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Christian L. Masch
info@iuraQuest.de

The amendment of the German Stock Companies Act (*Aktiengesetz, AktG*) by the draft of the "Integrity and Modernising the Law of Contestation Act" (*Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts, UMAG*)

*As a third[1] step—after the appointment of a Corporate Governance Commission in 2000[2] and the passing of the Transparency and Disclosure Act (*Transparenz- und Publizitätsgesetz,TrPublG/TransPuG[3]*) in 2002—the above mentioned draft bill,[4] published January 28th, 2004, is focussing on the law of stock companies. This paper is dealing with the amendments.*

1. Section 93 paragraph 1 *AktG*[5]

Section 93 paragraphs 2 et seq. *AktG* governs the corporate-law liability of the members of the executive board[6] towards the stock company. Section 93 paragraph 1 *AktG* deals with the duties of care of the members of the executive board. In paragraph 1 a so-called business judgement rule[7] is governed. It defines that there will be no breach of duty, and thus no personal liability of the members of the board, if "the members of the executive board can assume to make an entrepreneurial decision on the basis of sufficient information and for the benefit of the company without gross negligence".[8]
That means, that there will be no personal liability for reasonable entrepreneurial decisions, even if they prove to be (dead) wrong.

The reference to the "entrepreneurial decision", however, makes it clear that the privilege is only applicable to such decisions and does not operate in relation to other duties. The "immunity" is only meant to protect the necessary entrepreneurial freedom which is the bedrock of the company's success—
and barely controllable as it bases on prognoses and estimations, instinct, intuition, feeling and even fantasy.[9] It does, however, not leave the observance of law and contractual duties up to the executive board. The regulation is only meant to protect the entrepreneurial discretion and latitude to act.

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[1] As *Diekmann/Leuering*, *Neue Zeitschrift für Gesellschaftsrecht* (*NZG*) 2004, p. 249 state, one has to bear in mind the Review Procedure Restructuring Act, *Spruchverfahrensneuordnungsgesetz* of June 12th, 2003, too. This act deals with the (judicial) review procedure (*Spruchverfahren*, *vide* below, 11, b, note 59) with respect to the compensation of shareholders not taking part in a profit-transfer agreement or being squeezed out.
[2] The first commission under Professor Dr. *Theodor Baums* ("*Baums*-Commission") was appointed in 2000. *Vide* for the Commission's final report *Deutscher Bundestag Drucksache* (*BT-Drucks.*) no. 14/7515 of August 14th, 2001 (http://dip.bundestag.de/btd/14/075/1407515.pdf, last visited March 25th, 2004). The second commission under Dr. *Gerhard Cromme* ("*Cromme*-Commission") was appointed in 2001. *Vide* for the latest version of the German CGC: https://www.ebundesanzeiger.de/research/banzservlet/event_redirect/page_research_ministerial/sid_58e4a742acaed7a70ca0c0a5b101d2a4 (last visited March 25th, 2004).
[3] *Bundesgesetzblatt I* (*BGBl.*), p. 2681, (http://217.160.60.235/BGBL/bgbl1f/bgbl102s2681.pdf, last visited March 25th, 2004).
[4] *Vide* http://www.bmj.bund.de/media/archive/362.pdf (last visited March 25th, 2004).
[5] Article 1, no. 1 *UMAG*.
[6] The same applies to members of the supervisory board, section 116 clause 1 *AktG*.
[7] *Kuthe*, *Betriebsberater* (*BB*) 2004, p. 449. The US-American law business judgement rule originated in an 1829 decision by the Louisiana Supreme Court, *Percy vs. Millaudon*, 8 Mart. (n.s.) 68 (La. 1829). The claimant sought to hold a bank director liable for the bank president's errors. The court developed a protective standard to evaluate the director's conduct and denied liability. It was feared that "persons of reason, intellect and integrity would not serve as directors if the law exacted from them a degree of precision not possessed by people of ordinary intellect and integrity". The Rhode Island Supreme Court, in *Hodges vs. New England Screw Co.*, 3 R.I. 9, 18 (1853), stated the rule, that "a Board of Directors acting in good faith and with reasonable care and diligence, who nevertheless fell into a mistake, either as to law or fact, are not liable for the consequences of such mistake".
[8] Draft (note 4), p. 19.
[9] Draft (note 4), p. 19.

Three elements will have to be fulfilled, for the new section 93 paragraph 1 clause 2 to apply:
(1st) There has to be an entrepreneurial decision. The definition of such decisions is rather wide, so that every entrepreneurial activity is included. The Explanatory Memorandum[10] is describing the entrepreneurial activity as putting into practice entrepreneurial decisions. This is somewhat circular, because not only the transformation of the decision, but the decision itself is entrepreneurial activity and (thus) relevant.

(2nd) The members of the executive board have to act in good faith, so that they e.g. have to act for the benefit of the company and without private interests or irrelevant influences.
The Ministry of Justice mentions 5 elements,[11] while acting for the benefit of the company as well as the absence of private interests are two features of good faith. Hence, it is superfluous to mention them separately.
Additionally, good faith means that public policy has to be borne in mind, so that e.g. the engagement in tax evasion will render the business judgement rule inapplicable.

(3rd) They have to act on the basis of sufficient information.

The members of the board take the burden of proof for the prerequisites, since clause 2 is an exception of clause 1, which defines the general duties of care.[12] However, if the business judgement rule does not apply, this does not mean that the members of the executive board have automatically violated a duty of care. That is a separate question for the court to determine.

2. Section 117 paragraph 7 no. 1 *AktG*[13]

Section 117 *AktG* deals with the liability for malicious influence on organs[14] of the stock company. The company and the shareholders can claim for damages, if the influence caused damage to the company and the shareholders, respectively. Today's section 117 paragraph 7 no. 1 *AktG* governs that there is no such liability, if the influence causing the damage was exercised by means of voting power in the general meeting. In other words: under section 117 paragraph 7 no. 1 *AktG*—current version—the shareholders who hold the majority of the vote are allowed to treat the company at will. Such a privilege is truly democratic, though deemed outdated. Thus, section 117 paragraph 7 no. 1 *AktG* will be abolished.

The draft, nevertheless, hints at a possible contributory negligence of the outvoted minority (section 254 Civil Code, *Bürgerliches Gesetzbuch, BGB*).[15] The latter, in case there is a malicious resolution, has to prevent damages by making use of the action for annulment under section 243 paragraph 2 *AktG*, i.e. by taking legal action against the resolution. Otherwise, the shareholders' claim for damages might be reduced or precluded. The *companies'* claim, however, will not be affected.

In the Explanatory Memorandum, the Ministry of Justice mentions the opinion after which employees of shareholders holding a controlling interest, can be liable under section 117 *AktG*, too.[16] The draft leaves open the dispute, only pointing out that the employee's liability has no practical relevance besides the shareholder's liability.

3. Section 123 *AktG*[17]

a) Section 123 *AktG* deals with the registration for the annual general meeting. The articles of association may set forth such registration as mandatory. The "lodgement" of stocks, however, will be abolished. Foreign investors, especially foreign funds, according to the draft,[18] are being deterred from investments or at

[10] Draft (note 4), p. 18.
[11] Draft (note 4), p. 17.
[12] The business judgement rule replicates the guidelines, set forth by the German Federal Court in its decision "*ARAG/Garmenbeck*", *BB* 1997, 1169, reviewed at http://www.iuraquest.de/aragam.
[13] Article 1, no. 2 *UMAG*.
[14] The executive board and the supervisory board are "organs" of the stock company, i.e. mandatory in existence and with legally—instead of contractually—defined authority.
[15] Draft (note 4), p. 20.
[16] Draft (note 4), p. 20.
[17] Article 1, no. 4 *UMAG*.
[18] Draft (note 4), p. 20.

least from exercising their voting power in Germany because of misconceptions with respect to that term, especially regarding salableness of the shares.

Moreover, the alteration is said to adapt the law to the practice, because the shareholders, instead of depositing stocks with the company, do already simply present bank certificates instead of depositing their shares at the company.

The reshaped paragraph 2, however, will furthermore allow to stipulate a registration in the articles of association, because the companies are interested in knowing the number of shareholders attending the general meeting. Otherwise, in particular listed companies could not adequately organise their annual meeting.
Section 123 paragraph 2 clause 3 *AktG* will after its amendment govern that, whatever deadline the articles of association specify, the shareholders will be admitted to the general meeting, if they have registered no later than 7 days before the date the annual general meeting is held.

b) Under the altered paragraph 3 the articles of association may stipulate how[19] the authorization to take part in the general meeting (paragraph 2) has to be proven by the owners of bearer shares (with respect to inscribed stocks, the authorization results from checking the stocks against the stock record).

Paragraph 3 clause 2, however, makes it clear, that a certificate provided by the—domestic or foreign—safekeeping bank will always suffice as authorization.
Clause 3 defines the 14th day prior to the general meeting as a record date. Certificates not certifying the ownership (still or already acquired) on that date do not allow the shareholder to take part in the annual general meeting.

Clause 4 stipulates, by way of an absolute presumption, that the company—for the duration of the general meeting—has to regard as shareholders (only) those, who have proven their authorization as stipulated in the articles of association or according to clause 2. Clause 4, to mention the obvious, does only apply to the relationship between the company and the shareholders and only with respect to the general meeting. It does not interfere with the ownership as such, so that e.g. dividends will be paid to the real owner. In other words: the real owner of the shares is the shareholder, even if the shares were purchased after the 14th day prior to the general meeting. He is just not permitted to take part in the general meeting. The seller, again, can take part in the meeting, but is no shareholder. The seller has, however,—by virtue of the stock sales contract—either to act according to orders of the new owner or not to take part in the annual general meeting at all.[20]

Clause 5 regulates another preclusive period. The company has to receive the certificate of ownership by the 7th day prior to the general meeting. Otherwise, the shareholder will—again—not be permitted to the general meeting. The articles of association may, however, stipulate a later date than the 7th day before the general meeting.[21]

4. The shareholders' forum (*Aktionärsforum*)[22]

With the new section 127a *AktG* the draft leaves well travelled rails behind. The norm will deal with the problem of minimum participation. Certain rights of the shareholders depend on a quorum, in particular section 122 *AktG* (calling the shareholders on request of shareholders), section 142 *AktG* (appointment of a special auditor by a judicial decision), sections 147, 147a (certain claims for damages). In these cases the necessary motion of the shareholders' minority has to be backed by at least 1 % of the shareholders or by shareholders holding shares to the market value of at least 100,000 Euros.[23]

[19] *Kuthe*, *BB* 2004, p. 451, note 25, states that the draft leaves open the question, whether the owners of bearer shares do *always* have to prove their ownership (as the prevailing opinion says). The draft does, however, follow the latter opinion, and gets that straight by the word "additionally" (*zusätzlich*) in paragraph 3 clause 1, word 6, so that the question is not left open.
[20] Draft (note 4), p. 22.
[21] This is barely to be taken from the wording of the new section 123 paragraph 3 *AktG*, but only from the draft (note 4), p. 22, *vide Kuthe*, *BB* 2004, p. 451, note 26.
[22] Article 1, no. 6 *UMAG*. This will not implement a class action as practised in the United States.
[23] Since market value means the value at the stock exchange, the 100,000 Euro threshold does not apply to non-listed ("private") companies. There, the minority has to reach the one per cent threshold, *Kuthe*, *BB* 2004, p. 449, note 11.

It is, however, often difficult for a shareholder to get in contact with other shareholders and to co-ordinate legal steps. Here, section 127a *AktG* will break new ground by stipulating a "shareholders' forum" in the internet. Therefore, the Electronic Federal Gazette (*elektronischer Bundesanzeiger*), available via internet,[24] will contain a new section, the shareholders' forum. Within this forum to be created, every shareholder will be able to announce his requests and to seek for participation of other shareholders.

The communication between the shareholders will necessitate the following procedural steps:
At first, the shareholder has to send the request to the stock company. He has to point out, that he is going to announce his request.
Then, he can announce his request in the Electronic Federal Gazette, on condition that he substantiates to the Electronic Federal Gazette, that he has sent his request at least 3 workdays prior to his announcement order to the stock company. The period of at least three working days is meant to enable the company to quickly react or to apply for a temporary injunction, in case it deems the announcement illegal. The stock company can also comment the request in the Electronic Federal Gazette.
Section 127a *AktG*, as the draft says,[25] does not entitle the shareholder to an announcement. The announcement as such is subject to a contract between the shareholder and the Electronic Federal Gazette.
The wording of the new norm mentions the announcement ("three workdays prior to the date of announcement"), not the—necessarily foregoing—announcement order. In fact, however, the norm refers to the day on which the shareholder applies for the announcement in the Electronic Federal Gazette. The Electronic Federal Gazette will have to check the mentioned precondition on this very day, because it may only announce the request in case the precondition is met. Thus, the day of order will be decisive. The wording apparently bases on the idea that the day of the announcement on the Electronic Federal Gazette's web site will regularly coincide with the day of the order.

For the present, the shareholder has to take the costs of the announcement. He will be reimbursed by the stock company in case his request is successful. The stock company, however, only has to take the costs of the announcement (limited to the costs of no more than 5,000 characters, including commas, dots, blanks, etc.). The shareholder has to bear further expenses, e.g. costs for more than 5,000 characters or any costs arising from legal advice, by himself.

The new forum is to be developed as an internet-forum for all German[26] stock companies. The Ministry prefers that solution to the publication on the web sites of the undertakings. The central platform should facilitate the investors' search for information. Furthermore, the Ministry deems it easier for the shareholder to announce his request if the company has such reactive position towards the announcement in the Electronic Federal Gazette, instead of being able to refuse the announcement on its own homepage.[27]

5. The right to ask questions during the general meeting (*Fragerecht*)[28]

Three new numbers will be added on section 131 paragraph 3, which deals with denial of information during the general meeting.

a) Under the new no. 7, the executive board may deny information, in case the shareholder has exceeded his speaking time, which has previously been determined by the chairman of the meeting (*Versammlungsleiter*[29]). This is a legal measure against the misuse of the right to speak. The right to speak shall not be abused as a means of talking and asking the executive board into making mistakes—which can be contested in court, so that the board, and thus the company, may become open to blackmailing.

[24] https://www.ebundesanzeiger.de.
[25] Draft (note 4), p. 24.
[26] Stock companies are to be called "German" if they have been founded under the German Stock Companies Act and - for the time being - have their real seat within the territory of the Federal Republic of Germany. For the German real seat doctrine *vide* http://www.iuraquest.de/gmbh/transfer.
[27] Draft (note 4), p. 24.
[28] Article 1, no. 8 *UMAG*.
[29] Usually the chairman of the supervisory board.

No. 7 is meant to enhance the quality of the general meeting. The general meeting shall be re-established as an effective platform for decisive strategic decisions, rather than an endless and boring Q-and-A session.[30]

b) The new no. 8 will govern that questions do not necessarily have to be answered during the general meeting, if they do not go beyond information already available on the company's web site. By disburdening the board from answering such (often standard) questions, more room will be left for the discussion of the decisive topics. The information, however, has to be available since—at least—one week prior to and du r-ing the general meeting, as well as at the latter itself.

c) The new no. 9 refers to the new section 131 paragraph 6 *AktG*. This paragraph allows to stipulate in the articles of association that the shareholders, by a corresponding decision of the executive board, can put forward questions with regard to certain items on the agenda in writing, including e-mail. Paragraph 6 allows to answer such questions on the company's homepage in the run-up to the annual general meeting. That shall enhance the efficiency in answering shareholders' questions. The answers can be given in the form of formulated answers or by supplying corresponding documents.
Paragraph 3 no. 9 together with paragraph 6 will govern that those questions can, but do not necessarily have to be answered during the general meeting (again), if being answered on the homepage, and if the answers are available there not later than three days prior to and during the general meeting, as well as at the latter.[31]
It follows from the new section 131 paragraph 3, no. 9 with paragraph 6 last sub-clause *AktG* that the questions can be answered only at the homepage (given, the three-day period is met) *or* only during the general meeting *or* at the homepage *and* during the general meeting. The "and-variant" probably will be chosen, if the question is very important. The first and second variant, i.e. to (only/also) answer the question in the general meeting, will have to be chosen in case the three-day deadline has elapsed, because then answering the question only at the homepage will not enable the board to deny answers to single questions during the general meeting. However, even though this is not as clear as day from the wording, it has to be taken from paragraph 3, no. 9, together with paragraph 6 last sub-clause, plus a grain of salt, and does even then contradict the wording of paragraph 3, no. 9, that answering the written questions exclusively during the general meeting,[32] will enable the executive board to deny further answers, too. The reason is that the need for information will be satisfied in this way, too.

d) No. 8 and no. 9—in the web-site-only variant—apply on condition that the information / answers with questions are directly and without further search accessible on the homepage. Minor and temporary malfunctions of the general access to the internet will, nevertheless, not be decisive.[33]

[30] *Diekmann*/*Leuering*, *NZG* 2004, p. 256 hold, that the companies, in a conservative approach (better safe than sorry), may not make use of their right to deny information, i.e. prefer to repeatedly answer questions in order to avoid contestable mistakes. That remains to be seen.
[31] The Explanatory Memorandum somewhat surprisingly states that the executive board has to define a deadline for the questions, and that this deadline shall not be earlier than 5 days prior to the date of the general meeting, draft (note 4), p. 28. *Kuthe*, *BB* 2004, p. 450, note 19, hints that this by no means can be taken from the wording of the draft. Thus, either the draft has to be changed insofar, or the idea of a preclusive period has to be abandoned, the more so as a deadline (three days prior to the general meeting) does already exist.
[32] A certain form is not stipulated, so that the answers can be given in written form, too. That includes the possibility to supply the information on data terminals.
[33] Draft (note 4), p. 27.

6. The new quorum in section 142 paragraph 2 *AktG*[34]

a) The motion for the appointment of a special auditor by court order will be made easier. Shareholders holding shares to a market value of at least 100,000 Euros[35] or 1 % of the shares, will be able to file such a motion (clause 1). A special auditor will be appointed, if facts foster the suspicion that dishonesty or infringements of the law or the articles of association happened during the process which is to be investigated. The mention of "facts" shall ensure that bare allegations will not suffice for the appointment of a special auditor.[36] That, together with section 146 *AktG*, under which the applicants will have to bear the costs in certain cases,[37] is meant to hinder shareholders from misusing the instrument of a special audit.
The 100,000-Euros threshold will be calculated on the basis of the trade-weighted average list price during the last three months preceding the motion.[38]

b) Clause 3 will stipulate that the applicants either have to deposit their shares or (this is new:) to provide an affirmation by the safekeeping credit institution that the shares are not going to be sold for the course of the special audit. The precondition, that the applicants have to be shareholders since at least three months prior to the general meeting and that they have to substantiate that, will be left unchanged.

c) Paragraph 4 clause 1 will reduce the quorum with regard to the motion for replacement of the special auditor—on behalf of bias, lack of necessary knowledge or concerns with respect to reliability—to the r e-quirements stipulated in paragraph 2 clause 1.

7. The new section 145 paragraph 4 *AktG*[39]

Under section 145 paragraphs 1 - 3 *AktG* the stock company is obligated to co-operate with the special auditor, in particular, to lay open information to the latter. In certain cases, however, the disclosure of facts might harm the company('s interests). The new paragraph 4 is meant to protect business secrets. It enables the company to become dispensed from the paragraph-1-to-3 obligations. The court will, however, acquit the company from the obligations only as far as necessary, so that the special audit is going to take place, even if business secrets are being touched.

The Ministry of Justice was at no pains to further define the cases in which the interests of the company will outweigh the interest in an effective special audit. Nevertheless, two guidelines are to be seen: on the one hand the possible damage, so the Ministry,[40] has to be considerable, so that one has to think of damages on the scale of millions[41] rather than thousands of Euros. On the other hand, the company's release from the duties under paragraphs 1 - 3 is meant to be limited. In general, the special audit shall not be at stake. Thus, in case the special audit as such does depend on the information the company is trying to hold back, i.e. in case the special audit is virtually impossible without the information, the company will possibly have to face (potential) damages for the sake of the shareholders' interests. Here, some case law is to be expected.

8. The new section 146 *AktG*[42]

The new section 146 *AktG* governs—as a basic rule—that the company has to carry the costs of the legal fees and the costs of the special audit. Those amongst the applicants, however, who cause the special audit by means of intentionally or gross negligently bringing forward false facts, will have to carry the costs themselves. This is not only meant to underline possible claims for damages outside the *AktG* (especially section 826 *BGB*, dealing with liability in case of wilful damage), but constitutes a new claim for damages within the *AktG*.

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[34] Article 1, no. 10 *UMAG*.
[35] *Vide* note 23.
[36] Draft (note 4), p. 29.
[37] *Vide* below, 8.
[38] Prices will be published at the web site of the German financial services watchdog, http://www.bafin.de.
[39] Article 1, no. 11 *UMAG*.
[40] Draft (note 4), p. 30.
[41] Or billions—according to the size of the business of the particular corporat ion.
[42] Article 1, no. 12 *UMAG*.

9. The new sections 147 paragraph 1 and 147a[43]

Under the current section 147 paragraph 1, claims for compensation related to the incorporation (sections 46 - 48 and 53 *AktG*[44]), to the liability of the management (section 93 *AktG*[45]), or to malicious influence of a shareholder (section 117 *AktG*[46]) have to be enforced by the company, in case the general meeting decides so or a minority of shareholders, holding at least 10 % of the shares, do demand so.

a) Under the new section 147a paragraph 1 *AktG*, additionally, a minority of shareholders holding shares to a market value of at least 100,000 Euros[47] or holding 1 % of the shares will be enabled to—after seeking leave from the court—enforce the claims mentioned in section 147 paragraph 1 *AktG* themselves (*actio pro socio*[48]).

The court will, under section 147a paragraph 1 clause 2 *AktG*, grant leave:

no. 1: if the minority makes it plausible by the help of legal documents that they have purchased their shares before the date they got informed about the objected breach of duty; that does not apply to shareholders who are universal successors (*Gesamtrechtsnachfolger*, especially heirs), and

no. 2: if the minority makes it plausible that the company itself has not brought an action within a reasonable deadline fixed by the minority (inaction by the company), and

no. 3: if there are facts fostering the suspicion that the company has suffered a loss because of dishonesty / gross infringements of the law or the articles of association, and

no. 4: if the interests of the company do not stand in the way of the claim.

No. 1 aims at excluding those who have purchased the shares only in order to bring an action. The rather rigid stipulation, that the lacking knowledge can only be made plausible by the help of documents, is meant to save the formal preliminary proceedings from a time-consuming hearing of evidence. Suitable documents are e.g. a deposit statement or actual securities.

The facts in the sense of no. 3 have to be proven by the minority. A mere substantiation[49] in the sense of section 294 Civil Procedure Act (*Zivilprozessordnung, ZPO*) will not suffice.[50]
The *actio pro socio* is not restricted to breaches of duty after the coming into force of the *UMAG*, so that the minority will also be able to pursue old claims, given the claims are not statute-barred.[51]
b) Section 147a paragraph 2 *AktG* will define that the regional court (*Landgericht*) of the area where the company has its seat, has jurisdiction.

c) Under section 147a paragraph 3 clauses 1 and 2 *AktG* the action will have to be directed against the (allegedly) responsible organs, proxies or shareholders of the company and is to be taken to court within three months after the authorization has been delivered to the applicants.
Several actions (by different minorities) are possible, but will have to be procedurally combined (clause 4). The draft hints that further actions of another shareholder minority, dealing with the same subject and bas-

[43] Article 1, nos. 13 and 14 *UMAG*.
[44] Sections 46 - 48 *AktG* deal with the liability of the founders, other people the founders were acting for, and the members of the two boards in relation with the foundation of the stock company; section 53 deals with the same questions in the case of an "additional/subsequent foundation" (*Nachgründung*), i.e. when the company within two years after its foundation (entry in the register) enters into a contract with a founder or with a shareholder who is holding more than 10 % of the shares, by which the said persons sell goods to the company at a price of more than 10 % of the original stock, section 52 paragraph 1 *AktG*.
[45] See above, 1.
[46] See above, 2.
[47] *Vide* note 23.
[48] Or *actio pro societate*, respectively—i.e. action on behalf of a company / action as companion / action for the company.
[49] German procedural law differentiates between proof (*Beweis*, *Vollbeweis*) and substantiation (*Glaubhaftmachung*, *Substantiierung*). The latter is less than evidence, i.e. a plausible, believable allegation.
[50] *Diekmann*/*Leuering*, *NZG* 2004, p. 250.
[51] Neither from the wording of the draft nor from its Explanatory Memorandum comes clear, whether already the preliminary proceedings (or only the lawsuit) hinder(s) the limitation. The wording of the Explanatory Memorandum hints at the first alternative, *vide* draft (note 4), p. 33 and *Diekmann*/*Leuering*, *NZG* 2004, p. 251. The law, i.e. section 204 *BGB*, dealing with the interruption of the limitation in certain—expressly mentioned—cases, however, speaks another language, because it does not mention the preliminary proceedings under section 147 *AktG*.

ing on virtually the same facts as the already preliminary approved action, may be denied authorization, because the additional costs may be regarded unnecessary, given the subject is in good (lawyer's) hands, i.e. sufficiently represented.
An intervention by a third party in support of the minority (*Nebenintervention*) will not be possible (clause 3), because the authorization is limited to the applying minority.
The company will have to publish the action without delay (clause 5). The company's (non-) performance of this obligation will, however, not affect the action.

d) Section 147a paragraph 4 will deal with situations in which the action has been settled other than by court decision, i.e. especially out-of-court settlements, independent of whether the action was ever brought to court.
The executive board[52] has to publish without delay how the proceedings were discontinued. It has to announce the wordings of all the deals made with regard to the closure of the proceedings, including the names of the participants in the decision—not to bring, not to defend, to discontinue, to settle or to compromise the action—and their holdings. Payments by the company or third parties acting for the company will have to be highlighted and itemised.

The core component of paragraph 4 is its clause 5, under which the comprehensive announcement is condition for every single obligation to payment becoming effective, while it will be no prerequisite for the validity of the settlement as such (clause 6).
It is to be taken from the Explanatory Memorandum that every unpublished obligation makes void all the financial obligations of the company.

Time will tell whether the courts will leave room for smaller mistakes, e.g. by allowing subsequent publishing of omitted details or participants. Even if not, there seems to be a loophole for "unpublished payments", because there might be a further liability of the company. If the latter does negligently not announce all the payments without delay, so that it does not have to pay, one could think of a contractual liability of the company. Such liability could arise from the settlement, so that the company would have to pay damages to the extent of the sums agreed upon before. The draft, to address a possible objection, is not as clear as to prohibit such a claim as an evasion, because it is only dealing with the shareholders' and the company's interests, but not with further negligent behaviour of the company. Thus, an evasion presupposes more than negligence, i.e. the intention not to publish and to—at least partly—evade the rigid legal stipulations.

e) Section 147a paragraph 5 *AktG* will govern that the judgement will be binding for the company and all shareholders at any rate, i.e. independent of whether the minority is winning or losing the case. The same applies to settlements.
f) Paragraph 6 will deal with legal fees. It will stipulate that if the motion is successful, the company will have to carry the costs, otherwise the applicants (as co-debtors). If the action is also successful, the company will have to carry its costs, too. Otherwise, i.e. if the action is not or not entirely successful, the claimants will have to fully or partly carry the costs.

10. The new section 193 paragraph 2 no. 4[53]

Under section 192 *AktG* the general meeting can determine a conditional increase in capital in relation with stock option plans or convertible bonds and in the run-up to mergers. Then, the increase in capital depends on whether or not and to what extend the stock purchase options are being triggered and thus the additional shares are being issued.

Due to section 193 paragraph 2 no. 4 *AktG* the general meeting has to resolve on the crucial points of stock option plans. This obligation, however, does currently only apply to stock option plans offering "naked war-

[52] The draft expressly refers to the "executive board", and not to the "company". This is being criticised by *Diekmann*/*Leuering*, *NZG* 2004, p. 251, because under section 76 paragraph 1 *AktG*, defining the executive board as the usual representative of the stock company, "company" would in general mean "executive board", so that it is unnecessary to mention the executive board in section 147a *AktG*, and thereby to interfere with the general rules of representation (systematic view). To refer to the executive board may further unduly complicate necessary activity of the supervisory board in case of conflicts of interest.
[53] Article 1, no. 15 *UMAG*.

rants" to the employees or members of the boards of the company or its affiliated companies, i.e. stock options not being combined with convertible bonds or the like.

Under the new section 193 paragraph 2 no. 4 *AktG* the general meeting, for the sake of equal treatment and transparency,[54] will have to resolve on the crucial points of capital-increasing stock option plans linked with convertible bonds, too, if the stock options are conceded as part of the wages or payments of employees or members of the boards of the company or its affiliated companies.

Otherwise, the register court will not register the resolution, so that—under section 197 clause 1 *AktG*—the shares do not have to be issued and the increase in capital will not take place.

11. The annulment of resolutions of the general meeting[55]

Sections 241 et seq. deal with the validity of resolutions of the general meeting. There are new sections 242 paragraph 2, 243 paragraph 4, 245 and 246a *AktG*.

a) The core of the new regulation will be sections 246a and 242 paragraph 2 clauses 5 and 6 *AktG*, governing clearance proceedings (*Freigabeverfahren*). If a resolution of the general meeting with respect to an increase or decrease in capital or with respect to a control or profit-transfer agreement is contested in court, the company will be able to apply for a clearance with respect to this resolution by the court already dealing with the action. If the court regards the action inadmissible or evidently not sound, or if the court comes to the conclusion that not registering the—possibly void—resolution in the commercial register would unduly harm the company, it will release the registration. As a result of the clearance order, the resolution will become valid by virtue of registration, even if it is actually void.[56] The plaintiffs' personal claims for damages will regularly be limited to reimbursement with regard to the court fees, and even that only in some cases and as far as the action was sound and would have been successful without clearance order and registration.

An action will be e*vidently not sound* if the claimants are in all likelihood about to loose the case, i.e. if the general presumption of soundness, resulting from the structure of the norm, does not apply.[57] The court will be urged to decide within three months (section 246a clause 4 sub-clause 1 *AktG*).[58]

It should be born in mind, however, that the clearance order is no cure-all. It does only go as far as the court has actually ruled. Thus, the register court, responsible for the registration, can refuse the registration because of other—i.e. not mentioned by the process court—reasons, e.g. lack of authority of the representative applying for registration.

b) With respect to the action for annulment of decisions of the general meeting (*Anfechtungsklage*) the draft pursues two goals. On the one hand, the action for annulment, an important means of protection of the shareholders' (and the stock companies') interests, will be maintained. On the other hand, the misuse of the action for annulment has to be avoided.
Section 243 paragraph 4 *AktG* will limit the annulment of resolutions in case of incorrect information by the executive board. In order to limit the possible misuse of the action for annulment, the new paragraph 4 clause 1 defines an objective yardstick. Thus, an action for annulment will only be successful, if an objective shareholder would have been influenced by the subject of the information, too. In fact, the judicial view will be established as decisive.

It has to be pointed out that the court will not have to ask, whether the shareholder, given the information would have been provided correctly, had voted differently. The court will only have to ask, whether an objective shareholder would have based his voting on the information. Thus, the importance of the information

[54] Draft (note 4), p. 40.
[55] Article 1, nos. 17 - 21 *UMAG*.
[56] Therein lies the difference between a registration with and a registration without a clearance order (the latter is likewise possible, because the action for annulment does not block the registration): in the without-case the decision can be contested, even if it has been registered.
[57] Draft (note 4), p. 47.
[58] There are, however, calculations that such a decision may take up to ten months, *vide Diekmann*/*Leuering*, *NZG* 2004, p. 254, note 60.

as such, not the supplied or possible answer, will be decisive. To give an example: information on mergers or considerable investments are decisive, while an objective shareholder would probably not rest his voting on information regarding the colour of company cars or the cooperation with certain service providers or suppliers. In general, one can say, that a view, not taking into account personal likes or dislikes, but only the interests of the company and the interests of long-term shareholders, has to be applied.

Furthermore (clause 2), the action for annulment will not be admissible in case and as far as the law stipulates a special judicial review (*Spruchverfahren*) for the complaints about insufficient information with regard to the calculation, extent and reasonableness of payments, gratuities, co-payments and to further questions of valuations.[59]
The draft hints that section 243 paragraph 4 clause 2 *AktG* will only apply to "usual" faults. Far reaching misstatements or denials of information are not covered because in these cases the action for annulment has to be admissible as a protective instrument against wilful violations of the right to information.[60]

c) Section 245 no. 1 *AktG* will stipulate that claimants of an action for annulment can only be shareholders who have purchased their shares before the agenda of the general meeting was published. There is no quorum.[61] The draft hints, that the Ministry of Justice did not regard a certain foregoing holding period to be necessary, but that the announcement of the agenda is deemed a suitable date for the differentiation. Those who purchase their stocks later, on the one hand, know (or could know, respectively) the agenda and that there might come unfavourable decisions, so that they need less protection. On the other hand, it shall not be possible to purchase stocks after the announcement of the agenda only in order to later bring an action for annulment (in order, again, to blackmail the company).

d) In section 246 paragraph 3 *AktG* it will be governed, that the state governments, i.e. the *Länder*, may concentrate the jurisdiction for actions for annulment at one of the regional courts in every higher regional court's district (*Oberlandesgerichtsbezirk*). Thereby the legal expertise with respect to (actions for annulment and thus with regard to) corporate law shall be focussed, which is deemed advantageous because of the often complex problems.[62]

e) Section 248a *AktG* will govern, that if the action for annulment is discontinued other than by a court decision, the company will have to publish that. Section 147a paragraph 4 *AktG* will have to be applied, so that payments and their beneficiaries have to be announced.

12. Section 258 *AktG*[63]

Section 258 *AktG* deals with the judicial appointment of a special auditor in case it is to be feared that certain items are undervalued in the annual account. The new paragraph 2 clause 3 will adopt the quorum to that in section 142 paragraph 2.[64] The alteration is a consequence of the lowered requirements in section 142 paragraph 2. Furthermore, under the new paragraph 2 clause 4 the applicants—as well as under section 142 paragraph 2 clause 2 *AktG*—either have to deposit their shares or (this is new) to provide an affirmation by the safekeeping credit institution, that the shares are not going to be sold during the special audit.

13. Section 280 *AktG*[65]

Section 280 *AktG* is dealing with the foundation of limited associations by shares (*Kommanditgesellschaft auf Aktien, KGaA*). Today's section 280 governs that a *KGaA* has to be founded by at least five people.

[59] Sections 14 paragraph 2, 15, 29, 32, 125, 176 - 181, 184, 186, 196, 207 and 210 Transformation Act (*Umwandlungsgesetz, UmwG*), sections 304 paragraph 3 clause 3, 305 paragraph 4 clause 1 and 2, 320b paragraph 2 clause 1 and 2, 327f clause 1 and 2 *AktG*. The *Spruchverfahren* are special, non-adversary proceedings, since June 12th, 2003 governed in the *Spruchverfahrensgesetz, SpruchG*.
[60] Draft (note 4), p. 42.
[61] *Diekmann*/*Leuering*, *NZG* 2004, p. 253.
[62] Draft (note 4), p. 43.
[63] Article 1, no. 29 *UMAG*.
[64] *Vide* above, 6.
[65] Article 1, no. 32 *UMAG*.

Since stock corporations and limited liability companies can be established even by a single person, this is being deemed an anachronism. Under the new section 280 paragraph 1 *AktG* it will be possible for one person to found a *KGaA* by becoming the personally liable partner and acquiring all issued shares at the same time.

14. Section 315 *AktG*[66]

Section 315 *AktG* deals with conflicts between the controlled and the controlling company. Under clause 1 one single shareholder can apply for a judicial appointment of a special auditor in certain cases: if the annual auditor has limited his audit certificate or has refused to certify with respect to an affiliated company; if the supervisory board has declared that there are objections against the executive board's final statement; if the executive board itself has declared that the company has suffered a not yet offset loss as affiliated company.
Under clause 2 a quorum of shareholders can apply for the judicial appointment of a special auditor, if there are facts[67] supporting the suspicion that the company has suffered a loss as a result of illegal behaviour within the group. This quorum, alike that in section 280 paragraph 1 *AktG*, will be adopted to the requirements set forth in section 142 paragraph 2 *AktG*.[68]

15. Coming into force[69]

The new section 16 of the Introductory Act on the Stock Companies Act (*Einführungsgesetz zum Aktiengesetz, EGAktG*) will govern that the new regulations for the first time will have to be applied to general meetings taking place after December 31st of the year of coming into force of the *UMAG*. The coming into force of the *UMAG* is planned to be January 1st, 2005 (article 3 *UMAG*), so that there will be a lead time of at least one year.[70] The new regulations will not have to be applied until January 1st, 2006.

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[66] Article 1, no. 34 *UMAG*.
[67] *Vide* above, 9, a with note 49.
[68] *Vide* above, 6.
[69] Articles 2 paragraph 1, 3 *UMAG.*
[70] The Explanatory Memorandum furthermore hints that the coming into force is proposed to fall into an off-peak period, where there are only a few general meetings, so that there will be less problems with the necessary adjustments, draft (note 4), p. 55.