

# German Corporate Governance Texts – A Translator's Guide

ATA 58<sup>th</sup> Annual Conference, Washington, D.C.  
October 28, 2017

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## What this presentation offers

A very brief introduction to corporate governance in Germany:

- Core concepts
- Organizational structures (*Aktiengesellschaften*)
- Statutory framework
- German Corporate Governance Code
- Common text types
- Translation issues
- Resources
- Questions (at end, please!)

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## Core terms and concepts

## Corporate governance (1)

There is no standard global definition and the term is also not defined in detail in the German Corporate Governance Code. However, the following are useful:

- G20/OECD Principles of Corporate Governance (2015): “Corporate governance involves a set of relationships between a company’s management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.”
- Institute of Directors – Corporate Governance: A Director’s Guide (2004): “...a mix of regulation, structure, best practice and board competency”
- Gabler Wirtschaftslexikon (online, 08/17): “...bezeichnet den rechtlichen und faktischen Ordnungsrahmen für die Leitung und Überwachung eines Unternehmens”

## Corporate governance (2)

- Corporate governance attempts to solve the **agency problem** that arises with corporations: Ownership (shareholders) and management are separated, leading to potential conflicts of interest/risk/opportunism/inefficiencies
- Corporate governance also helps accommodate the interests of other stakeholders (employees; customers; suppliers; creditors; local communities; local, regional and national authorities/governments ...)
- Formalized, transparent corporate governance is needed for confidence in corporate management/oversight (and hence in the financial system as a whole), and to protect investments
- Key drivers include the increasing size/complexity of corporations, widespread share ownership, globalization (of corporations and ownership), and technology

## Corporate governance (3)

- **Broad range of areas** involved: risk management; corporate culture/values; corporate strategy; compliance; (financial and other) reporting; planning; organizational and ownership structures; operations; (corporate, board, and individual) performance; human resources (selection, qualification, oversight, compensation) ...
- **Key principles** include ensuring the entity's continued existence; sustainable value creation; accountability and integrity; clarity and transparency; ethically sound and responsible behavior; complete, accurate and timely information; quality; effectiveness ...

## Corporate governance (4)

**Core trends** in corporate governance at present include:

- Risk management and uncertainty
- Transparency and disclosure
- Corporate/industry culture, structures, and tone
- Board performance and composition; board members' skills and experience; board member selection, assessment, and compensation
- Increased representation of women; diversity and stakeholder inclusion
- Shareholder/stakeholder engagement and activism
- Global differences in corporate governance
- Corporate governance at privately held and public sector enterprises, other company forms, etc. ...

# Compliance

- General language: Conformity with rules, regulations, standards, policies, instructions, guidelines, specifications, etc.
- “Regulatory compliance” means conformity with applicable laws, policies, and regulations, and the procedures and checks adopted to ensure this
- The term “compliance” is used in many specific contexts (GMP, health and safety, anti-money laundering, antitrust, insider trading, IT/data storage/technology, accounting and tax, etc.)
- Entities are adopting comprehensive, standardized compliance management systems as the number, reach, and complexity of rules and requirements grow within and across jurisdictions

# Organizational structures (*Aktiengesellschaften*)

## AGs – governing bodies

A German *Aktiengesellschaft* (AG – stock corporation, public (limited) company, etc.) has three *Organe* (“governing bodies”) and a two-tier board structure (*dualistisches System*):

- *Vorstand* (executive/managing/management board, board of management/board of managing directors, etc.) Consists solely of senior executives who run the company's operations.
- *Aufsichtsrat* (supervisory board) Consists solely of non-executive members (shareholders plus other shareholder representatives such as academics and consultants; employee representatives where applicable) who appoint, dismiss, monitor, and supervise the *Vorstand*
- The two boards are required to work closely together for the good of the company
- *Hauptversammlung* (general meeting/shareholders' meeting, meeting of stockholders, etc.)

## *Vorstand* (1)

- Has a minimum of one member (normally at least two, especially for larger companies); the actual number is stipulated in the *Satzung* (articles of incorporation/association)
- *Satzung/Aufsichtsrat* may stipulate that one member of the *Vorstand* can represent the company together with a *Prokurist* (authorized signatory)
- Members are appointed by the full *Aufsichtsrat* for a maximum of five years and can only be dismissed for good cause (though departures can be negotiated); reappointment is possible
- Not technically employees – *Dienstvertrag* (contract of service)
- Responsible for managing the company in its best interests with the goal of creating sustainable value; develops strategy, coordinates it with *Aufsichtsrat*, and implements it; represents the company in and out of court
- Reports to the *Aufsichtsrat* on the company's policy, profitability, course of business, etc.
- Convenes general meetings, including drawing up the agenda and preparing/executing general meeting resolutions
- Responsible for implementing the risk monitoring system/accounting and reporting/escalation management

## Vorstand (2)

- Members are bound by law, general meeting resolutions, the *Satzung*, any *Geschäftsordnung* (bylaws/rules of procedure), general guidelines, working instructions, etc. ...
- The *Aufsichtsrat* may require some actions to be approved by it in advance
- Where a *Vorstand* consists of more than one member, the *Gesamtführungsprinzip* (collective responsibility) applies; however, exceptions to this can be set out in the *Satzung*
- A *Geschäftsordnung* can be drawn up by the *Aufsichtsrat* or the *Vorstand* itself to regulate activities in more detail; this can also define *Ressorts* (areas of responsibility; functions) or set out a *Geschäftsverteilungsplan* (schedule of responsibilities)
- Members have a duty of care, a duty not to compete with the company, and a duty not to disclose secrets
- The *Vorstandsvorsitzende(r)* (CEO, chair, etc.) is appointed by the *Aufsichtsrat*
- In fully codetermined AGs an *Arbeitsdirektor(in)* (Director of Labor Relations/Labor Director) must also be appointed; he or she is a full board member

## Aufsichtsrat (1)

- In its purest form, the *Aufsichtsrat* consists solely of shareholder representatives
- Many large companies in Germany are governed by *Mitbestimmung* (codetermination), which among other things gives employees formal representation on the *Aufsichtsrat*
- Minimum of three members; the maximum depends on the company's size; the actual number is stipulated in the *Satzung*; the *Aufsichtsrat* elects a chair and at least one deputy from its ranks
- The *Aufsichtsrat* supervises/advises the *Vorstand* in its management of the company; represents the interests of shareholders/the company in dealings with the *Vorstand*; appoints and dismisses members of the *Vorstand*; and determines the compensation payable to the latter
- The *Aufsichtsrat's* work is governed by the *Satzung*, its *Geschäftsordnung*, and the legal framework
- It may not issue management instructions to the *Vorstand*, but must be involved in fundamental decisions and can reserve the right to approve actions proposed by the *Vorstand*
- The *Aufsichtsrat* (or its audit committee) oversees the company's accounting/reporting and auditing, and the effectiveness of the internal control and risk management systems and of internal audits; it also engages the external auditors and ensures their independence

## *Aufsichtsrat (2)*

- Committees of members with relevant specialist expertise are normally set up to improve efficiency/ reduce workload of full *Aufsichtsrat*; efficiency reviews must be performed
- Members elected by *Hauptversammlung* (shareholder representatives)/employees (employee representatives) or appointed by the courts if necessary; normal term is until general meeting approves actions for fourth fiscal year after appointment (excluding year in which office starts)
- 30% minimum quota for both men and women on *Aufsichtsrat* required by law for listed companies covered by *Mitbestimmungsgesetze*; for other companies covered by *Gleichstellungsgesetz* (Gender Equality Act), the *Aufsichtsrat* sets targets for itself
- *Aufsichtsrat* of listed and codetermined companies also sets targets for proportion of women on *Vorstand* and takes diversity into account when considering the *Vorstand*'s composition
- *Aufsichtsrat* members must meet character/professional requirements set out in law/Code; *Aufsichtsrat* must have appropriate number of independent members
- Members cannot be members of the *Vorstand* or *Prokuristen* and cannot have been on the *Vorstand* in the past two years unless this is proposed by more than 25% of voting capital
- Caps on max. number of appointments for individual members; requirement to work actively

## *Hauptversammlung (1)*

A meeting of the company's shareholders to which the *Vorstand* and *Aufsichtsrat* report. Shareholders assert their rights and express their wishes by passing resolutions. At general meetings of *Aktiengesellschaften*, shareholders:

- Elect/dismiss (shareholder) members of the *Aufsichtsrat*
- Appoint the auditors of the annual financial statements, etc.
- Approve the actions of the *Vorstand/Aufsichtsrat* for the prior period ("*entlasten*")
- Resolve changes to the *Satzung/Gesellschaftszweck* (corporate purpose), etc.
- Resolve on the appropriation of net profit/dividends
- Approve/reject compensation scheme (non-binding vote; listed companies)
- Can discuss mergers and acquisitions, resolves on capital increases and decreases, dissolving the company, etc.
- May only resolve on management issues if *Vorstand* requires this



## Hauptversammlung (2)

- *Jahreshauptversammlung (JHV)* (“annual general meeting” (AGM), etc.)  
Mandatory shareholder meeting held within first eight months of fiscal year
- *ordentliche Hauptversammlung*  
Normally can be translated as for JHV; “ordinary general meeting” is not so common except in contrast to *außerordentliche Hauptversammlung*
- *Hauptversammlung (HV)*  
Can be used either to mean all types of general meeting or as shorthand for *Jahreshauptversammlung* – be alert!
- *außerordentliche Hauptversammlung* (“extraordinary general meeting” (EGM), etc.); specially convened by the *Vorstand* in response to significant events (e.g., takeovers/mergers, capital increases) or if it is found that a loss of half of the share capital has been incurred, or at the request of shareholders representing at least 5% of the share capital (or a lesser amount specified in the *Satzung*) or €500,000; or convened by *Aufsichtsrat* whenever required in the interests of the company

## Statutory framework

## German statutory framework (1)

*Handelsgesetzbuch* (HGB – German Commercial Code) The core piece of commercial legislation in Germany. Covers various legal forms, accounting and reporting, commercial transactions, etc. Section 289f is the source for the *Erklärung zur Unternehmensführung* (Corporate Governance Statement).

*Aktiengesetz* (AktG – German Stock Corporation Act/German Public Companies Act) Governs *Aktiengesellschaften*, including structures and responsibilities of/procedures for governing bodies. Section 161 requires companies covered by it to issue an *Entsprechenserklärung* (Declaration of Conformity) with the German Corporate Governance Code.

*Mitbestimmungsgesetze* These regulate codetermination at AGs and large GmbHs (other legislation applies to codetermination in SEs)

## German statutory framework (2)

*Wertpapierhandelsgesetz* (WpHG – German Securities Trading Act) Regulates securities trading in Germany; covers issues such as shareholdings, directors' dealings, insider trading/inside information, etc.

*Wertpapiererwerbs- und Übernahmegesetz* (WpÜG – German Securities Acquisition and Takeover Act) Governs public tenders for the acquisition of shares and takeovers in Germany

*Börsengesetz* (BörsG – German Stock Exchange Act) Regulates the establishment, operation, and supervision of stock exchanges and the admission of companies to them

*Marktmissbrauchsverordnung* (Market Abuse Regulation – MAR) European Regulation (2014/594/EU) which, together with the Market Abuse Directive, is designed to combat insider trading and market manipulation in European financial markets. Directly applicable in Germany.

## German statutory framework (3)

Steady stream of new legislation/frequent amendments to existing laws and regulations in recent years reflect rapid national and international developments in this area:

...KonTraG, 3./4. FimaföG, TransPuG, AnsVG, BilReG, BilKoG,  
KapMuG, VorstOG, UMAG, VorstAG, BilMoG, VorstKoG,  
1. FiMaNoG, AReG ...

## German Corporate Governance Code

## German Corporate Governance Code (1)

- Developed by Government Commission set up by Federal Ministry of Justice in September 2001 in the wake of the Philipp Holzmann insolvency
- Goal is “to promote confidence in the management and supervision of German listed corporations by international and national investors, customers, employees and the general public” (2017 Foreword)
- Also to provide a single-source overview of corporate governance in Germany (i.e., both existing law and best practice), especially for foreign investors
- The Commission secretariat is hosted by Deutsches Aktieninstitut e.V. (i.e., it is independent of the government/Committee chair)
- The Commission comprises 14 senior German *Vorstand/Aufsichtsrat* members; academics; and representatives of asset management companies, professional associations, and related institutions

## German Corporate Governance Code (2)

- First version of Code resolved on February 26, 2002. Frequent revisions since then (once a year except 2004, 2011, and 2016); the current version is dated February 7, 2017
- Does not have legal force, but section 161 of the AktG anchors the “comply or explain” principle for recommendations: The *Vorstand* and *Aufsichtsrat* of listed companies have to disclose this information in the annual *Entsprechenserklärung*
- *Handelsblatt* June 22, 2017: New Commission chairman wants to overhaul the Code to focus, among other things, more on best practice and less on existing law

## German Corporate Governance Code (3)

The Code combines statements on the existing law in Germany with recommendations and suggestions on corporate best practice. The objective is to facilitate the latter while allowing implementation to reflect sector- and company-specific requirements. The English convenience translation provided by the Commission expresses these different categories as follows:

- *Recommendations* are denoted by the word “**shall**”. Companies are permitted to depart from these in well-justified cases but must disclose such departures in the *Entsprechenserklärung*.
- *Suggestions* are denoted by the word “**should**”. Companies are not required to disclose departures from suggestions in the *Entsprechenserklärung* (but should comment on them in the Corporate Governance Report).
- Reiterations/consolidation of *existing law* do not use “shall” or “should”. Instead, “must” or a straight verb such as “comply” or “ensure” is used. No statutory sources are cited.

## German Corporate Governance Code (4)

Contents:

- Foreword
- Shareholders and the General Meeting
- Cooperation between Management Board and Supervisory Board
- Management Board
- Supervisory Board
- Transparency
- Financial Reporting and Auditing
- Appendix (“model tables” for management board benefits)

## German Corporate Governance Code (5)

Key content changes in 2017:

- Focus on greater transparency (disclosures on compliance management system; requirement for whistleblowing mechanisms; more information/requirements regarding *Aufsichtsrat* composition, skillsets, candidates, and independence; publication of information on material business developments; etc.)
- Foreword now emphasizes the need for “ethically sound and responsible behaviour” in addition to compliance with the law
- Reference to particular importance/responsibility of institutional investors
- *Aufsichtsratsvorsitzende(r)* can speak to investors on *Aufsichtsrat*-related topics if appropriate
- Independence of audit committee chairman reaffirmed
- Forward-looking focus of multiyear compensation components for *Vorstand*; no early disbursement

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## German Corporate Governance Code (6)

- The 2017 English convenience translation has been substantially revised (the old one was highly Germanic and literal in places). The new version was published on June 2, 2017 (the German version was published in the *Bundesanzeiger* (Federal Gazette) on April 24, 2017).
- **The revisions to the English are not apparent from the English markup version** (only the changes as against the 2015 German version are flagged red).
- **Therefore, remember to update your TMs/be aware of potential consistency issues when updating past translations that quote/reference the Code!**
- The new English version offers the following improvements/changes:
  - Fewer Germanic noun constructions/stacks (e.g., “personal exercising” is now “exercise in person”)
  - Fewer long-form genitives (e.g., “shareholder representatives” instead of “representatives of the shareholders”)

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## German Corporate Governance Code (7)

- Improvements/changes (continued):
  - Gender neutrality (“Chair”, “Spokesperson”)
  - Consistent use of UK English (“s” form; *Vergütung* is now “remuneration” rather than the US “compensation”)
  - More appropriate translations (e.g. *ungerechtfertigte Vorteile* was previously “unlawful advantages” but is now “inappropriate benefits”)
  - Terminology improvements (e.g., “true and fair view”, “departure” instead of “deviation”)
  - Terminology changes (“Corporate Governance Statement” instead of “statement on Corporate Governance” (*sic*) for *Erklärung zur Unternehmensführung*; “company” instead of “enterprise” is used for *Unternehmen*, which is used in the sense of *Konzern*; the single-entity term *Gesellschaft* is translated as “corporation” ...)
  - No/reduced use of typical “Germlish” constructions such as “accordingly” and “respective(ly)”

## Example - Section 2.3.1: 2015 v. 2017

### **2015:**

At least once a year the General Meeting is to be convened by the Management Board giving details of the agenda. A quorum of shareholders is entitled to demand the convening of a General Meeting and the extension of the agenda. The convening of the meeting, as well as the reports and documents, including the Annual Report, required by law for the General Meeting are to be made easily accessible to the shareholders on the company's internet site together with the agenda.

### **2017:**

The Management Board must convene the General Meeting at least once a year, disclosing the items on the agenda. Groups of minority shareholders are entitled to require the convening of a General Meeting and the extension of the agenda. The notice convening the General Meeting and the reports and other documents required by law, including the annual report, must be made easily accessible to the shareholders on the corporation's website, together with the agenda.

## German Corporate Governance Code (8)

The following translation issues still apply, however:

- *Entsprechenserklärung* = “Declaration of Conformity” – “conformity” is actually more of a technical term (see e.g., CE marking requirements). “Compliance Statement” or “Declaration of Compliance” would have been better. However, this one has probably got away ...
- Translation of *soll* as “shall” and *sollte* as “should” – in legal English, “shall” is often prescriptive (i.e., more than a recommendation), while “should” can be a strong recommendation ...
- Capitalization has improved but is still erratic (“Corporate Governance”/ “Severance Cap”)
- Terminological infelicities (e.g., “one-tier”, “net assets, financial status and results of operations” ...)
- Ultimately it still reads like a translation in places (sentence structure, nominalization, etc.), but progress has been made

## Common text types



## Common text types (1)

*Entsprechenserklärung* – section 161 of the AktG  
(Declaration of Conformity)

- Annual “comply or explain” document for the Code
- Issued jointly by *Vorstand* and *Aufsichtsrat*
- Applies to listed companies/companies with publicly traded debt instruments whose registered office is in Germany
- Must be made available permanently on the company's website
- All *Entsprechenserklärungen* for DAX/MDAX companies are available on the DCGK website
- AktG term is *Erklärung zum Corporate Governance Kodex* (Corporate Governance Codex Declaration)

## Common text types (2)

*Erklärung zur Unternehmensführung* – section 289f of the HGB  
(Corporate Governance Statement (2017 Code term))

- Applies to listed companies/companies with publicly traded debt instruments whose registered office is in Germany
- Separate section of management report (annual report)
- Can be made available on company's website with cross-reference
- Also known as
  - “Statement on Corporate Governance” (old Code translation)
  - “Corporate Governance Declaration” (GAS 20)
  - “Declaration on Corporate Governance” (sometimes used in practice)

## Common text types (3)

### *Erklärung zur Unternehmensführung* (continued)

- Contains
  - *Entsprechenserklärung*
  - Information on key management practices
  - Information on how *Vorstand* and *Aufsichtsrat* perform their work
  - Information on composition and work of *Vorstand/Aufsichtsrat* committees
  - Information on compliance with target ratios for women in senior management and membership of *Vorstand* and *Aufsichtsrat* (listed companies), plus reasons for any non-compliance
  - Description of diversity concept and its goals; on how it is being implemented; and on the results achieved in the reporting period (for large AGs)

## Common text types (4)

### *Corporate Governance Bericht* – Code sections 3.10, 5.4.1, 7.1.3 (Corporate Governance Report)

- Recommendation in section 3.10 of Code
- Annual report by *Vorstand* and *Aufsichtsrat*
- Published “in connection with the Corporate Governance Statement”
- Should provide comments on suggestions in the Code
- Must also detail
  - Status of implementation of targets for representation of women on *Aufsichtsrat*
  - The appropriate number/names of independent shareholder representatives
  - Stock option programs/incentive systems (unless dealt with elsewhere)

## Common text types (5)

- *Bericht des Aufsichtsrats* (Supervisory Board Report – part of annual report)
- *Satzung* (articles of incorporation/association)
- *Geschäftsordnungen* (bylaws/rules of procedure) for management and supervisory boards
- *Geschäftsverteilungsplan* (schedule of responsibilities)
- Codes of conduct, guidelines, working instructions
- Corporate mission statements/corporate value statements
- ESG/CSR materials
- etc.

## Additional translation issues

## “Corporate governance” in German

- *Corporate Governance*  
As in “Deutscher Corporate Governance Kodex”. This “Neudeutsch” term is used in particular in technical contexts, or where a shorthand phrase is needed. Watch capitalization in English!
- *gute Unternehmensführung/*  
*gute und verantwortungsvolle Unternehmensführung*  
The most common phrases used in narrative texts (with or without the words “Corporate Governance” in brackets). The *und verantwortungsvolle* is often added to avoid any potential confusion with *Unternehmensführung* in the sense of “management”.
- The Code translates *Corporate Governance* as “corporate governance”, *gute Unternehmensführung* as both “corporate governance” and “good corporate governance”, and *gute und verantwortungsvolle Unternehmensführung* as “good and responsible governance”
- Occasionally *gute Unternehmensführung und -kontrolle* or other variants are used – be alert!

## “Deutscher Corporate Governance Kodex”

- *German Corporate Governance Code*  
The long form
- “*The Code*” (with a capital “C”)  
The abbreviation used in the Code itself (in German “der Kodex”)
- “*DCGK*”  
A common German abbreviation among corporates. The direct English equivalent, “GCGC”, is relatively uncommon (and a bit clunky). Use “the Code” if possible instead, but “GCGC” may be needed for clarity.

# Resources

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# Resources (1)

Deutscher Corporate Governance Kodex

[http://www.dcgk.de/files/dcgk/usercontent/de/download/kodex/170424\\_Kodex.pdf](http://www.dcgk.de/files/dcgk/usercontent/de/download/kodex/170424_Kodex.pdf)

[http://www.dcgk.de/files/dcgk/usercontent/de/download/kodex/170424\\_Kodex\\_Markup.pdf](http://www.dcgk.de/files/dcgk/usercontent/de/download/kodex/170424_Kodex_Markup.pdf)

German Corporate Governance Code

[http://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214\\_Code.pdf](http://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214_Code.pdf)

[http://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214\\_Code\\_markup.pdf](http://www.dcgk.de/files/dcgk/usercontent/en/download/code/170214_Code_markup.pdf)

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## Resources (2)

Welge/Eulerich "Corporate-Governance-Management:  
Theorie und Praxis der guten Unternehmensführung" (Gabler, 2nd ed., 2014);  
ISBN 978-3-8349-4538-9 (hardcover), ISBN 978-3-8349-4539-6 (e-book)

Berlin Center of Corporate Governance  
<http://www.bccg.tu-berlin.de/>

Deloitte Center für Corporate Governance  
<http://www.corpgov.deloitte.com/site/gereng/>

European Corporate Governance Institute  
<http://www.ecgi.org/index.htm> and <http://www.ecgi.global/>

Barclay Simpson  
<http://www.barclaysimpson.com>

Russell Reynolds  
<http://www.russellreynolds.com>

## Resources (3)

German laws in German and (sometimes also) in English  
<http://www.gesetze-im-internet.de/>

Norton Rose translation of German Stock Corporation Act (May 10, 2016)  
<http://www.nortonrosefulbright.com/knowledge/publications/147034/german-stock-corporation-act-aktiengesetz>

"Der Aufsichtsrat" magazine and resources  
<http://www.aufsichtsrat.de/Content/default.aspx>

Audit Committee Institute  
<http://www.audit-committee-institute.de>

Overview of EU company law and corporate governance activities and resources  
[http://ec.europa.eu/justice/civil/company-law/index\\_en.htm](http://ec.europa.eu/justice/civil/company-law/index_en.htm)

# Questions?

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# Thank you!

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