic is the manner in which stock options are evidenced on a company's income statement. According to a proposal submitted by the German Accounting Standards Board it would appear that the value of an option should be recorded as an expense[5]. However, the relevant nationally applicable standard has not yet been promulgated.

A last topic that should be addressed under this heading is the determination of performance targets. The Government Commission expressed the position that a performance target may not be merely an increase in the relevant company's share price by *x* percent. I regret to say that also on this point the Code Commission chose not to follow our recommendation, and expressly permits companies to fix as performance targets a mere increase in their share price. This allows windfall profits and the rewarding of under-performance in a rising market. This should not be permitted.

The Government Commission recommended not to impose an absolute cap on the income received through a stock option plan because such caps could be inappropriate for any given company taken on an individual basis. However, it is worth considering whether a supervisory board should be asked to develop an individual cap for its own company and to impose and publish such cap.

b). Liability and Enforcement

In theory, the liability of board members to the company under German law has a sharp bite. As in Anglo-American legal principles, German law distinguishes between a breach of duty of care and a breach of duty of loyalty. For matters involving the duty of care, a presumption in favor of management is created by application of the business judgement rule. As a practical matter however, a director is only held liable when the company is subject to insolvency proceedings or when the company defends itself against the claims of a (in most cases terminated) director. German company law does not allow derivative suits (*actio pro socio*) that could be filed by any, individual shareholder. Rather, a shareholder must hold five per cent of the company's shares or have a holding with a nominal value of at least € 500,000 in order to file a similar action. The

[5] German Accounting Standard Nr. 11 (E-DRS 11), www.standardsetter.de/drsc/doc/11.pdf

Government Commission recommended that, for cases of gross negligence or intentional action, the German legislator reduce this threshold to one per cent or a stock exchange or market value of € 100,000.

2. The Supervisory Board

As mentioned above, there are no current plans in Germany to make changes to the two-tier board system or the right of employee co-determination. In the future, the supervisory board should be better informed, become more active, and exercise its counselling and supervisory functions more effectively. The recommendations of the Government Commission – which serve as the basis for the Code of Best Practices and the Law for the Further Reform of Corporation Law, Accounting Law, and of Transparency and Publicity – seek to contribute to reaching this goal. In practice, this means an improved flow of information from the management board and broader supervisory powers, more frequent meetings and better preparation for each meeting, supervisory board members with higher qualifications, increased independence, and more international background and experience, more work for the supervisory board, stricter confidentialitiy requirements and liability provisions (and better pay, which may of course be performance-linked). In addition, the supervisory board should in the future examine the efficiency of its own performance.

3. The Shareholders' Meeting

The recommendations of the Government Commission regarding the shareholders' meeting, and communication between the company and its shareholders in general, aim toward promoting the broadest possible use of modern information and communication technologies, including interactive webcasts of shareholders' meetings (a webcast of the meeting with online shareholder voting). Competition for proxies should be increased.

The Government Commission recommends transforming the various, paper-based archives of information on companies (the Commercial Register (*Handelsregister*), the Official Gazette (*Bundesanzeiger*), the regulatory files of interim reports (*Zwischenberichte*), current reports (*Ad-hoc Mitteilungen*), and changes in major equity holdings in listed companies, and prospectuses) into electronic form, and creating a centralized internet portal through which such information can be retrieved (a "German Business Register").

4. Accounting and Auditors

The Government Commission also made a number of recommendations regarding accounting and auditors. Permit me to mention two such recommendations here. The first of these concerns the enforcement of accounting standards. It was felt that there was a gap in German regulation in this respect. The Commission proposed to adopt an enforcement system similar to the British model (enforcement by the Financial Reporting Review Panel) rather than the U.S. approach (enforcement by a government agency). The second recommendation goes to the independence of auditors. German law already contains a number of provisions designed to counteract typical conflicts of interest. The Government Commission held the opinion that these requirements should be strengthened through disclosure requirements.

In the future, before the supervisory board proposes an auditing firm to the shareholders' meeting for appointment, it must examine the auditing firm's independence and consider any doubts that may arise concerning such independence. For this purpose, the supervisory board must have the proposed auditing firm submit a declaration disclosing all professional, financial, and other relationships it has with the company and its management and supervisory bodies; this includes, in particular, consulting assignments during the preceding fiscal year and the compensation received for such assignments. In addition, the auditing firm must promptly inform the chairman of the supervisory board or the audit committee of any grounds for potential conflicts of interest or partiality arise during the performance of the audit.

GERMAN GOVERNMENT PANEL ON CORPORATE GOVERNANCE

Summary of Recommendations

Foreword

The institutionalization and internationalization of shareholdings, the globalization of capital markets and the rapid development of information technologies have placed our corporate law system under increasing pressure to adapt to the ever changing requirements of the market. For this reason, in May 2000, the German government called together a group of industrialists, representatives of shareholder associations and institutional investors, trade unionists, politicians and scholars to form an expert Panel with the task of reviewing the German corporate governance system. This "Government Panel on Corporate Governance" prepared a questionnaire on key issues in the field, and solicited responses and input from numerous national and international experts and institutions.

In July 2001, the Commission presented its 320 page report (available at www.otto-schmidt.de/corporate_governance.htm) to the German Chancellor. The Report made nearly 150 recommendations for amendments or changes to existing provisions of German law and also set forth proposals on how the German corporate governance system should be further developed in order to maintain a normative framework that is suitable and attractive not only for companies, but also for domestic and foreign investors. In order that the Panel's proposals may receive careful consideration from a diverse audience, it seems very useful to keep a wider public informed of the Panel's recommendations. Therefore, also on behalf of the Panel, I very much appreciate that the international law firm Shearman & Sterling has taken the initiative to have the summary of the Panel's recommendations translated into English.

Theodor Baums

Chairman, Government Panel for Corporate Governance

German Government to Reform Company Law and Strengthen Germany's Financial Market

The following statement was given by the State Minister to the Chancellery, Mr. Hans Martin Bury, when the Chairman of the Government Panel on Corporate Governance, Prof. Dr. Theodor Baums, delivered the Panel's report to the German Chancellor.

The work of the Government Panel on Corporate Governance has laid the foundation for a comprehensive reform of German company law. The Panel's recommendations aim to improve corporate management and supervision, transparency and competition. They improve the protection of stockholders and strengthen Germany's financial market. The Government Panel not only has accomplished its mission of formulating recommendations to correct undesirable past trends, but has also developed proposals with well-reasoned future orientation to strengthen the German system of Corporate Governance and eliminate potential shortcomings.

To better protect investors, the Panel recommends extending the civil liability of management and supervisory board members of publicly listed companies from its current standard of "willful intent" to also include "gross negligence" in connection with the release of false information to the capital market. Quarterly reports should be mandatory for all publicly listed companies and audits by certified public accountants should be required. In addition, the Government Panel recommends measures to improve the independence of auditors.

The federal government will immediately act on the Panel's central proposal by appointing a group of experts to draft and continuously improve a Code of Corporate Governance, as well as by creating the legal framework for this new, flexible instrument. In accordance with the principle of "comply or explain" which the Panel recommends, the Code itself will not be fixed in law. It would only be required that publicly listed companies state in their annual reports whether they observe the Code of Corporate Governance or, in the alternative, set forth the reasons why they do not follow its recommendations. The financial markets will value this innovative element internationally, and this will further improve the financing conditions obtained by German companies.

The Government Panel expects that the Code will, among other things, define goals for improving the performance of supervisory boards. This includes, for example, restricting to five per person the number of external supervisory board positions that a supervisory board member may hold, strengthening the independence of supervisory board members, and the recommendation that supervisory board members should not be permitted to fill positions that are in competition with the company. Further, the Code should contain

expanded transparency standards, such as for management stock option plans and for the shareholdings of members of the reporting company's management and supervisory boards, as well as increase the duties of the management board to provide information to stockholders.

In addition, the federal government will immediately begin drafting a "Transparency and Disclosure Act" in which further proposals of the Government Panel will be implemented. These will include the legal foundation for the "comply or explain" principle, measures to strengthen supervisory boards, such as through broader disclosure duties for the management board and tighter confidentiality requirements for supervisory board members, the use of electronic media for company publications and deregulation in corporation law, such as through a further reduction of the minimum par value of stock.

In a further stage, the Panel's recommendations will serve as the foundation for a comprehensive reform of corporation law and accounting regulations.

The federal government thanks the Government Panel for its excellent work. Thanks go especially to the Chairman, Prof. Dr. Theodor Baums, and also to the Panel members from the business sector, unions, stockholder associations, academia and politics who achieved a broad consent to the reform of company law through their intensive consultations. The federal government will forward the Panel's final report to the German Bundestag, the parliament's lower house.

Summary of Recommendations

	Marginal Note Number
First Chapter: Regulation by Statute vs. Code of Corporate Governance	
The Government Panel recommends a German Code of Corporate Governance. ...	5 - 7
The rules of such a Code would supplement statutory law, and they should not be binding in substance but should have the character of recommendations. However, it should be made mandatory to state whether the rules of the Code are being observed ("comply or explain").	8
The Government Panel proposes that management and supervisory boards of publicly listed companies state on an annual basis that they observe the recommendations of a Code of Corporate Governance published in the German Federal Gazette (*Bundesanzeiger*) ("statement of compliance"). The statement of compliance must include reasons for any deviations from the recommendations of the Code of Corporate Governance.	9 - 12
The applicability of a Code of Corporate Governance should be restricted to publicly listed companies. Privately held companies are free to adopt the supplemental rules of a Code in their articles of association, rules of procedure or employment contracts; this may be of particular interest to companies planning on going public.	13 - 15
The Government Panel recommends that the federal government assign a Committee the task of drafting a Code of Corporate Governance for German publicly listed companies. The Committee should comprise a maximum of twelve members who should have recognized qualifications and appropriate expertise; in particular, individual members should have experience and knowledge with respect to the corporate governance of domestic and foreign publicly listed companies, as well as in the fields of company law, accounting and auditing. Institutional and private investors, employee representatives, management and supervisory board members, management consultants in relevant fields and academics should be appointed to the Committee.	16 - 17
The Code drafted by this Committee should be published in the Federal Gazette. The Committee should reconvene at appropriate intervals in order to discuss whether the Code needs to be updated or amended.	17

Second Chapter: Management and Supervisory Boards

The Government Panel recommends that the included corporations that draw up consolidated financial statements or partial group financial statements, or that consolidate other companies on a pro rata basis pursuant to § 310 of the German Commercial Code (*Handelsgesetzbuch* – HGB) be required by law to include those subsidiaries in their regular reporting provided for in § 90(1), sentence 1, of the Stock Corporation Act (*Aktiengesetz* – AktG). 21

The Government Panel proposes that legal provisions be enacted to extend the supervisory board's right of inspection and review pursuant to § 111(2) AktG as follows: an expert appointed by the supervisory board and subject to a duty of professional confidentiality should have power to exercise the rights under § 111(2), sentence 1 AktG, including towards affiliated companies within the meaning of § 290(2) HGB and other companies within the meaning of § 310 HGB. The expert should have power to demand explanations and evidence from the legal representatives of the respective subsidiaries. 22

The Government Panel proposes that, in § 90(1) AktG, it be made clear that the management board must, in its reports on the intended business policy and other principal issues of corporate planning, disclose any deviation from previously set targets, and provide reasons for such deviation. 24

The Government Panel recommends to stipulate in § 90 AktG that the reports pursuant to § 90(1), sentence 1, (3) must as a rule be made in writing. 25

The Government Panel recommends to provide in § 90 AktG that, as a rule, the management board's reports must be submitted to the supervisory board members in a timely fashion. 27

The Government Panel recommends to delete the requirement stipulated in §§ 90(3), sentence 2, and 110(2) AktG that an additional supervisory board member has to second a request for a report or convocation. ..... 30 - 31

The Government Panel recommends to replace the term "*Aushändigen*" (literally "handing over") by the term "*Übermittlung*" (literally "transmission") in all cases where law currently requires "handing over" of documents to supervisory board members, pursuant to, for example, §§ 90(5), 170(3) and 314 Akt. 32

The Government Panel recommends that the federal government observe the implementation of risk management systems pursuant to § 91(2) AktG and their review pursuant to § 317(4) HGB, and, on the basis of its findings, consider whether the duty of risk management pursuant to § 91(2) AktG should be extended to companies having other legal structures. 33

The Government Panel recommends amending § 111(4), sentence 2 AktG and inserting the following new sentence 3: "However, the articles of association or the supervisory board should specify that certain types of transactions may be entered into only with the consent of the supervisory board. These shall include decisions or measures to be taken by the company or its subsidiaries that fundamentally change the projects for profit or risk exposure of the company." ..... 34 - 35

The Government Panel recommends that § 86 AktG be deleted and not be replaced. .. 41

The Government Panel recommends supplementing the explanatory list for the concept "total remuneration of individual management board members" under § 87(1), sentence 1 AktG ("salary, profit-sharing, expense allowances, insurance premiums, commissions and fringe benefits of all kinds") by making reference to stock-based or incentive-based remuneration commitments. 44

The Government Panel recommends that, in the Code of Corporate Governance for publicly listed companies, the management board be required to present a report to the shareholders' meeting on any creation of contingent capital or authorization to repurchase own stock for the purpose of servicing stock options for management board members or employees. This report should contain all information required for a proper evaluation of the plan, in particular, details regarding the value or value spread of the option. 45

The Government Panel is in favor of including a recommendation in the Code of Corporate Governance that would prohibit a person who serves on the supervisory boards of five other non-affiliated companies from becoming a supervisory board member of a publicly listed company. 52

It is recommended that the Committee to be established for the drafting of a Code of Corporate Governance provide in the Code that supervisory board members may not hold office in or represent other companies that are in competition with the company in which they serve on the supervisory board. 54

It is recommended that the Committee to be established for the drafting of a Code of Corporate Governance consider the issue of the independence of supervisory board members when formulating the Code; this also includes the problem of management board members switching to the supervisory board. 55

The dissemination of information about the work of the supervisory board committees to the entire supervisory board should be improved by a revised § 107(3), sentence 3 AktG, providing that the supervisory board should receive regular reports on the committees' work. 56

The Government Panel recommends to provide in § 110(3) AktG that, as a matter of principle, the supervisory boards of all companies must convene at least twice in each calendar semester. Privately held companies should be able to provide otherwise with the consent of all supervisory board members. Physical presence of the supervisory board members should not be required in all individual cases; telephone or video conferences or respective add-on connections should be possible (as an exception when justified). 57

The Government Panel recommends to delete § 10(4) of the German Corporation Tax Act (*Körperschaftsteuergesetz*). 65

The Government Panel recommends that the Committee to be established to draft a Code of Corporate Governance may in such Code address the issue of how supervisory board members are to treat company secrets and confidential data, in particular with regard to the employees involved (back office), and in dealings with the press. 66

The Government Panel endorses an increase in the range of punishment provided for in § 404 AktG "Violation of the Duty of Confidentiality" in subsection 1 up to two years, and in subsection 2 up to three years. 67

The Government Panel recommends to clarify in § 93 AktG that members of the management and supervisory boards are not liable towards the company for the success of their actions ("business judgment rule"). 70

The Government Panel recommends to revise the right to commence derivative suits pursuant to § 147 AktG under consideration of the following key issues:

- The right to initiate legal action should not be designed as an individual right to file proceedings, but as a minority right. Holdings of one per cent of the capital stock or stock with an exchange or market value of 100,000 euro should be sufficient.
- Procedure to admit legal action:
  For purposes of avoiding unnecessary, unfounded or harassment actions, institution of proceedings should be made dependent upon a particular admission procedure by the trial court. Prerequisites for such admission of proceedings should be:
  - sufficient prospects of success, to wit: the availability of facts substantiating any suspected dishonesty or other gross violations of law or the articles of association by relevant members of the management and supervisory boards;
  - an unsuccessful request to the company to itself initiate legal action, and the absence of preponderant reasons on the company's side speaking against the enforcement of the compensation claim;
  - achievement of a quorum by the petitioners and evidence that they purchased their shares prior to learning about the violations of a duty that entails liability;
  - should the application to admit the action prove to be unsuccessful, the petitioners should bear the court fees and costs incurred by the defendants.
- Proceedings for actions seeking compensatory damages
  If the trial court admits the claim, the following procedural principles should apply to proceedings for compensatory damages:
  - the authorized plaintiff should be the petitioner of the successful admission procedure;
  - the special representative that was previously required to be appointed by the trial court (§ 147(3) AktG) is to eliminated;

- proceedings should be initiated against the relevant members of the management and supervisory boards and seek compensatory damages on behalf of the company; there should be no "bonus" payment to the plaintiffs;
- the action should be initiated within a proper period of time;
- the remaining stockholders should be given notice of the intention to initiate proceedings by advance announcement in the business newspapers, so that they have an opportunity to participate;
- the legal effect of the verdict should extend to the corporation and to the remaining stockholders, even if the action is dismissed;
- the effectiveness of a settlement should be dependent upon the consent of the trial court; in this context, § 93(4) AktG should not apply;
- the decision regarding the costs of the case should be made in line with § 91 of the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO). However, given that the stockholders who are successful in a procedure to admit a legal action would have to bear the costs as a consequence of the action's dismissal, they should have been granted a claim to reimbursement of expenses from the corporation. However, costs which were caused by the plaintiffs' improper prosecution of the case should be excluded from such claim;
- the minority right stipulated in § 147(1) AktG should be deleted, and § 147(2) AktG should be adjusted. ..... 72 - 73

The Government Panel recommends that, by amending §§ 289, 314 HGB the amount paid for any directors and officers ("D&O") insurance plan for management and supervisory board members, and the amount of the respective payment by each member be disclosed in the Notes to the individual or consolidated financial statements. 75

Third Chapter: Stockholders and Investors

Companies should be able to publish invitations to the shareholders' meeting either in writing by publication in the Federal Gazette or in an online version of the Federal Gazette. 83

Recommendation is made to the Committee for drafting a Code of Corporate Governance that it specify in such Code that the dates of the shareholders' meetings may be published otherwise than as provided for in § 121(3) and (4) AktG, for example, by means of a financial calendar, which should also be placed on the company's website. 84

In addition, the Government Panel recommends that the Committee to be established for drafting a Code of Corporate Governance for publicly listed companies adopt a rule that the company provide all financial service providers and stockholders that have so requested within a specified period of not more than one year, with invitations to shareholders' meetings, including all pertinent documents, electronically upon the latter's request. 86

The Government Panel proposes that the information provided to German

investors on foreign companies listed on German stock markets be improved. Once the unified electronic access portal (the "German Company Register") has been installed, the previously used newspaper publication (for calls to meetings) should be replaced by electronic publications. Foreign issuers who are listed on German stock markets should be required to provide the data required for stockholder communication to the stock market or the Federal Gazette electronically. 88

It is recommended that the Committee to be established for drafting a Code of Corporate Governance for publicly listed companies adopt a rule in the Code requiring that reports and documentation that are to be presented for the stockholders' perusal from the date the shareholders' meeting is called also be placed on the company's website. The Code Committee should also make this requirement apply to business reports that companies distribute voluntarily. 97

The Government Panel proposes that the announcement of counter motions by stockholders (§ 126 AktG), including the management's positions thereon, no longer be made pursuant to § 125 AktG, but should simply be made available in a generally accessible form, such as on the company's website, and only if the motion was sent to an address made known to the stockholders in the call to the shareholders' meeting. ..... 100 - 102

The Government Panel is in favor of eliminating the requirement that shares be deposited as a prerequisite for participating in or voting at the shareholders' meeting. Instead, the articles of association should provide for stockholders to prove their status as holders by presenting or electronically submitting a certificate issued by an institution (e.g., a bank or notary public) specified in the articles of association. If the articles of association provide for registration or presentation of proof, it should suffice if evidence of status as holder is provided as of the seventh day preceding the shareholders' meeting. 104

Section 131 AktG should be expanded to allow the management board to refuse a request to provide information that is available on the company website up to the end of the shareholders' meeting and, at the same time, has been made available in written form at the shareholders' meeting. 105

The Government Panel recommends that it should be possible to limit, in the articles of association or in procedural rules (§ 129 AktG), the number of questions that stockholders may ask during the shareholders' meeting. In this case, at least five questions must be admitted per stockholder and agenda item. The articles of association or procedural rules should further provide that stockholders who intend to ask more than five questions regarding one agenda item must submit them to the company up to five days before the shareholders' meeting. 106

The Government Panel proposes to permit, on the basis of a provision in the articles of association, tele-transmission of verbal contributions during the shareholders' meeting, to include visual transmission of the person, including without the consent of the stockholder concerned. 109

The Government Panel proposes that it should be possible to hold a shareholders' meeting with all shares present or represented (§ 121(6) AktG) as a mere

shareholders' meeting by internet. Resolutions requiring documentary certification, however, should not be adopted during such meetings. 111

The Government Panel is of the opinion that the articles of association or the procedural rules should define appropriate limitations on the timeframe for exercising the right to speak and obtain information, as well as restrictions on the list of speakers. 113

The company's articles of association should be able to provide for stockholders to participate directly in the shareholders' meeting without either being themselves present or using a proxy, and to exercise all or certain rights by means of electronic communication. ..... 115 - 120

As in the similar case of § 135(1), sentence 2 AktG, the Government Panel recommends to clarify in § 134(3) AktG that voting by a company-appointed proxy should be permitted only if the proxy is given express instructions. 122

The Government Panel further recommends that the Code of Corporate Governance require companies either to place electronic links on their website to those proxy voters who exercised voting rights for stockholders during the last shareholders' meeting or, alternatively, to integrate the proxy's voting proposals directly into the company's own on-screen form. 123

In the opinion of the Government Panel, the articles of association should in the future allow members of the supervisory board, in well-founded exceptional cases, to participate in shareholders' meetings by any effective means of electronic, telephonic or video communication. 125

The Government Panel supports extending § 10(1), sentence 4 of the Investment Company Act so that investment companies may authorize independent parties to vote by proxy on a permanent basis rather than just in specific cases. 128

The Government Panel recommends facilitating communication between stockholders in cases where the law requires a certain minimum shareholding or minimum amount of voting rights for the exercise of stockholder rights. The company's website offers a good medium for this. Management should be permitted to refuse any publication on the grounds specified in § 126(2), sentence 1, nos. 1-3, and sentence 2 AktG, or if a request has already been made based on the same facts. The stockholder must advance the publication costs, which the company must reimburse if the minority petition is approved. 131

The Government Panel suggests reviewing whether it should be made possible for privately held companies to provide expanded stockholder rights in their articles of association, with particular reference to creating rights of stockholders to inspect records and obtain information. 132

The Government Panel suggests that the federal government examine how to make it clear that an action for rescission based on allegations of insufficient information regarding valuation is excluded in all cases when the challenge to valuation is referred to declaratory proceedings, in particular, in cases of mergers. ……..... 134

The Government Panel recommends that a minimum shareholding be required to commence an action for rescission of a shareholders' resolution based upon a violation of a duty to provide information (reporting or disclosure duties). The claimant in an action for rescission or, in the case of a class action, the claimants must either own shares constituting one per cent of the capital stock, or having an exchange or market value of 100,000 euro. The judicial procedure for enforcing disclosure (§ 132 AktG) should be extended to violations of other obligations to disclose (such as reporting duties). 139

The Government Panel supports specifying in the Stock Corporation Act that a shareholders' resolution may only be rescinded on the basis of incorrect, incomplete or denied information if the material significance of the information leads to the assumption that the disclosure of correct and complete information would have influenced the behavior of a reasonable shareholder. 140

The Government Panel suggests to adopt the following rule in the Code of Corporate Governance: "Stockholders shall receive access to any and all information that is provided to financial analysts and similar persons. The company shall also use communication media like the Internet to provide current and consistent information to stockholders and investors." 143

The Government Panel is of the opinion that the right to special audit (§ 142 *et seq*. AktG) requires a revision. 144

The Government Panel suggests that the exclusion of an action for rescission pursuant to § 14(2) German Reorganization Act (*Umwandlungsgesetz* – UmwG) also be extended to the accepting company, that § 15(1) UmwG be adjusted accordingly, and that a declaratory proceeding instead be established for this purpose. 151

The Government Panel suggests to provide for a formal freeze on registration following the example given in § 16(2) UmwG when an action for rescission against a capital increase or decrease is filed (in the case of both publicly listed and privately held companies) and against other corporate actions requiring registration, except for simple amendments to the articles of association and declarative entries, and, moreover, for a curative effect of the register entry in such cases in line with § 20(2) UmwG. In addition, it is recommended that a release procedure before the trial court be introduced in these matters following the example of § 16(3) UmwG. 153

The Government Panel suggests that a legal deadline of three months for the release decision be set from the date the motion was received, with the possibility for a court to extend it for good cause (*schwerwiegender Grund*). Such cause must be set forth in the extension decision. The same should apply for decisions made by the appeals court. 155

The Government Panel recommends that for resolutions that require registration, and for which an action for rescission does not trigger a legal freeze on registration, an entry release proceeding before the trial court similar to the model of § 16(3) UmwG should be introduced after the entry procedure pursuant to § 127 of the Act Regulating Jurisdiction over Non-Contentions Matters (*Gesetz über die*

Angelegenheiten der freiwilligen Gerichtsbarkeit – FGG) has been suspended. The company should be the petitioner in that proceeding. The decision on the release should, as *de lege ferenda* in cases of release proceedings under the UmwG, generally be made within three months from the date the petition was received. 157

The Government Panel recommends that the parties to judicial and out-of-court settlements of actions for rescission be required to publish the agreements made (publication in the Federal Gazette). In addition, the management board should report on the issue at the shareholders' meeting. ..... 158 - 159

The Government Panel recommends that arbitration clauses in conformity with the articles of association of stock corporations be permitted for resolving actions challenging resolutions. This rule should be restricted to privately held companies. 161

The Government Panel recommends allowing and suggesting to the federal states (*Länder*) to give one district court (*Landgericht*) exclusive jurisdiction for the entire state territory to handle all corporation law actions challenging shareholders' resolutions. 163

The Government Panel recommends that the exemption from liability for intentional infliction of damage through the exercise of voting rights, as covered by § 117(7) no. 1 AktG, be repealed. 164

In order to address the concern of stockholders of a parent company who may be exposed to the risk of value impairment (watering) of their shares when one of the parents' subsidiaries or sub-subsidiaries makes an initial public offering, the Committee to be established for drafting a Code of Corporate Governance is recommended to highlight this risk and emphasize that the management board is responsible, on the basis of its duty of care and duty of loyalty, for confronting this risk by either granting the stockholders preemptive rights to the offering or pursuing proper pricing procedures in line with market practice. 165

The Government Panel supports the position that, in cases that may entail a declaratory proceeding, any expert auditor who is to review a settlement or compensation payment should be selected and appointed by the court that would have to render the decision in the declaratory proceeding. 170

The reform of declaratory proceedings should involve raising a petitioners' duty to substantiate the claim. Concrete reasons have to be set forth to demonstrate which aspects of the pretrial expert assessment require a review. 171

The expert assigned by the court for a declaratory proceeding should have a claim to adequate remuneration against the company; expenditures and remuneration are to be established by the court. 172

The Government Panel recommends allowing and suggesting to the federal states to give one district court exclusive jurisdiction for the entire state territory to handle all declaratory proceedings. 173

The Government Panel recommends that the appeal of a district court decision in a declaratory proceeding be restricted to violations of law. 174

The Government Panel suggests that the petitioners in a declaratory proceeding be required to bear all out-of-court expenditures if the claim is not successful. 175

The Government Panel suggests that reports on controlled status and the related audit reports be disclosed when a subsidiary becomes insolvent. This duty to disclose should extend back to the reports on controlled status and audit reports for the last five years prior to insolvency. The controlling company should be given the opportunity to comment before disclosing the reports. Upon petition by the controlling company, the insolvency court should restrict or prohibit the disclosure if this is justified by legitimate interests of the controlling company, such as the protection of business secrets. 180

Legislation should provide that the members of the management and supervisory boards of publicly listed companies will incur civil liability for releasing false information about the state of the company intentionally or in a grossly negligent manner. ..... 186 - 187

The Government Panel recommends to provide for common representation of damaged investors in the case that false information is released intentionally or in a grossly negligent manner. Any obligation to join such a collective representation should be excluded, as should be any commercialization of the claim by multiple representations or contingency fee. ..... 188 - 190

Fourth Chapter: Corporate Finance

I. Deregulation

The Government Panel recommends amending § 8 of the Stock Corporation Act on the minimum par value of shares so that, in the future, par value shares may have a par value of (at the least) one euro cent, and that the pro rata amount of the capital stock allotted to one share without par value may not be less than one euro cent. …… 192

By amendment of the articles of association with the necessary majority of votes, the shareholders' meeting should be able to authorize the management board, for a maximum period of five years and with the consent of the supervisory board, to amend the provisions of the articles of association regarding the allocation of the capital stock (par value and number of shares). 193

The Government Panel recommends deleting the prohibition on company split-ups set forth in § 141 of the Reorganization Act. 196

The Government Panel suggests deleting § 58(2), 2nd half of sentence 2 AktG and thus affording publicly listed companies the possibility freely to provide in their

articles of association for greater discretion in creating reserves..... 197

The Government Panel suggests amending the rules on distribution of § 58 AktG so that the articles of association may permit the shareholders' meeting to distribute dividends not only in cash, but also in kind. 200

The Government Panel recommends that interim dividends be permitted. 201

The Government Panel recommends to amend § 71(1), no. 2 AktG as follows: a company may acquire its own shares without being authorized by the shareholders' meeting if the shares are to be offered to persons in the present or past employ of the company or an affiliate, or to persons who are exclusively engaged in serving the company as sales representatives. 204

In the opinion of the Government Panel, provision should be made in law to allow a company to acquire its own shares without authorization by the shareholders' meeting for the purpose of compensating stockholders of the company or of its subsidiaries. 205

Section 71(1) no. 3 AktG should further provide that a company's acquisition of its own shares without authorization by the shareholders' meeting for compensatory purposes is permitted only in cases where the duty to make payment rests on a shareholders resolution, or is attributable to such a resolution. 205

The Government Panel proposes that use should be made of the authorization granted by § 24a (4a) of the Second Company Law Directive of the European Council for the repurchase of shares of a parent by its subsidiaries only if such subsidiaries are supervised financial service providers. 206

The Goverment Panel recommends that use should be made of the authorization granted by § 24a (4b) of the Second Company Law Directive but it should be specified in § 71d AktG that a shareholders' resolution of the company that holds a majority of the company's shares or controls the company is required. 207

The Government Panel supports creating an exception to the limitation on the admissible purpose of acquisition in § 71(1), no. 8, sentence 2 AktG for publicly supervised financial service providers, thereby permitting them to acquire their own shares under § 71(1), no. 8 AktG for the purpose of asset management in respect of its own shares and those of its parent company. 208

The Government Panel recommends that it be made clear in § 71e AktG that a dependent credit institution may accept shares of its parent company as pledged collateral under the conditions stated therein. 211

The Government Panel advocates that § 204(1) sentence 1 AktG be amended to allow the management board to decide on the type of shares (bearer or registered shares) to be issued when new shares are being issued from authorized capital. 214

The Government Panel recommends amending § 185(1) sentence 3, no. 2 AktG, which requires that the final issue price has to be determined as early as when the new shares are subscribed to, even in the case of a capital increase against a

contribution in kind. In the case of a capital increase against a contribution in kind, it should suffice at the time of subscription to determine either the issue price or a minimum issue price, and the basis on which the final issue price will be established. 217

Section 186(2) AktG should be amended as follows: in the notice of opportunity to exercise a preemptive right, the management board may limit itself to stating the basis on which the final issue price is to be calculated. In this case, the final issue price has to be published prior to the expiration of the subscription period, providing adequate time so that the preemptive right may still be exercised. This shall be referred to in the notice of opportunity to exercise the preemptive right and reference must be made to the time and location of the publication and the final issue price. 218

The Government Panel recommends that it be made possible to exclude preemptive rights analogue to § 186(3) sentence 4 AktG for issues of convertible bonds (including warrant issues) if the par value or pro rata amount of the shares to be granted when exercising the conversion or subscription rights does not exceed ten per cent of the capital stock existing at the time of the shareholders resolution, and the issue price does not significantly fall below the market value of the bond as established by recognized methods, provided the bond is actually placed on the market. 221

The Government Panel suggests that it also be possible to effect contingent capital increases in the future for the execution of mergers of undertakings, acquisitions of undertakings, or other purposes. If the subscription of shares is made dependent upon the achieving of certain targets, the prerequisites for these (targets, exercise periods) should be determined in the resolution raising the contingent capital. ..... 223 - 224

The Government Panel recommends that the provision of § 193(2), no. 4 AktG should apply to all option rights granted for remunerating purposes. 226

The Government Panel supports an expansion of the duty provided for in §§ 202 *et seq*. AktG requiring the management board to provide current (and also retrospective) written reports on the use of authorized capital with excluded stockholder preemptive rights. The contents of the reports should be aligned to the requirements of § 186(4) sentence 2 AktG, and must thus state the reason for excluding the preemptive rights, and, in particular, provide the basis for the issue price of the new shares. The management report should also be required to be filed with the commercial register and be published in the form specified in the articles of association for publications (§ 23(4) and 25 AktG). 230

The Government Panel suggests to limit the management board's reporting duties on the use of authorized capital with exclusion of stockholders' preemptive rights as provided for in § 293a (2) AktG and § 8(2) UmwG. 231

The Government Panel proposes that an intrinsic value verification be required in all cases in which new shares are issued to holders of more than 10 per cent of the company's capital stock against an in-kind contribution. In these cases, it should be provided that the court-appointed auditor may be neither the certified accountant of the company nor that of the contributor. The findings of the intrinsic

value verification have to be filed with the commercial register. 232

The Government Panel advocates repealing § 207(3) AktG. 233

The Government Panel suggests that it be permitted to redeem no par value shares without par value even if a reduction of capital is not effected. 234

II. New Financing and Structured Instruments

The Government Panel recommends to provide for redeemable shares also under the German Stock Corporation Act within the framework of and pursuant to the requirement of § 39 of the Second Company Law Directive. In addition, an upper ceiling of 50 per cent of the capital stock should be introduced according to the example given in § 139(2) AktG. 235

The Government Panel is in favor of removing the special requirements for adopting resolutions for specific classes of shares pursuant to §§ 182(2), 193(1), sentence 3, 202(2), sentence 4, 221(1), sentence 4, 222(2), 229(3), 237(2), sentence 1 AktG and the corresponding provisions of the UmwG and making it clear that § 179(3) AktG is applicable. 241

The Government Panel recommends making appropriate amendments in the Stock Corporation Act for tracking stock to be redeemed or converted into common stock at the request of the company or of the holder of the tracking stock in as flexible a way as possible. 242

Fifth Chapter: Information Technology and Publicity

The Government Panel proposes that the federal government create a unified electronic access portal ("German Company Register") which will give the business world and capital market participants access to official corporate information published to meet disclosure requirements (commercial register, relevant federal gazette announcements, database of reported shareholdings maintained by the Federal Supervisory Authority for Securities Trading (*Bundesaufsichtsamt für Wertpapierhandel*). 252

The Government Panel recommends allowing an online query system that would also include non-published documentation filed with the commercial register which may be accessed pursuant to § 9(2) HGB. 253

The Government Panel recommends repealing the restriction to print media found in §§ 10 and 11 HGB with respect to commercial register publications. 253

The Government Panel recommends clarifying that companies may transmit the documentation to be filed with the registry court pursuant to § 325(1) HGB in paper copy or in an electronic form that the court can read. 253

In the opinion of the Government Panel, § 325(2) and (3) HGB should provide that the Federal Gazette shall transmit announcements to the registry court in paper copy or in an electronic form that the court can read, together with the accompanying documentation. 253

The Government Panel suggests that announcements to be made in the Federal Gazette pursuant to §§ 10 and 325 HGB should, in the future, be made exclusively in electronic form. 254

The Government Panel is of the opinion that, according to the example of § 121(4) AktG, announcements in the business newspapers should in the future no longer be required if a notification is exclusively addressed to the stockholders and the company knows the stockholders by name. In such cases, a facilitated means of announcement should be provided analogous to § 121(4) AktG. 254

The Government Panel recommends that access to the "voting rights data base" of the Federal Supervisory Authority for Securities Trading be provided via the German Company Register internet portal. 256

The Government Panel supports the draft of the German Standardizing Council regarding the details on stock option plans to be provided in the Notes to the consolidated financial statements. ..... 257 - 258

It is recommended that the Corporate Governance Committee to be established require in the Code of Best Practice that appropriate data on stock option plans of publicly listed companies be provided in the Notes to the consolidated and individual financial statements. This likewise applies to other performance-linked means of remuneration. The remuneration of management body members must be separately specified as fixed allowances, performance-linked payments and incentive (stock) price oriented components. It should be made clear in §§ 285 no. 9a and 314(1), no. 6a HGB that the remuneration to be reported includes both stock-based remuneration commitments and the resulting profits. 259

The Government Panel suggests that the Code of Corporate Governance for publicly listed companies include a requirement for the members of the management and supervisory boards to report on the amount of stock held in the reporting company, related subscription rights and derivates. This information should be reported in the Notes to the financial statements and the Notes to the consolidated financial statements, if the member of the management or supervisory board of the reporting company is at the same time a member of the management or supervisory board of an affiliated company. 262

The Government Panel recommends adopting a rule in the Code of Corporate Governance requiring the management board to submit a report to the supervisory board once annually specifying the amount by which donations exceed a limit to be determined by the supervisory board. 263

The Government Panel suggests provisions be inserted into the Code of Corporate Governance in particular regarding disclosure duties to the management board and the supervisory board to prevent damages to the company and its subsidiaries resulting from transactions with executive officers and members of the management and supervisory boards, as well as with persons closely related to them or companies in which they have personal shareholdings. 264

It should be required that remunerations or benefits paid by the company, its parent company or its subsidiaries to members of the supervisory board for personal services rendered, in particular for consultation and brokerage services, be disclosed in the Notes to the annual (consolidated) financial statements. 265

Sixth Chapter: Accounting and Auditing

I. Recommendations for Accounting

The Government Panel recommends that the German government support the endeavours of the European Commission to implement uniform international accounting standards for consolidated financial statements as from 2005. The results of the efforts of IASB for a harmonization of IAS and US-GAAP should be given priority in this regard. 267

The Government Panel proposes implementing the EU Regulation on the application of international accounting standards for all corporations, including those not oriented towards the capital market, by giving all companies required to prepare consolidated financial statements the option to prepare their entire accounting in accordance with IAS even before January 1, 2005. 268

The Government Panel recommends that publicly listed companies (§ 3(2) AktG) should be required by law to draw up interim financial statements. Companies required to prepare consolidated financial statements should draw up interim financial statements on a consolidated basis; subsidiaries included in consolidated financial interim statements should be freed of this obligation. 269

The Government Panel recommends that quarterly reports for the first three quarters of the financial year be required. The legal regulation of the contents of quarterly reports should be restricted to a framework, which should be filled in according to a relevant accounting standard. 270

The Government Panel favors making it possible for interim reports to be submitted and published electronically, as well as to be quickly and centrally retrievable. 271

Not only publicly listed companies, but all capital market oriented parent companies within the meaning of § 292a(1), sentence 1 HGB should be required to expand their Notes to the consolidated financial statements by adding a cash flow statement and segment reporting. 272

The Government Panel recommends extending the audit of the risk management systems to be established pursuant to § 91(2) AktG through an auditor (§ 317(4) HGB) and the related report on such audit (§ 321(4) HGB) to all publicly listed companies. 273

The Government Panel suggests having the supervisory board approve the consolidated financial statements in a manner similar to that set out in the rules on individual financial statements, with the option to leave the approval to the shareholders' meeting. The supervisory board's reporting requirement pursuant to § 171(2), sentences 3 and 4 AktG should be extended to the consolidated financial statements.. 274

The Government Panel recommends providing for an institution supported and organized by the private sector, following the example of the British Financial Reporting Review Panel, to pursue alleged gross violations of accounting standards pursuant to procedural rules that such institution will develop in agreement with the companies concerned; the institution will, in the case of a refusal to comply, have power to take action pursuant to §§ 256 and 257 AktG. ... 277 - 278

II. Annual Audit

The Government Panel suggests that the Code of Corporate Governance should recommend to the supervisory boards of parent companies required to prepare consolidated financial statements that they ensure that, as a rule, the shareholders' meetings of subsidiaries to be included in the consolidated financial statements appoint the same auditor (auditing firm) that audits the consolidated financial statements. ..... 282 - 283

The Government Panel recommends making it clear in § 111(2) AktG that the supervisory board should also order an audit of (consolidated) financial statements that are prepared on a voluntary basis. 284

The Government Panel advises providing for an audit review of interim reports by an auditor/auditing firm that generally should be the same as the auditors for the previous, full fiscal year. ..... 288 - 289

The Government Panel recommends that reporting on violations of law and the articles of association (§ 321(1), 2nd half of sentence 3 HGB) that are not accounting-related in the future be placed in a narrative separate from the audit report. In such narrative, the auditor shall state whether facts were revealed during the audit that would indicate serious violations of law, the partnership agreement, or the articles of association by legal representatives or employees. Section 321(5) HGB should apply to such narrative *mutatis mutandis*. 290

The Government Panel suggests separating the reporting on the audit of the annual (consolidated) financial statement (§ 321 HGB) from the reporting to supervisory offices or authorities as based on particular requirements of law and regulations. The audit report pursuant to § 321 HGB should, in the future, report only the more significant assessments of a regulatory law nature in summary fashion. Completed audit reports on regulatory matters must be presented to the supervisory board; § 321(5) HGB should apply *mutatis mutandis*. 291

The Government Panel suggests releasing the auditor who audited the last annual financial statements from his or her duty of secrecy in communications with the new auditor. The same should apply to the auditor of the interim reports of the last fiscal year. The auditor of the consolidated financial statements should also be released from his or her duty of secrecy in communications with the new auditor of the consolidated financial statements. 295

The Government Panel suggests that audit reports be disclosed in the case of the audited company's insolvency. If the annual (consolidated) financial statements for the last three fiscal years prior to commencement of the insolvency procedure had to be, or were voluntarily audited, the auditor should be required, upon request of the committee of creditors, to disclose the portions of the audit report provided for in § 321(1), sentences 2 and 3 and (2) HGB and give explanations upon query. The insolvency administrator should be able to prohibit the disclosure of company and business secrets. The auditor's duty of secrecy, his or her right to refuse to testify, and the sanctions imposed for a violation of the duty of secrecy should be adjusted accordingly. ..... 296 - 297

It is advisable to point out in the Code of Corporate Governance that the supervisory board appoints the auditor and negotiates the agreement on fees. 299

The Government Panel recommends setting forth in the HGB that the designated auditor of companies having a supervisory board, and for which an audit is mandatory, must provide details to the supervisory board or its audit committee regarding any circumstances (professional, financial, family ties to the company, the members of its management and supervisory boards or affiliated companies) that may give reasonable grounds to suspect partiality. At any rate, until such a legal obligation has been introduced, precautionary measures should be taken in the Code of Corporate Governance to be drafted for publicly listed companies. Such Code should also provide that any grounds for suspecting incompatibility or partiality occurring during the time that the auditor is retained by the company must be reported promptly to the chairman of the supervisor board. 303

The Government Panel recommends that the supervisory board, prior to its proposal to the shareholders' meeting of the auditor to be appointed, provide the shareholders' meeting with information regarding remuneration of the auditor and regarding the kind of auditing and non-auditing services performed by the auditor during the preceding fiscal year. In addition, the auditor should be required to inform the supervisory board of additional non-audit assignments he or she may receive from the management board while the audit is being performed. In addition, provision should also be made for the supervisory board to report to the shareholders' meeting within the scope of its reporting duties pursuant to § 171(2) AktG on the ratio of remuneration paid to the auditor for auditing and non-auditing services, and to state whether, in the opinion of the supervisory board, the auditor's independence may be in doubt. ..... 307 - 308

III. Supervisory Board and Annual Audit

The Government Panel suggests incorporating the following recommendation into the Code of Corporate Governance: "When proposing to the shareholders' meeting persons to be elected to the supervisory board, the supervisory board members representing the stockholders shall make sure that the members of the supervisory board have the skills, knowledge and professional experience necessary for the proper performance of the tasks of the supervisory board. ". 311

The Committee to be established for drafting a Code of Corporate Governance is recommended to incorporate the following into that Code as a best practice for supervisory boards: the supervisory board or audit committee shall require that, before an auditor's report is issued, the members of the audit committee or certain supervisory board members elected by stockholders and employees shall be provided draft copies of the annual (consolidated) financial statements, the (consolidated) report on the state of the company, and a business report for their brief review and comment. 318

The Government Panel recommends that the following be set forth in the Code of Corporate Governance: the supervisory board shall ensure by appropriate wording in the auditor's letter of engagement and through consultation with the auditor, that, beyond the items that must be reported pursuant to § 321 HGB, the supervisory board will be informed of all assessments and occurrences that may be revealed during the audit and are significant for the performance of the tasks of the supervisory board (for example, defects in organization). The auditor should be questioned about any disagreements with the management board regarding the balance sheet and valuation. 324

The Government Panel suggests to provide for a duty of the auditor to notify the supervisory board in writing of material findings of the audit review of interim reports. The supervisory board should be required to review the interim report to determine whether it accurately reflects the assets and liabilities, financial position, and profits and losses of the company (or group); disclosure should be conditioned upon the supervisory board's approval of the interim financial statements. 325

The Government Panel recommends supplementing § 171(1) AktG by adding that each supervisory board member shall have the right to request information from the auditor regarding the results of the audit during the supervisory board's or the designated committee's negotiations. 326

The Government Panel recommends providing that, in the future, in cases addressed in § 33(2) nos. 1 and 2 AktG the audit of the incorporation of the company may also be performed by the certifying notary public. 329

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