Corporate Governance in Germany

- System and Current Developments –

Prof. Dr. Theodor Baums*
Universität Osnabrück

I. Types of companies

There is, as in most EU-legislations, a formal division of corporations in German law between stock corporations or "Aktiengesellschaften" ("AG") and private limited companies ("Gesellschaften mit beschränkter Haftung" or "GmbH"). AG and GmbH are governed by different acts, the Aktiengesetz (Stock Corporation Act)[1] and the GmbH-Gesetz (Limited Liability Companies Act)[2], although some basic principles of corporate law apply equally to both types. The division between stock corporations and limited liability companies does not refer to the size of the company - there are large firms in the form of a GmbH and small, family-owned corporations in the form of an Aktiengesellschaft. Only shares of a stock corporation, however, can be listed and traded on a stock exchange. The stock corporation rather than the limited liability company is the suitable legal form especially for large publicly held firms with widely distributed ownership. Currently there are more than 700,000 limited liability companies (GmbH) as compared with about 4,200 stock corporations. Of the latter about 700 are listed on the stock exchange. That means that most stock corporations are also privately-held. The following report refers to the stock corporation only.

II. Sources

The basic law on stock corporations, the Stock Corporation Act [3], is supplemented by other acts such as the Codetermination Acts, the Commercial Code with its rules on the commercial register, accounting and other issues, or the Securities Trading Act (with its provisions, inter alia, against insider dealing). The most important self-regulation for publicly traded companies is the Takeover-Code of 1995.[4] There is, however, no self-regulation (a "code of best practice") or a semi-official report concerning corporate governance comparable to the various codes or reports in the U.S.,[5] the U.K.[6], France[7], Belgium[8], the Netherlands [9] and Spain[10].

---

* with the friendly assistance of Anja Birkenkämper, Research Assistant, Universität Osnabrück.

1 Aktiengesetz of Sept. 6, 1965 (Bundesgesetzblatt).

2 Gesetz betreffend die Gesellschaft mit beschränkter Haftung of April 20, 1892 (Reichsgesetzblatt, 477) in the form of the publication of May 20, 1898 (Reichsgesetzblatt, 846).

3 See footnote 1), supra.

4 Übernahmekodex der Börsensachverständigenkommission beim Bundesministerium der Finanzen, revised as of Nov. 28, 1997.

5 American Law Institute, Principles of Corporate Governance: Analysis and Recommendations, 2 vols., St. Paul, 1994.

6 Report of the Committee on the Financial Aspects of Corporate Governance („Cadbury Report“), London 1992; Directors` Remuneration. Report of a study Group („Greenbury Report“), London 1995.

III. Specific features: Two-tier system and co-determination

A specific feature of German corporate law is the separation between a management board ("Vorstand") and a supervisory board ("Aufsichtsrat"). This two-tier board system dates back to the 1870's. This separation is mandatory for stock corporations and large limited liability companies. The management board consists of inside directors only and manages and represents the company as will be described in more detail below. The supervisory board has the task of appointing and supervising the management of the company. It is exclusively made up of outside directors; members of the management board cannot serve as members of the supervisory board and vice versa. As tasks and duties of the members of the management and the supervisory board are different, these two types of board will be dealt with separately in what follows.

A further specific feature of German corporate law, the co-determination regime, relates to the supervisory board. This will also be described in more detail below[11].

IV. Functions and powers of the management board

1. Appointment, dismissal, salary

The members of the management board are appointed, at most for five years, by the supervisory board and may be dismissed by it, though only for cause[12]. Reappointment is, of course, permissible. Remuneration for management board members is also fixed by the supervisory board. Performance-oriented pay is traditionally tied to figures derived from the annual statement of accounts (like the annual surplus); only recently have market-oriented instruments like stock options caught on.

---

7 Conseil National du Patronat Francais – CNPF: Le Conseil d‘ Administration des Sociétés Cotées, Paris 1995.
8 Fédérations des Entreprises de Belgique (FEB): Recommendations pour le bon fonctionnement du conseil d´ administration d´ une société, Brussels 1996.
9 Committee on Corporate Governance: Recommendations for Corporate Governance, Amsterdam 1996.
10 Comisión Especial para el estudio de un Código Etico de los Consejos de Administración de las Sociedades , “El Gobierno de las Sociedades“, Madrid 1998.
11 VI. 4., below.
12 § 84 Stock Corporation Code.

2. Composition and tasks

There may be a chairman or speaker of the managing board. If so, he will not have the position of an US-style CEO or a French PDG (he can neither hold the seat of a chairman of the supervisory board nor can he decide against the majority of the management board's members[13]).

The management board represents the company in its business dealings and legal affairs[14].

In a central rule (§ 76) the Stock Corporation Code states that the management board "directs the company under its own responsibility". This rule has a double meaning: First, it reserves the task of actual management of the company's affairs, especially its day-to-day business, exclusively to the management board. Although the supervisory board must monitor the management[15], "management tasks" cannot be left to the supervisory board[16]. The shareholders' meeting is also restricted to taking basic decisions[17]; it may decide on regular management issues only at the request of the management board[18].

3. Stakeholders' interests

Second, the leeway which is given to the management by § 76 AktG allows and even obliges it to take the interests of other "stakeholders" like the employees, the creditors of the firm and the general public into account. There is a discussion in German legal literature about whether the company is an "enterprise" with all interested groups such as employees, shareholders, creditors and others as "stakeholders", whose interests management must pursue[19]. But even those who do not skate on this ice agree that the management is not obliged solely and exclusively to pursue the interests of the present shareholders. There is no duty to maximise the value of the shares; management may and must take the interests of the employees, creditors, and the community at large into account. Management has, on behalf of the

[13] § 77 (1) (2) Stock Corporation Code.
[14] §§ 76 – 78 Stock Corporation Code.
[15] § 111 (1) Stock Corporation Code.
[16] § 111 (4) (1) Stock Corporation Code.
[17] § 119 (1) Stock Corporation Code.
[18] § 119 (2) Stock Corporation Code.
[19] For a detailed report see *Hopt*, “Directors` Duties to Shareholders, Employees and other Creditors: A View from the Continent, in: McKendrick (ed.), Commercial Aspects of Trusts and Fiduciary Obligations, Oxford 1992, 115 onward.

company, to act as a "good citizen". It may for instance, make donations to a university even though its competitors could profit from the research there. It may make provisions for employees about to lose their jobs even if there is no benefit from this for the company because it is about to cease trading as a result, say, of a merger with another company or a shutdown.

4. Groups of companies

§ 76 Stock Corporation Act is also applicable in groups of companies. The management board of a subsidiary may not follow instructions or take measures which are not in the interest of the subsidiary and cannot or likely will not be compensated by the holding company[20]. Different rules apply only if there exists a specific agreement between the subsidiary and the holding company which provides, inter alia, for compensation of the subsidiary's shareholders and protection of its creditors[21].

V. Control devices

1. Market forces and regulatory supplements

Modern microeconomic and legal theories see managers as "agents" and the owners (or the "stakeholders") in a firm as their "principals". This separation between principals and agents may lead to specific problems such as

- traditional conflicts of interests, as, for example, unfair self-dealing;
- shirking of managers whose effort cannot be observed; and
- positional conflicts - these may occur in a great variety of ways: among other measures, managers can make it particularly difficult to monitor their performance, impose high barriers to their own removal, seek to increase corporate size and so on[22].

---

[20] Cf. §§ 311, 317 Stock Corporation Code. Cf. for more detailed report *Immenga*, The law of Groups in the Federal Republic of Germany, in: Wymeersch (ed.), Groups of Companies in the EEC, Berlin/New York 1993, at p. 85, 106 ff.; *Lutter/Zöllner*, Das Recht der verbundenen Unternehmen in: Balzarini/Carcano/ Mucciarelli, (eds.), I Gruppi Di Societá, 1996, Vol. I, at p. 217 ff.

[21] Cf. § 308 Stock Corporation Code; *Immenga*, op. cit. at p. 102 ff.

[22] See in more detail *Eisenberg*, The Structure of Corporation Law, Columbia L.R. 1989, 1471, 1474 ff.

There are of course market forces which help to reduce these problems like pressure from the various factor markets (product, capital, labor) as far as these are competitive, monitoring by creditors and competition in the market for managers. These market mechanisms will not - except for some remarks on the so-called "market for corporate control"[23] - be treated in the following. In any event market forces alone cannot safely redress the aforementioned problems. Hence various devices have been developed to support and supplement the market forces to help align the interests of the management with those of the stockholders, employees and creditors of the firm. The main ones are:

- incentives in contracts, with the compensation of managers tied to their performance;
- monitoring of the management by the supervisory board and by auditors. The institutional device "supervisory board" will be described in more detail below (VI.);
- personal civil liability of directors;
- rules of procedure and disclosure in corporate law and provisions against criminal behavior in penal law.

Certainly, not all of these devices have the same objectives. The liability rules, for example, are more concerned with misbehavior such as self-interested conduct by management, rather than with monitoring managerial efficiency. The following remarks will be confined to describing briefly these liability rules and their place in the German corporate governance system[24]. Further parts will then deal with the composition and functions of the supervisory board and the “market for corporate control”. A section on recent legislation concludes.

2. Liability of managing directors

The practical importance of directors' liability under German law seems to be limited: Court decisions are comparatively rare, albeit with an upward tendency in recent years. But liability disputes between directors and their companies may well be settled outside the courtroom, and the relative lack of court decisions does not say anything about the preventative function of such rules. The director of a company is, apart from cases of tort, legally liable to his company under the following conditions:

---

23 VII, below.

24 More extended reports on the liability of company directors in German Law in *Kreuzer* (ed.), Die Haftung der Leitungsorgane von Kapitalgesellschaften, 1990; *Baums*, Personal Liabilities of Company Directors in

(i) breach of a contractual or statutory duty owed to the company;

(ii) that this breach occurred either intentionally or negligently; and

(iii) that this has caused damage to the company.

At least in theory German law differentiates between the breach of a (contractual or statutory) duty and the question whether the director has acted negligently. In practice however, both aspects reduce in most cases to one question, that is, how a prudent and diligent manager would have acted. That is an objective and comparatively high standard. Directors need not take all possible care but more than the usual care that might be expected of an ordinary man. A director will also not succeed with the defence that he has acted with such care as he would apply in his own affairs.

Common law systems use to differentiate between the "duty of care" and the "duty of loyalty". German law also knows - at least in practice, as was mentioned before - a "duty of care" and a duty of loyalty (Treuepflicht). The range of the fiduciary duties developed by, for instance, the English law system seems however somewhat wider and more developed than its German counterpart[25]. The Federal Civil Supreme Court has also only recently explicitly acknowledged a business judgement rule with its corresponding judicial self-restraint[26].

The enforcement of directors' duties by the shareholders themselves is rendered difficult by German law. Vis-à-vis its managing directors a stock corporation is represented by its supervisory board[27]. This includes the power to commence an action against a wrongdoing director in the company's name. The problem with this solution is that very often in the case of fault of the managing directors, the supervisory board could equally be blamed for not having fulfilled its monitoring tasks correctly. Hence the supervisory board will normally be reluctant to take action against the members of the management board. Recently the Federal Civil Supreme Court held however that the supervisory can even be obliged to sue management[28].

The single shareholder does not have the right, apart from specific situations in groups of companies, to bring a (derivative) action against the management on behalf of the company.

German law, Int´ Company and Commercial Law Review 9, 1996, 318 ff. with further references.

25 Cf. the detailed comparative report by *Abeltshäuser*, Leitungshaftung im Kapitalgesellschaftsrecht, 1998.

26 Bundesgerichtshof 21.4.1997, Zeitschrift für Wirtschaftsrecht 1997, 883, 885 f.

27 On the supervisory board sub. VI., below.

28 Bundesgerichtshof, 21.4.1997 (n. 26 supra).

According to § 147 Stock Corporation Act, the majority of shareholders in a general meeting can decide that the management be sued either by the supervisory board or by special representatives. Furthermore this paragraph provides that a minority with at least 10 per cent share of the company's capital can demand that the supervisory board or a special representative take action against managing directors. The problem here is, of course, the high threshold of 10 per cent of the equity capital. In big companies that can mean that one would have to hold or bring together shares with a nominal value of a three-digit million DM amount. Another problem is that the shareholder(s) who bring this action will have to bear all the costs and expenses of the other party and the company should the action be dismissed.
Recent legislation has eased suing management.[29]

VI. Composition and functions of the supervisory board

1. Tasks

The two main tasks of the supervisory board have already been mentioned: It appoints and dismisses the members of the management board, and it supervises management. The meaning of "supervision" should however not be misunderstood as allowing or even ordering interference with the company's day-to-day business. Under the by-laws of the company or by decision of the supervisory board certain categories of transactions may be subjected to the supervisory board's prior approval.

2. Size

The supervisory board or Aufsichtsrat consists of at least three members and at most 21 members, depending on the stated capital of the corporation. The average Aufsichtsrat has about 13 members.[30] One person can hold up to ten seats on supervisory boards of other companies, the average number being 2-3 seats per person.

---

[29] See VIII. 1., below.
[30] *Hopt*, The German two-tier board: experiences, theories and reform proposals, in: Hopt et. al. (eds.), Comparative Corporate Governance (forthcoming).

3. *Appointment and remuneration*

The members of the supervisory board are appointed by the shareholders' meeting with the exception of the representatives of the workforce in firms under a co-determination regime[31]. The influence of the management board on the process of selection of its supervisors is difficult to assess. It depends on the legal form (codetermined firms and other), the composition on the shareholders' side (widely distributed holdings vs. closely held firms) and whether the members of the management board themselves have considerable shareholdings on their own. All members of the supervisory board are outside directors in that they may not serve on the management board of the same firm at the same time, and that the shareholders' representatives usually work only part-time in their capacity as supervisory board members for the firm. They are elected for a term of between four and five years[32].

The remuneration for the supervisory board members is fixed by the general meeting of shareholders. The average pay is rather modest[33].

4. *Firms under a co-determination regime*

There are three different systems of labor participation on corporate boards[34]. The one-third participation model for corporations with more than 500 employees; the full-parity model for coal and steel companies; and the quasi-parity codetermination for corporations with more then 2,000 workers.

Under the "Industrial Constitution Act" (Betriebsverfassungsgesetz) of 1952, one third of the members of the supervisory boards of stock corporations and limited liability companies with more than 500 employees is appointed by the employees and two thirds by the shareholders. The clear majority of voting power is hence held by the shareholders' representatives, putting

---

[31] Cf. at 4., below.

[32] Not beyond the end of the shareholders` meeting in the fourth year following the beginning of the term of the office, cf. § 102 Stock Corporation Act.

[33] Cf. F.A. *Schmid*, Vorstandsbezüge, Aufsichtsratsvergütung und Aktionärsstruktur, Zeitschrift für Betriebswirtschaft 67, 1997, 67, 74: Board member remuneration ranges from DM 3, 000 to DM 107,300 with an average of DM 34,400 per annum (numbers as of 1991). *Schmid* finds the supervisory board remuneration is (weakly) positively related with company performance.

[34] Detailed report on the German co-determination system by *Wiedemann*, Codetermination by Workers in German Enterprises, AmJCompL 28, 1980, 79 ff.; *Hopt*, Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe, International Review of Law and Economics 14, 1994, 203 ff.

the employees' representatives in a mere counselling position. In firms (corporations and limited liability companies) in the mining and steel industries with more than 1,000 employees, the supervisory board consists of at least eleven members (up to a maximum of 21, depending on the size of the firm). On boards with 11 members five are appointed by the employees (of them, three by the unions), five are elected by the shareholders, and a further "neutral" member (with a casting vote) is appointed by the majority of both sides of the supervisory board.

The third model is based on the 1976 Co-determination Statute. In corporations and limited liability companies outside the iron and coal industries with more than 2,000 employees, half the members are elected by the shareholders; the other half is elected by the employees and the trade unions. For instance, in a firm with not more than 10,000 employees shareholders will elect six, the employees (blue and white collar as well as lower-ranking management) four, and the trade unions two members, the highest number of all members on the board of the biggest firms being 20. If there is a stalemate in a vote by the board (a rare event), the chairman, who is elected by the shareholders rather than by the employees, has a casting vote. Because of this slight superiority of the shareholders this model is usually described as "quasi-parity co-determination". In practice however, this tie-breaking vote is rarely used, for pushing through important decisions in this way would worsen relations between shareholders, management and the workforce well beyond the supervisory board.

The economic effects and impacts on corporate performance have been discussed extensively[35]. Although theoretically disputed and frequently considered as detrimental for corporate performance, practice has come to terms with co-determination, and it is presently not questioned by any side in German politics.

---

[35] Cf. *Baums/Frick*, Co-determination in Germany: The Impact on the Market Value of the Firm, Economic Analysis, Vol. 1, No. 2, 1998 with further references; most recently *Schmid/Seger*, Arbeitnehmermitbestimmung und Shareholder Value, Zeitschrift für Betriebswirtschaft, 68, 1998, 453 ff; *Sadowski*, Mitbestimmung und Investitionen: Expertise für das Projekt “Mitbestimmung und neue Unternehmenskulturen“ der Bertelsmann Stiftung und der Hans-Böckler-Stiftung, 1997.

5. Representation of banks

An even more widely noted and, at the same time, widely critized, phenomenon of the German system of corporate governance is the role of the banks in the system[36]. German banks, in particular the four or five biggest, own sometimes quite large equity stakes in numerous public companies, they control the proxy machinery of most public companies where there are not otherwise controlling shareholders, and they are represented on the boards of most large German public companies[37]. An overview has, for instance, shown that the three Grossbanken (Deutsche Bank, Dresdner Bank, Commerzbank) held 37 positions, or about 16% of the approximately 231 positions reserved for the stockholders on the supervisory boards of the 24 nonfinancial industrial companies comprising the DAX 30 (the leading index of German publicly traded "blue chip" companies)[38]. But it would be overstated to contend that these firms are bank-dominated. Factors which mitigate the influence of banks are the co-determination regime and personal interlocks among all publicly-held firms. A relatively small number of individuals (approximately 45) control more than one-half of the positions available for equity representatives (288) on the boards of the DAX 30 companies[39]. Hence it cannot be said that the banks alone numerically dominate the supervisory boards. A stronger case can be made that a network of individuals serving on the boards of big publicly held firms does have that potential. We may expect that their incentives to mutually monitor each other will not be pronounced. We still however lack, reliable studies on the efficiency and the performance of our supervisory boards.

---

[36] Cf. *Baums*, The German Banking System and its Impact on Corporate Finance and Governance, in: Aoki/Patrick, The Japanese Main Banking System, 1994, p. 409 ff.; *Baums/v. Randow*, Shareholder Voting and Corporate Governance: The German Experience and a New Approach, in: Aoki/Kim, Corporate Governance in Transitional Economies, 1995, p. 435 ff.; *Edwards/Fischer*, Banks, Finance and Investment in Germany, 1994; *Köndgen*, Duties of Banks in Voting Their Clients` Stock, in: Baums/Buxbaum/Hopt (eds.), Institutional Investors and Corporate Governance, 1994, p. 531 ff.; *Roe*, Strong Managers, Weak Owners, 1994; *André*, Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Boards, Tulane L.R. 70, 1996, 1819 ff.

[37] The most recent and comprehensive studies in this respect have been published by *Boehmer*, Who controls Germany ? An empirical assessment, Working Paper Humboldt University, Dept. of Economics, 1998, 17 and *Boehmer*, Industry groups, bank control, and large shareholders: An analysis of German takeovers, Working Paper Humboldt University, Dept. of Eonomics, 1998, 24 ff.

[38] *André*, op. cit., at p. 1842.

[39] *André*, op. cit., at p. 1840.

6. *The board at work*

The supervisory board has a right to comprehensive information vis-à-vis the management board (§ 90 Stock Corporation Act). This includes the annual auditor's report which must be examined and commented by the board. In practice however, the auditor's report is as yet delivered to the ordinary supervisory board members in only a minority of companies.

Most companies have certain important transactions and issues listed in their by-laws or a separate set of rules of procedure as needing the supervisory board's approval. In general, supervisory board consider as their main tasks the nomination of new management board members, discussing and helping to develop the long-term corporate strategy and finance, improving operational performance, and reviewing the management board's performance. To what extent the supervisory board as a whole and its single members do contribute is open to question, especially if one takes the rather infrequent meetings into account (4 times per year for about 4 hours on average). Board committees will be convened more frequently, although committees seem to be less widespread than, for instance, in US-companies.

The chairman of the supervisory board holds a particularly influential position which has even been accentuated by the Co-determination Act of 1976: in the respective companies the chairman has a tie-breaking vote.
As a general rule, the chairman stands in close contact with the management board. He can influence the information available to the board and sets its agenda. A widely shared assumption is that the Co-determination Act of 1976 has further reduced the board's intensity of control and strengthened the position of the chairman.

VII. The Market for corporate control

The threat of an unwanted takeover can serve as a monitoring device provided that management is not entrenched. The structural impediments and possible statutory antitakeover provisions under German law have been described frequently[40]. Apart from that,

---

[40] *Lutter/Lammers*, Hostile Takeovers: Possibilities and Limitations according to German law, in: Maeijer/Geens (eds.), Defensive Measures Against Hostile Takeovers in the Common Market, 1990, 113 ff.; *Baums*, Takeovers versus Institutions in Corporate Governance in Germany, in: Prentice/Holland (eds.), Contemporary Issues in Corporate Governance, Oxford 1993, 151 ff.; *Immenga*, Corporate Takeovers Through the Public Market – German Report with References to EC Law, in: Kozyris (ed.),

public opinion and politicians are still opposed especially to public hostile takeover bids whereas some of the big banks seem to have changed their minds. This became apparent recently when Krupp-Hoesch AG tried to launch a public hostile takeover bid on the shares of its larger competitor Thyssen AG. A public outburst of accusations against the bidder and the banks involving employees, trade union representatives, politicians from all sides of the political spectrum, the media and not least the target's management was its consequence. Hence the bid was bogged down before it had started formally. That does not however, mean that there are no hostile takeovers in Germany at all.[41] In closely held firms controlling blocks will change hands irrespective of the obstruction of the incumbent management. But clocks in big publicly held firms tick differently.

As to the regulation, there is no explicit statutory regulation of public takeovers in Germany. In an attempt to modernize the financial market place in Germany a commission of experts convened by the Ministry of Finance has developed rules concerning public takeover bids[42]. The provisions of this code are mere recommendations which are meant to be recognized voluntarily by the stock exchange-listed companies. The majority of these companies has however so far refused to do so.

The Social Democrats in the Federal Parliament have tabled a bill which provides an explicit statutory takeover regulation including a mandatory bid on all outstanding shares as soon as an acquirer has purchased a controlling block[43]. Statutory takeover regulation will become necessary as soon as the EU Thirteenth Directive comes into force.

VIII. Recent legislation

New legislation regarding corporate governance has been introduced recently. The Act on Control and Transparency of Enterprises (KonTraG) entered into force on May 1, 1998.[44]

Spurred by several spectacular company crises comprising inter alia, Metallgesellschaft AG, and by discussion concerning the condition of the German economy, corporate governance has become a field of legislative initiatives. It could, of course, not be expected that basic

Corporate Takeovers Through the Public Markets, The Hague 1996, 191 ff.

41 Cf. Boehmer, op. cit. (n. 37).

42 See footnote 4), supra.

43 Entwurf eines Gesetzes zur Regelung der Unternehmensübernahmen (Übernahmegesetz), BT-Drucksache 13/8164 vom 2.7.1997.

44 Bundesgesetzblatt I vom 30.04.1998, 786 ff.

structures (e.g. the two-tier system or codetermination) would be up for discussion. Therefore, the KonTraG provides modest changes in details and does not mean a complete overhaul.
The aims of the KonTraG are the improvement of the work of the supervisory boards and more transparency and strengthening of the shareholders´ position. Differences in voting rights are reduced and obstacles to modern financing and salary instruments removed. Finally, improving quality of auditing and a critical look at the role of the banks in corporate governance is also part of the new legislation.

1. Management´s duties, liability and pay

The KonTraG clarifies the duties of the management board. It is now explicitly provided that there be an appropriate risk management. In particular, it is required to implement a supervisory system in order to detect at an early stage developments which may endanger the existence of the stock corporation.
Moreover, the annual accounts must identify the risks of future developments for the stock corporation and, in the case of parent companies, the whole group. It is also set out in somewhat more detail that the management board reports to the supervisory board on the future business policy and, in particular, the planning relating to financial matters, investments and personnel.[45]

Enforcing the liability of the management has been made easier. If there is a strong suspicion that the company has been damaged by dishonesty or infringement of the law the newly established § 147 III Stock Corporation Act provides that shareholders holding 5 per cent of the share capital or shares of an amount of one million German DM can demand that the supervisory board or a special representative take action against managing directors.

The KonTraG makes performance-oriented pay of the managers by granting stock options easier. This incentive device was not previously frequently used in Germany as there were technical impediments in the law. Now there are two new ways to satisfy an option contract with the management. The company may either buy back shares on the market. Or it may increase its share capital and create new stock on the condition that the stock options will

[45] *Claussen*, Wie ändert das KonTraG das Aktiengesetz ?, Der Betrieb 53, 1998, 177, 181; *Hommelhoff/Mattheus*, Corporate Governance nach dem KonTraG, Die Aktiengesellschaft 43, 1998, 249, 252 ff.

mature and be exercized.[46] The former more complicated way – granting management and employees convertible bonds – will, of course, also remain viable in the future.

2. *Strengthening the supervisory board*

Because of some spectacular insolvencies of stock corporations, the institution of the supervisory board has become the subject of heated debate.[47] The contention even was that the supervisory board is structurally incapable of or impeded in carrying out its main tasks.

One of the more specific complaints in this context is related to the maximum number of memberships on supervisory boards that an individual may hold. Although the maximum number has remained ten, it is now provided that the chairmanship of a supervisory board counts double because of the time that is required to fulfil this task.[48]

In order to allow the shareholders to scrutinize whether a candidate for the supervisory board is capable of fulfilling the duties of a member of the supervisory board effectively and with no conflicts of interest, appointment proposals for the position as a board member as well as the corporations` annual accounts must identify the professional occupation of the (proposed) member. Appointment proposals for members of the supervisory board of a listed stock corporation should also identify that person´s membership of other supervisory boards and similar bodies.

In order to improve efficiency of the supervisory board it is provided that it should meet once a quarter and that it must meet once each half year, or, if the stock corporation is listed on a stock exchange, twice each half year.

Substantial changes have also been made regarding the role of the supervisory board in auditing. A copy of the auditor´s report must be delivered to each member of the supervisory board or its corresponding committee. The supervisory board of a parent company must not only scrutinize its own annual accounts, but also the consolidated accounts of the group.

---

46 § 192 (1) no. 3 Stock Corporation Code.

47 See *Adams*, Stellungnahme zur Aktienrechtsreform 1997, Die Aktiengesellschaft , Sonderheft – Die Aktienrechtsreform, 1997, 9 ff.; *Baums*, Stellungnahme zur Aktienrechtsreform 1997, Die Aktiengesellschaft, Sonderheft - Die Aktienrechtsreform, 1997, 26 ff.; *Kübler*, Stellungnahme zur Aktienrechtsreform 1997, Die Aktiengesellschaft, Sonderheft – Die Aktienrechtsreform, 1997, 48 f.

48 Begründung des Regierungsentwurfes, BT-Drucksache 13/9712 vom 28.01.1998, p. 15 f.

Finally, the auditor must attend the meeting of the supervisory board or its corresponding committee in which the annual accounts are discussed.[49]

3. The role of the banks

As mentioned above[50], banks have substantial influence on the exercise of voting rights in publicly held stock corporations. This influence on German stock corporations was also the subject of debate before the KonTraG entered into force.[51] The amendments made to the Stock Corporation Act will however limit the position of banks in this respect only marginally.

In future, banks must inform customers whose shares they administer that they may choose to have their voting rights exercised by the bank or by a shareholder association.

In addition, a bank must inform its customers when it holds 5 % or more of the voting rights if the company is listed or if the bank was a member of the company`s most recent underwriting syndicate.

Finally, the bank must also advise customers in the case that one of its managers or employees is a member of the management or supervisory board of the respective stock corporation.

It is now clarified that banks must submit proposals on how to exercise the voting rights of customers and that they must devise such proposals in accordance with the hypothetical interests of an average customer. Furthermore, they must take organisational measures ensuring that their own interests will not influence such proposals. In particular, a bank must appoint a member of its management board who is responsible for compliance with the aforementioned duties, and who must supervise the orderly exercise of the voting rights and the recording thereof.

A more substantial amendment is provided by the new § 135 I s. 3 AktG. According to this provision a bank may not exercise the voting rights of its customers in stock corporations in which it holds more than 5 % of the share capital, unless its has specific instructions from the customer or it does not exercise its own voting rights.[52]

---

[49] See *Hommelhof/Mattheus*, Corporate Governance nach dem KonTraG, Die Aktiengesellschaft 43, 1998, 249, 254 ff.; *Lingemann/Wasmann*, Mehr Kontrolle und Transparenz im Aktienrecht: Das KonTraG tritt in Kraft, Der Betriebs-Berater 53, 1998, 853, 856 ff.

[50] See VI. 5.

[51] See footnote 36), supra.

[52] *Seibert*, Kontrolle und Transparenz im Unternehmensbereich, Die Aktienrechtsnovelle PRO und KonTraG, Die Aktiengesellschaft, Sonderheft – Die Aktienrechtsreform, 1997, 65, 68.

Finally, banks must disclose in their annual accounts all appointments of their employees and managers to the mandatory boards of large corporate entities, such as stock corporations and companies with limited liability, and all shareholdings in such corporate entities which exceed 5 % of the voting rights.[53]

4. ”One share, one vote” and capital interlocks

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 abolition of multiple voting anticipates a similar provision in the Draft Proposal of a Fifth Directive.[54] As with multiple voting stock, caps on voting rights (Hoechststimmrechte) are also exposed to the objection that voting rights and ownership do not correlate.[55]

A considerable number of stock corporations in Germany have provisions for maximum voting rights in their by-laws. The main objective of such provisions has been the prevention of hostile takeovers. As these may also be value-increasing, voting caps as a general impediment were recognized as detrimental to the development of the capital market. The legislation has therefore responded by abolishing maximum voting rights for listed stock corporations.[56]

Finally, the KonTraG lays down a further limitation of voting rights concerning interlocking shareholdings. Such interlocks may create the danger of watering of capital stock and of reducing ownership control. [57] According to the new § 328 III AktG a listed stock corporation

---

53 *Claussen*, Wie ändert das KonTraG das Aktiengesetz ?, Der Betrieb 53, 1998, 177, 183 ff.; *Meyer-Wegner*, New legislation reforms stock corporation rules, German Tax and Business Law News-Letter, June 1998, 3, 4.

54 Zweite Änderung eines Vorschlags für eine Fünfte Richtlinie des Rates über die Struktur der AG, Abl.EG Nr. C 7 vom 11.01.1991.

55 Begründung des Regierungsentwurfs, BT-Drucksache, 13/9712, vom 28.01.1998, p. 20.

56 *Hartenfels,* Neuer rechtlicher Rahmen für Aktiengesellschaften, Die Bank, 1997, 182, 183; *Lingemann/ Wasmann*, Mehr Kontrolle und Transparenz im Aktienrecht: Das KonTraG tritt in Kraft, Der Betriebs-Berater 53, 1998, 853, 854 f.

57 Begründung des Regierungsentwurfs, BT-Drucksache 13/9712 vom 28.01.1998, p. 25.

is not allowed to exercise its voting rights as far as the election of supervisory board members in the other company`s general meeting is concerned.
