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Problems of dual mandates in corporations – How to deal with conflicts of interests and how to sanction them? – A comparative law approach

bei

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List of Abbreviations

Abbreviation	German Translation	English Translation
Abs.	Absatz	Section
AG	Aktiengesellschaft	Stock Corporation
AktG	Aktiengesetz	Stock Corporation Act
Art.	Artikel	Article
BGB	Bürgerliches Gesetzbuch	Civil Code
BGH	Bundesgerichtshof	Supreme Court of Germany
BT-Drs.	Bundestagsdrucksache	
Cir.		Circuit
Co.		Company
Corp.		Corporation
CCZ	Corporate Compliance Zeitschrift	
f.	Folgende Seite	Following Page
ff.	Folgende Seiten	Following Pages
FS	Festschrift	Commemorative
GmbH	Gesellschaft mit beschränkter Haftung	Limited Liability Company
GmbHG	GmbH-Gesetz	Limited Liability Companies Act
GWR	Gesellschafts- und Wirtschaftsrecht	
Hrsg.	Herausgeber	Editor
Inc.		Incorporated
KK	Kölner Kommentar	
LG	Landgericht	District Court
p.	Seite(n)	Page(s)
S.	Satz	Sentence
SE	Societas Europaea	European Corporation
StGB	Strafgesetzbuch	Criminal Code
MAR	Marktmissbrauchsverordnung	Market Abuse Directive
MüKo	Münchener Kommentar	
Nev. Rev. Stat.		Nevada Revised Statutes
NJW	Neue Juristische Wochenschrift	
NJW-RR	NJW-Rechtsprechungsreport	
N.N.	Nomen Nominandum	Unknown Name
No.	Nummer	Number
NZG	Neue Zeitschrift für Gesellschaftsrecht	
OLG	Oberlandesgericht	Appellate Court
OWiG	Ordnungswidrigkeitengesetz	Act on Regulatory Offenses
Var.	Variante	Variant
WM	Wertpapiermitteilung	
WpHG	Wertpapierhandelsgesetz	Securities Trading Act
WpÜG	Wertpapiererwerbs- und Übernahmegesetz	Securities Acquisition and Takeover Act
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht	
ZHR	Zeitschrift für das gesamt Handels- und Wirtschaftsrecht	
ZIP	Zeitschrift für Wirtschaftsrecht	

A. Introduction

"No man is able to be a servant to two masters: for [either] he will have hate for the one and love for the other, or he will keep to one and have no respect for the other."[1] This quotation from the Bible gives evidence how early people were concerned about conflicts of a person simultaneously serving for two masters. Evidently, two parties provide two areas of interest. Connecting or at least respecting both sides can lead to problems. However, such a constellation is common in our society and appears in many situations. Therefore, the above-mentioned principle seems to be outdated and too strict.[2] Nevertheless, current cases like the "takeover battle VW-Porsche" or "Dieselgate" indicate the significance of resulting damage. The central question is whether there is a possible balance to compensate problems.

Starting with the situation in Germany, the legitimacy of dual mandates in corporations will be discussed. With reference to current cases, problems of dual mandates will be evaluated coming to solutions sanctioning dual mandates. Eventually, the perspective under Anglo-American law will be described within a comparative law approach.

B. Perspective under German law

I. Formation of dual mandates

Basically, a dual mandate arises when the member of a company organ concurrently serves as the member of another company's organ. Due to the lower maleficence of dual mandates in limited liability companies,[3] this paper addresses only dual mandates within stock corporations. Dual mandates frequently occur within groups.[4] Here, dual mandates can be separated into two kinds depending on the company that induces the dual mandate.[5]

1. Bottom-up posting

If the subsidiary company posts a board member to the board of the parent company, a bottom-up posted dual mandate arises.[6]

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[1] Luther's translation of the Bible, New Testament, Matthew 6, 24.
[2] *Kleba*, Interessen- bzw. Pflichtenkollision und Haftung bei Vorstandsdoppelmandaten, p. 1.
[3] *Spindler*, in: MüKo GmbHG, 2nd edition 2016, § 52 margin no 658.
[4] *Kort*, in: Großkommentar AktG, 5th edition 2015, § 76 margin no 219; *Spindler*, in: MüKo AktG, 4th edition 2014, § 76 margin no 48; *Streyl*, Zur konzernrechtlichen Problematik von Vorstands-Doppelmandaten, 1992, p. 17.
[5] *Anders*, Vorstandsdoppelmandate – Zulässigkeit und Pflichtenkollision, 2006, p. 24.
[6] *Decher*, Personelle Verflechtungen im Aktienkonzern, 1990, p. 67.

This kind of dual mandate especially occurs within the integration of an independent company into a group.[7] In many cases, such groups are managed decentralized within a divisional organization, so that the subsidiary company can work independently.[8] The most prominent example is the application in holding groups.[9] This kind of formation is the most common in practice.[10]

2. *Top-down posting*

The second kind of formation is the posting of a board member from the parent company to the subsidiary. This generally happens within the process of acquisition of another company resulting in a centralized organized group.[11] The directors of the parent company can directly encroach on the operative business.[12] Therefore, dual mandates typically serve to achieve a regimented management.[13] Top-down posting often serves to recapitalize and to restructure smaller competing companies.[14]

II. *Legitimacy of dual mandates*

The prevailing view[15] including the judiciary[16] concludes that dual mandates are legitimate if the supervisory boards of all companies involved confirm the mandate according to § 88 I 2 AktG guaranteeing a full labor input for the company.[17]

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[7] *Anders*, Vorstandsdoppelmandate – Zulässigkeit und Pflichtenkollision, 2006, p. 24.
[8] *Fonk*, Zur Vertragsgestaltung bei Vorstandsdoppelmandaten, NZG 2010, 368, 368; *Fleischer*, in: Spindler/Stilz AktG, 3rd edition 2015, § 76 margin no 105.
[9] *Kort*, in: Großkommentar AktG, 5th edition 2015, § 76 margin no 219; *Koch*, in: Hüffer/Koch AktG, 13th edition 2018, § 76 margin no 53.
[10] *Eversberg*, Doppelvorstände im Konzern, 1992, p. 21; *Anders*, Vorstandsdoppelmandate – Zulässigkeit und Pflichtenkollision, 2006, p. 24.
[11] *Decher*, Personelle Verflechtungen im Aktienkonzern, 1990, p. 80 f.; *Eversberg*, Doppelvorstände im Konzern, 1992, p. 23; *Anders*, Vorstandsdoppelmandate – Zulässigkeit und Pflichtenkollision, 2006, p. 25.
[12] *Anders*, Vorstandsdoppelmandate – Zulässigkeit und Pflichtenkollision, 2006, p. 25 f.
[13] *Altmeppen*, in: MüKo AktG, 4th edition 2015, § 311 margin no 96.
[14] *Decher*, Personelle Verflechtungen im Aktienkonzern, 1990, p. 81 f.
[15] *Semler*, Doppelmandats-Verbund im Konzern, in: FS für Ernst C. Stiefel, 1987, p. 719, 734; *Hoffmann-Becking*, Vorstands-Doppelmandate im Konzern, ZHR 150 (1986), 570, 574; *Koch*, in: Hüffer/Koch AktG, 13th edition 2018, § 76 margin no 54; *Reuter*, Die aktienrechtliche Zulässigkeit von Konzernanstellungsverträgen, AG 2011, 274, 276.
[16] BGH, Judgment of 9 March 2009, II ZR 170/07, BGHZ 180, 105, 110 f. = WM 2009, 1138, 1140 – Doppelmandat; BGH, Judgment of 21 Dec. 1979, II ZR 244/78, NJW 1980, 1629, 1630; OLG Köln, Judgment of 24 Nov. 1992, 22 U 72/92, NJW-RR 1993, 804, 807.
[17] BGH, Judgment of 9 March 2009, II ZR 170/07, BGHZ 180, 105, 110 f. = WM 2009, 1138, 1140 – Doppelmandat; *Wirth*, Vorstands-Doppelmandate im faktischen Konzern, in: FS für Jobst-Hubertus Bauer, 2010, p. 1147, 1152; *Spindler*, in: MüKo AktG, 4th edition 2014, § 76 margin no 49.

Further, the dual mandate is required not to contradict § 100 II 1 no 2, no 3 AktG upholding the natural gradient of organization within the group.[18] This rule follows the principle laid down in § 105 I AktG prohibiting a concurrent membership in the supervisory board and the managing board.
Dual mandates are compatible with the principle of self-responsible management according to § 76 I AktG provided that the dual mandate carrier does not violate the articles of association or other provisions under corporate law.[19]
Dual mandates are consistent with the German Corporate Governance Code (DCGK) as long as the dual mandate carrier conforms with the transparency provision of 4.3.4. DCGK[20] and does not connect two competing companies as a supervisory board member according to 5.4.2 S. 4 DCGK.[21] Besides, he is prohibited to use a business opportunity in favor of himself, 5.5.1. S. 2 DCGK.
As a general rule to avoid potential conflicts, the dual mandate carrier must respect the interests of the area of responsibility he is currently active in.[22] The performance of an obligation connected to one company does not justify the violation of an obligation owed to the other company.[23]

III. Problems connected to dual mandates

With reference to current cases, problems connected to dual mandates will be presented. After discussing common preventive measures proposed by the literature, possible sanctions will be evaluated.

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[18] *Kropff/Thölke*, Aktiengesetz, 2005, p. 136; *Schneider*, Der Aufsichtsrat des abhängigen Unternehmens im Konzern, in: FS für Thomas Raiser, 2005, p. 341, 344.
[19] *Anders*, Vorstandsdoppelmandate – Zulässigkeit und Pflichtenkollision, 2006, p. 94 f., 100; *Altmeppen*, in: MüKo AktG, 4th edition 2015, § 308 margin no 95 ff., 101.
[20] *Passarge*, Vorstands-Doppelmandate, NZG 2007, 441, 444.
[21] *Kort*, in: Großkommentar AktG, 5th edition 2015, § 76 margin no 233.
[22] BGH, Judgment of 9 March 2009, II ZR 170/07, BGHZ 180, 105, 111 = WM 2009, 1138, 1140 – Doppelmandat; BGH, Judgment of 21 Dec. 1979, II ZR 244/78, NJW 1980, 1629, 1630; *Aschenbeck*, Personenidentität bei Vorständen in Konzerngesellschaften, NZG 2000, 1015, 1021.
[23] BGH, Judgment of 21 Dec. 1979, II ZR 244/78, NJW 1980, 1629, 1630; *Passarge*, Vorstands-Doppelmandate, NZG 2007, 441, 441 f.

1. *Case study 1: "takeover battle VW-Porsche"*

Porsche SE (P SE) is a holding corporation having its operative business in its subsidiary Porsche AG (P AG).[24] Contrary to press releases[25], P SE acquired 74,1% of the shares of Volkswagen AG (VW AG), a considerably larger corporation than P SE.[26] P SE financed the acquisition through speculative option transactions.[27] Dr. Piëch was the head of the supervisory board of VW AG and a member of the supervisory board of P SE.[28] Dr. Porsche had a seat in the supervisory board of VW AG and was the head of the supervisory boards of P AG, and P SE.[29] Besides, Dr. W and H were the heads of the management boards of P SE and P AG.[30] Dr. Piëch announced within an interview in Sardinia that he has no knowledge concerning the risks of the option transactions by P SE.[31] In 2009, P SE was not able to serve the credits anymore.[32] As a result, VW AG integrated P AG 100% into its group.[33] (To be continued.)

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[24] *Porsche AG*, „Porsche-Aufsichtsrat stimmt Beteiligungsaufstockung bei VW zu", press release of 26 March 2007, available at https://presse.porsche.de/prod/presse_pag/PressResources.nsf/Content?ReadForm&languageversionid=66436&archive=1 (accessed 4 June 2018); *Möllers*, Die juristische Aufarbeitung der Übernahmeschlacht VW-Porsche – ein Überblick, NZG 2014, 361, 362.

[25] *Porsche SE*, „Porsche weist Spekulationen über Aufstockung auf 75 Prozent bei VW zurück", press release of 10 March 2008, available at https://www.porsche-se.com/mitteilungen/pressemitteilungen/details/news/detail/News/porsche-weist-spekulationen-ueber-aufstockung-auf-75-prozent-bei-vw-zurueck/ (accessed 4 June 2018).

[26] *Porsche SE*, „Porsche strebt Beherrschungsvertrag an", press release of 26 Oct. 2008, available at https://www.porsche-se.com/mitteilungen/pressemitteilungen/details/news/detail/News/porsche-strebt-beherrschungsvertrag-an/ (accessed 4 June 2018).

[27] *Möllers*, Die juristische Aufarbeitung der Übernahmeschlacht VW-Porsche – ein Überblick, NZG 2014, 361, 362.

[28] *Porsche SE*, Geschäftsbericht 2008/09, available at https://www.porsche-se.com/fileadmin/downloads/investorrelations/events_and_presentations/annualgeneralmeeting-2010-january/Geschaeftsbericht_20082009.pdf (accessed 4 June 2018), p. 244.

[29] *Porsche SE*, Geschäftsbericht 2008/09, available at https://www.porsche-se.com/fileadmin/downloads/investorrelations/events_and_presentations/annualgeneralmeeting-2010-january/Geschaeftsbericht_20082009.pdf (accessed 4 June 2018), p. 244.

[30] *Porsche SE*, Geschäftsbericht 2008/09, available at https://www.porsche-se.com/fileadmin/downloads/investorrelations/events_and_presentations/annualgeneralmeeting-2010-january/Geschaeftsbericht_20082009.pdf (accessed 4 June 2018), p. 246.

[31] OLG Stuttgart, Judgment of 29 Feb. 2012, 20 U 3/11, ZIP 2012, 625, 626.

[32] *Möllers*, Die juristische Aufarbeitung der Übernahmeschlacht VW-Porsche – ein Überblick, NZG 2014, 361, 362.

[33] *Porsche SE*, „Porsche SE und Volkswagen AG schaffen den Integrierten Automobilkonzern", press release of 4 July 2012, available at https://www.porsche-se.com/mitteilungen/pressemitteilungen/details/news/detail/News/porsche-se-und-volkswagen-ag-schaffen-den-integrierten-automobilkonzern/ (accessed 4 June 2018).

a) *Conflicts of interests and preventive measures*

A dual mandate carrier is situated in different areas of interests.[34] Decisions regarding market structure, restructuring, or distribution of financial resources affect the group as well as the subsidiary's interests.[35] Transferred to case study 1, Dr. Piëch and Dr. Porsche were split between the interests of VW AG, P SE, and their personal interest to connect both corporations. Besides, Dr. W and H had to represent the interests of the subsidiary P AG equally as the interests of P SE. The literature suggests some preventive solutions to cope with resulting problems regarding a collision of interests.

(1) Voting ban

In corporate law, no general voting ban exists.[36] Neither § 181 BGB, nor §§ 28, 34 BGB can be applied analogously because such a voting ban would contradict the principle of joint representation in management boards.[37] Further, the absence of a general voting ban in corporate law indicates that a deviant regulation would contradict the legal system.[38]

Notwithstanding a general voting ban, a voting ban in special constellations could be another possibility to avoid conflicts; for instance, when the dual mandate carrier decides about the relief of the subsidiary's management board and hence, about the relief of himself.[39] A persuasive opinion deduces a special voting ban within an analogy of § 136 I AktG extending the scope of application to directors.[40] As a result, the dual mandate carrier has no vote deciding about the relief of himself. Besides, the voting ban includes decisions affecting third companies which the dual

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[34] *Aschenbeck*, Personenidentität bei Vorständen in Konzerngesellschaften, NZG 2000, 1015, 1024.

[35] *Passarge*, Vorstands-Doppelmandate, NZG 2007, 441, 441.

[36] *Spindler*, in: MüKo AktG, 4th edition 2014, § 77 margin no 21; *Koch*, in: Hüffer/Koch AktG, 13th edition 2018, § 77 margin no 8; *Mertens/Cahn*, in: KK AktG, 3rd edition 2010, § 77 margin no 38.

[37] *Emde*, Gesamtverantwortung und Ressortverantwortung im Vorstand der AG, in: FS für Uwe H. Schneider, Köln 2011, p. 295 ff.; *Fleischer*, Zum Grundsatz der Gesamtverantwortung im Aktienrecht, NZG 2003, 449, 449; *Kleba*, Interessen- bzw. Pflichtenkollision und Haftung bei Vorstandsdoppelmandaten, p. 50 f.

[38] *Kleba*, Interessen- bzw. Pflichtenkollision und Haftung bei Vorstandsdoppelmandaten, p. 51.

[39] BGH, Judgment of 27 April 2009, II ZR 167/07, NZG 2009, 707, 709 f.; *Petersen/Schulze de la Cruz*, Das Stimmverbot von § 136 I AktG bei der Entlastung von Vorstandsdoppelmandatsträgern, NZG 2012, 453, 453 f.

[40] LG Köln, Judgment of 17 Dec. 1997, 91 O 131/97, NZG, 1998, 193; *Fischer*, Entlastung von Vorständen bei Personenidentität in Konzerngesellschaften, NZG 1999, 192; *Aschenbeck*, Personenidentität bei Vorständen in Konzerngesellschaften, NZG 2000, 1015, 1022.

mandate carrier decisively influences.[41] However, such a modified voting ban could endanger the group's capacity to act in cases of single-head directorships or of majority installments of dual mandates. Consequently, the convincing prevailing view suggests a restriction of the voting ban when the capability of decision-making is endangered.[42]

In case study 1, a voting ban for Dr. Piëch, Dr. Porsche, and all further dual mandate carriers would endanger the decision-making and cannot be realized. Particularly, the management power of P AG and P SE would highly be endangered if Dr. W and H were prohibited from voting as the heads of the management boards of both companies. Overall, the solution of a voting ban is applicable only partially.[43]

(2) Abstention[44]

As a more flexible solution, the dual mandate carrier could be equipped with a right of abstention.[45] Contingent upon abstention, the dual mandate carrier would be released of his liability.[46] Generally, the above-mentioned arguments against a voting ban apply here as well. An abstention would negate the advantage of a better implementation and respect of interests in both companies.[47] Further, it is ambiguous in which situations the dual mandate carrier should use the right of abstention. Therefore, the effectivity and functionality of the entire group are endangered and no stringent process of decision-making is guaranteed.[48]

However, according to the annual report of P SE, the supervisory board checked for every agenda topic whether a conflict of interest existed. In case of such a conflict, the dual mandate carrier had to leave the room and did not participate in the decision-making.[49]

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[41] BGH, Judgment of 29 Jan. 1962, II ZR 1/61, BGHZ 36, 296, 299 ff. = NJW 1962, 864, 865 f.; *Petersen/Schulze de la Cruz*, Das Stimmverbot von § 136 I AktG bei der Entlastung von Vorstandsdoppelmandatsträgern, NZG 2012, 453, 455.

[42] *Kort*, in: Großkommentar AktG, 5th edition 2015, § 76 margin no 228; *Kleba*, Interessen- bzw. Pflichtenkollision und Haftung bei Vorstandsdoppelmandaten, p. 63.

[43] *Kleba*, Interessen- bzw. Pflichtenkollision und Haftung bei Vorstandsdoppelmandaten, p. 65.

[44] German convenience translation: "Stimmenthaltung".

[45] *Fleischer*, in: Spindler/Stilz AktG, 3rd edition 2015, § 76 margin no 110; *Wirth*, Vorstands-Doppelmandate im faktischen Konzern, in: FS für Jobst-Hubertus Bauer, 2010, p. 1147, 1158.

[46] *Hoffmann-Becking*, Vorstands-Doppelmandate im Konzern, ZHR 150 (1986), 570, 583.

[47] *Kleba*, Interessen- bzw. Pflichtenkollision und Haftung bei Vorstandsdoppelmandaten, p. 66.

[48] *Kort*, in: Großkommentar AktG, 5th edition 2015, § 76 margin no 229; *Fleischer*, in: Spindler/Stilz AktG, 3rd edition 2015, § 76 margin no 110.

[49] *Porsche SE*, Geschäftsbericht 2008/09, available at https://www.porsche-se.com/fileadmin/downloads/investorrelations/events_and_presentations/annualgeneralmeeting-2010-january/Geschaeftsbericht_20082009.pdf (accessed 4 June 2018), p. 11.

(3) Resignation

As the "ultima ratio", the strictest possibility avoiding conflicts of interests is the resignation of the dual mandate carrier.[50] Whereas a dismissal according to § 84 III AktG is possible only in case of an important reason, the convincing prevailing view permits a resignation without specification of an important reason.[51] For instance, the dual mandate carrier gets into a situation involving an insurmountable conflict being unable to execute obligations conformably.[52]

b) *Corporate transactions, § 27 WpÜG*

According to § 27 I 1 WpÜG, the management and supervisory boards of stock-listed corporations must provide a reasoned statement concerning an offer to acquire the company. The statement illustrates the acquisition price and evaluates whether the offer is reasonable.[53] This provision serves as a basis for the shareholders to properly decide about the offer.[54] A dual mandate carrier usually tends to act more in favor of the acquiring company than in favor of the target company.[55] In any case of conflicting interests, the dual mandate carrier is obliged to reveal this conflict.[56] If the conflict is of less intensity like in friendly acquisitions, the dual mandate carrier should have the right – but not the obligation – to take part in making the statement.[57] If the conflict is of higher intensity like in hostile takeovers, the dual mandate carrier is obliged to abstain or to resign because otherwise there would be no fair process of price building.[58]

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[50] *Spindler*, in: MüKo AktG, 4th edition 2014, § 76 margin no 53; *Fleischer*, in: Spindler/Stilz AktG, 3rd edition 2015, § 76 margin no 110; *Passarge*, Vorstands-Doppelmandate, NZG 2007, 441, 442 f.

[51] BGH, Judgment of 8 Feb. 1993, II ZR 58/92, BGHZ 121, 257, 261 f. = NJW 1993, 1198, 1199 f.; *Spindler*, in: MüKo AktG, 4th edition 2014, § 84 margin no 157; *Kleba*, Interessen- bzw. Pflichtenkollision und Haftung bei Vorstandsdoppelmandaten, p. 77 f.

[52] *Fleischer*, in: Spindler/Stilz AktG, 3rd edition 2015, § 76 margin no 110; *Hoffmann-Becking*, Vorstands-Doppelmandate im Konzern, ZHR 150 (1986), 570, 577.

[53] *Möllers*, Interessenskonflikte von Vertretern des Bieters bei Übernahme eines Aufsichtsratsmandats der Zielgesellschaft, ZIP 2006, 1615, 1618.

[54] *Hirte*, in: KK WpÜG, 2nd edition 2010, § 27 margin no 2; *Möllers*, Interessenskonflikte von Vertretern des Bieters bei Übernahme eines Aufsichtsratsmandats der Zielgesellschaft, ZIP 2006, 1615, 1618.

[55] *Möllers*, Treuepflichten und Interessenskonflikte bei Vorstands- und Aufsichtsratsmitgliedern, in: *Hommelhoff/Hopt/v. Werder*, Handbuch Corporate Governance, 2nd edition 2009, p. 423, 433; *Möllers*, Die juristische Aufarbeitung der Übernahmeschlacht VW-Porsche – ein Überblick, NZG 2014, 361, 361.

[56] *Hopt*, Übernahmen, Geheimhaltung und Interessenskonflikte, ZGR 2002, 333, 371 f.; *Hirte*, in: KK WpÜG, 2nd edition 2010, § 27 margin no 22.

[57] *Herkenroth*, Bankenvertreter als Aufsichtsratsmitglieder von Zielgesellschaften, AG 2001, 33, 37; *Hopt*, Übernahmen, Geheimhaltung und Interessenskonflikte, ZGR 2002, 333, 364 ff.; *Hirte*, in: KK WpÜG, 2nd edition 2010, § 27 margin no 22.

[58] *Harbarth*, in: Baums/Thoma/Verse WpÜG, Supplement 12 as at Sept. 2017, § 27 margin no 31.

Regarding case study 1, the supervisory board of VW AG was obliged to make a statement according to § 27 I 1 WpÜG concerning the acquisition of P AG. According to the statement, Dr. Piëch, Dr. W, and H did not vote due to possible conflicts of interests revealed in the statement.[59]

c) *Director's dealing, Art. 19 I MAR*

According to Art. 19 I MAR, persons carrying out management tasks including closely related persons are obliged to report the self-dealing of shares (director's dealing). This obligation can create confusing constellations in case of dual mandates because according to Art. 3 I no 26 d) Var. 1 MAR closely related persons include legal entities. Consequently, an entity has to report a dealing with shares of another entity connected through a mutual dual mandate even if the dual mandate carrier has no influence on the decision of dealing.[60] Due to this strict scope of application, the Federal Financial Supervisory Authority (BaFin) restricts the reporting obligation in case of dual mandates when the person has no interest in the legal entity.[61] Besides, a more detailed opinion justifies a reporting obligation when the dual mandate carrier has a vote or participates in profit and is able to influence the concrete decision of dealing.[62]

P SE publishes all relevant director's dealings on its homepage.[63] Further, they acknowledge that also legal entities connected through a dual mandate are obliged to report because a holding company of Dr. Porsche revealed the acquisition of shares of P SE due to Dr. Porsche's seat in the supervisory board of P SE.[64]

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[59] *Volkswagen AG*, Pflichtveröffentlichung gemäß 39, 27 Abs. 3 Satz 1, 14 Abs. 3 Satz 1 des Wertpapiererwerbs- und Übernahmegesetzes, statement of the supervisory board of 11 May 2007, available at http://docplayer.org/18833700-Volkswagen-ag-pflichtveroeffentlichung-gemaess-39-27-abs-3-satz-1-14-abs-3-satz-1-des-wertpapiererwerbs-und-uebernahmegesetzes.html (accessed 5 June 2018), p. 7.

[60] *Poelzig*, Kapitalmarktrecht, 2018, § 18 margin no 545.

[61] *BaFin*, Emittentenleitfaden, 4th edition 2013, available at http://www.bafin.de/SharedDocs/Downloads/DE/Leitfaden/WA/dl_emittentenleitfaden_2013.pdf?__blob=publicationFile&v=1 (accessed 5 June 2018), p. 75.

[62] *Zimmer/Osterloh*, in: Schwark/Zimmer Kapitalmarktrecht, 4th edition 2010, § 15a margin no 75.

[63] Available at https://www.porsche-se.com/mitteilungen/sonstige-veroeffentlichungen/ (accessed 5 June 2018).

[64] *Porsche SE*, Mitteilung über Geschäfte von Führungspositionen nach § 15a WpHG, announcement of 10 Oct. 2008 9:38 Uhr, available at https://www.porsche-se.com/mitteilungen/sonstige-veroeffentlichungen/directors-dealings/?newsID=494868&cHash=1d6c4bbe5488200ab1b4b2eaed3e456a (accessed 5 June 2018).

2. *Case study 2: "Dieselgate"*

US agencies discovered discrepancies concerning the emission of diesel engines produced by VW AG[65] because of a "defeat device". At this time, Prof. W was the head of the management board of VW AG and of P SE.[66] VW AG contested their errors and began to retrieve all affected vehicles in Europe and the USA.[67] Prof. W alleged that he had no knowledge regarding the "defeat device" until US agencies discovered the scandal.[68] (To be continued.)

a) *Obligation to confidentiality*

A dual mandate carrier must respect the interests of the company he is currently active in.[69] Therefore, a dual mandate carrier is according to §§ 93 I 3, 116 1 f. AktG obliged to keep confidential information secret.[70] However, the literature thinks about easing the confidentiality obligation in cases of dual mandates, particularly within bottom-up posting.[71] Here, the management board has the discretionary competence to reveal confidential information.[72] Further, the convincing prevailing view finds that a supervisory board member is justified to transfer crucial managing related information to the

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[65] *Volkswagen AG*, „Erklärung des Vorstandsvorsitzenden der Volkswagen AG, Professor Dr. Martin Winterkorn", press release of 20 Sept. 2015, available at https://www.volkswagen-media-services.com/detailpage/-/detail/Erklrung-des-Vorstandsvorsitzenden-der-Volkswagen-AG-Professor-Dr-Martin-Winterkorn/view/2709299/7a5bbec13158edd433c6630f5ac445da?p_p_auth=uFXR5Ptc (accessed 5 June 2018).

[66] *Porsche SE*, Geschäftsbericht 2015, available at https://www.porsche-se.com/fileadmin/downloads/investorrelations/events_and_presentations/annualgeneralmeeting-2016/Geschaeftsbericht_fuer_das_Geschaeftsjahr_2015__Konzernabschluss__zusammengefasster_Lagebericht__Bericht_des_Aufsichtsrats_.pdf (accessed 5 June 2018), p. 17.

[67] *Volkswagen AG*, „Wir arbeiten mit Hochdruck an einer Lösung", press release of 25 Sept. 2015, available at https://www.volkswagen-media-services.com/detailpage/-/detail/Dr-Herbert-Diess-Vorstandsvorsitzender-der-Marke-Volkswagen-Pkw-erklrt-Wir-arbeiten-mit-Hochdruck-an-einer-Lsung/view/2727397/69b97805cd0a97185b940cf096fb4a34?p_auth=bR9gw7Ey (accessed 5 June 2018).

[68] *Volkswagen AG*, „Erklärung Prof. Dr. Martin Winterkorn", press release of 23 Sept. 2015, available at https://www.volkswagen-media-services.com/detailpage/-/detail/Erklrung-Prof-Dr-Martin-Winterkorn/view/2721551/69b97805cd0a97185b940cf096fb4a34?p_auth=bR9gw7Ey (accessed 5 June 2018).

[69] BGH, Judgment of 9 March 2009, II ZR 170/07, BGHZ 180, 105, 111 = WM 2009, 1138, 1140 – Doppelmandat.

[70] BGH, Judgment of 5 June 1975, II ZR 156/73, BGHZ 64, 325, 328 = NJW 1975, 1412, 1412 f.; *Bank*, Die Verschwiegenheitspflicht von Organmitgliedern in Fällen multipler Organmitgliedschaften, NZG 2013, 801, 803.

[71] *Mertens/Cahn*, in: KK AktG, 3rd edition 2013, § 116 margin no 42; *Schürnbrand*, Wissenszurechnung im Konzern unter besonderer Berücksichtigung von Doppelmandaten, ZHR 181 (2017), 357, 372.

[72] BGH, Judgment of 5 June 1975, II ZR 156/73, BGHZ 64, 325, 331 = NJW 1975, 1412, 1413; BGH, Judgment of 26 April 2016, XI ZR 108/15, NJW 2016, 2569, 2570 ff.

controlling company.[73] Hence, as long as no opposing legal provision exists, board members can transfer information for the sake of practical merits.[74]

In case study 2, P SE has an immense interest in information regarding the "defeat device". Due to the majority holding of P SE, Prof. W would have had the discretionary competence to reveal the information to P SE.

b) *Imputation of knowledge*[75]

To be precise, a problematic situation could arise when the dual mandate carrier does not forward information to the authority in charge by following his confidentiality obligation. Basically, the existence of a dual mandate does not automatically justify an imputation of knowledge.[76] However, the BGH laid down two principles regarding the imputation of knowledge in labor-separated organizations.[77] First, companies have the obligation to properly organize the communication and flow of information.[78] Second, information will be imputed to the company when the exchange of information was possible and required.[79] The obligation reflects itself in forwarding[80] and inquiring[81] information. As a limitation, the persuasive prevailing view finds that the obligation does not apply when the dual mandate carrier gets forced to act unlawfully.[82] This is the case when the revealing of information contradicts data-protecting provisions or confidentiality obligations.[83]

Regarding case study 2, the imputation of knowledge of all dual mandate carriers to P SE can be seen as a central problem. Assuming Prof. W would have had information concerning the "defeat device" earlier than stated, this knowledge

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[73] *Mertens/Cahn*, KK AktG, 3rd edition 2013, § 116 margin no 42; *Bank*, Die Verschwiegenheitspflicht von Organmitgliedern in Fällen multipler Organmitgliedschaften, NZG 2013, 801, 806.
[74] *Schürnbrand*, Wissenszurechnung im Konzern unter besonderer Berücksichtigung von Doppelmandaten, ZHR 181 (2017), 357, 373.
[75] German convenience translation: "Wissenszurechnung".
[76] BGH, Judgment of 13 Oct. 2000, V ZR 349/99, NJW 2001, 359, 360; *Spindler*, in: MüKo AktG, 4th edition 2014, § 78 margin no 99.
[77] German convenience translation: "arbeitsteilige Organisationen".
[78] BGH, Judgment of 2 Feb. 1996, VZR 239/94, BGHZ 132, 30, 37 = NJW 1996, 1339, 1341; *Verse*, Doppelmandate und Wissenszurechnung im Konzern, AG 2015, 413, 416.
[79] BGH, Judgment of 12 Nov. 1998, IX ZR 145/98, BGHZ 140, 54, 62 = NJW 1999, 284, 286.
[80] BGH, Judgment of 2 Feb. 1996, V ZR 239/94, BGHZ 132, 30, 37 = NJW 1996, 1339.
[81] BGH, Judgment of 2 Feb. 1996, V ZR 239/94, BGHZ 132, 30, 37 = NJW 1996, 1339.
[82] *Buck-Heeb*, Private Kenntnis in Banken und Unternehmen, WM 2008, 281, 285; *Sajnovits*, Ad-hoc Publizität und Wissenszurechnung, WM 2016, 765, 772.
[83] *Verse*, Doppelmandate und Wissenszurechnung im Konzern, AG 2015, 413, 417; *Werner*, Die Zurechnung von im Aufsichtsrat vorhandenem Wissen an die Gesellschaft und ihre Folgen, WM 2016, 1474, 1477 f.

could have been imputed to P SE. The LG Stuttgart confirmed the above-mentioned principles within its order for reference[84] to the Court of Appeal: The personal connections of P SE and VW AG lead to an exchange of interests of all companies within the group.[85] The dual mandates lead to a faster flow of information and to a better transfer of the relevant information.[86] Due to the resulting intensity of integration, P SE got infected with insider information of VW AG.[87] The dual mandate carrier would have been obliged to transfer the information to P SE whereas no violation of § 93 I 3 AktG would have been given due to the public duty of ad-hoc publicity.[88]

The situation is different to case study 1. The Appellate Court of Celle held that the decision regarding the acquisition of VW AG shares cannot be imputed to VW AG through Dr. Piëch because of the compelling obligation to confidentiality.[89] Hence, Dr. Piëch would have violated the duty of confidentiality owed to P SE.

c) *Insider information and ad-hoc publicity, Art. 14 c), 17 MAR*

Art. 14 c) MAR prohibits the unlawful trade or disclosure of insider information. According to Art. 7 I MAR, an insider information is an information which will influence the share performance on the stock market if it gets announced to the public. A dual mandate carrier is endangered to violate this provision if he uses his inside knowledge to deal with shares or if he reveals unauthorized inside information to the other company.[90] Nevertheless, according to Art. 10 MAR, the transfer of information is legitimate whilst being within the regular exercise of employment.

The ad-hoc publicity under Art. 17 MAR is strongly connected to Art. 14 MAR. The issuer[91] is obliged to reveal insider information to the public immediately.

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[84] German convenience translation: "Vorlagebeschluss".
[85] LG Stuttgart, Judgment of 28 Feb. 2017, 22 AR 1/17 KAP, margin no 221 (Juris).
[86] LG Stuttgart, Judgment of 28 Feb. 2017, 22 AR 1/17 KAP, margin no 221 (Juris).
[87] LG Stuttgart, Judgment of 28 Feb. 2017, 22 AR 1/17 KAP, margin no 228 (Juris).
[88] LG Stuttgart, Judgment of 28 Feb. 2017, 22 AR 1/17 KAP, margin no 229 (Juris).
[89] *Verse*, Doppelmandate und Wissenszurechnung im Konzern, AG 2015, 413, 417; *Werner*, Die Zurechnung von im Aufsichtsrat vorhandenem Wissen an die Gesellschaft und ihre Folgen, WM 2016, 1474, 1174 referring to OLG Celle, Judgment of 24 Aug. 2011, 9 U 47/11, not published, p. 13 f.
[90] *Möllers*, Interessenskonflikte von Vertretern des Bieters bei Übernahme eines Aufsichtsratsmandats der Zielgesellschaft, ZIP 2006, 1615, 1619; *Passarge*, Vorstands-Doppelmandate, NZG 2007, 441, 443 f.
[91] German convenience translation: "Emittent".

The ad-hoc publicity is seen as a preventive measure to avoid violations of Art. 14 MAR.[92] In case of a violation, the issuer is obliged to compensate damages according to §§ 97 f. WpHG.

With regards to case study 2, VW AG would have been obliged to reveal the installment of the "defeat device" to the public if the management board had been informed. Assuming Prof. W would have had knowledge earlier than stated, also P SE would have been obliged to report this information. Hence, Prof. W would have imputed his knowledge from VW AG to P SE as a dual mandate carrier.

IV. Sanctions against dual mandates

To this point, the above-mentioned solutions can be determined as preventive measures. But it must be clarified what possibilities exist to sanction management misconduct resulting out of dual mandates and what options are available for minority shareholders to take action against malfunction. With reference to the progress of case study 1 and 2, several legal tools sanctioning misconduct by dual mandates will be evaluated.

1. Case study 1 continued

After P SE had announced to acquire 75% of VW AG shares, the value of VW AG shares skyrocketed.[93] Short sellers betting on declining stocks lost an enormous amount of money.[94] Besides suing for compensatory damages against P SE, plaintiffs took action to set aside the resolution relieving the supervisory board made by the general meeting.[95] Further, plaintiffs sued the dual mandate carriers Dr. Piëch and Dr. Porsche personally.[96]

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[92] *BaFin*, Emittentenleitfaden, 4th edition 2013, available at http://www.bafin.de/SharedDocs/Downloads/DE/Leitfaden/WA/dl_emittentenleitfaden_2013.pdf?__blob=publicationFile&v=1 (accessed 5 June 2018), p. 45.

[93] OLG Stuttgart, Judgment of 29 Feb. 2012, 20 U 3/11, margin no 21 (Juris).

[94] *Preuss*, Der Wirtschaftskrimi um VW/Porsche vor Gericht, FAZ.NET 10 Feb. 2014, available at http://www.faz.net/aktuell/wirtschaft/unternehmen/hedgefonds-fordern-schadensersatz-der-wirtschaftskrimi-um-vw-porsche-vor-gericht-12794948.html (accessed 7 June 2018).

[95] OLG Stuttgart, Judgment of 29 Feb. 2012, 20 U 3/11, ZIP 2012, 625, 625.

[96] *N.N.*, Hedge-Fonds will fast zwei Milliarden von Piëch und Porsche; FAZ.NET 2 Feb. 2014, available at http://www.faz.net/aktuell/wirtschaft/unternehmen/uebernahmeschlacht-hedge-fonds-will-fast-zwei-milliarden-von-piech-und-porsche-12781202.html (accessed 7 June 2018).

a) *Action to set aside the resolution relieving the supervisory board, §§ 243 I, 246 AktG*

The action to set aside the resolution of the general meeting relieving the supervisory board is based on §§ 243 I, 246 AktG if the misconduct of the board violates the law or the articles of association.[97] However, this action does not directly justify the court to review the conduct of board members.[98] According to § 243 I AktG, the court may check whether the general meeting violated the law by granting the decision to relieve the board members. For this, the court must evaluate whether the general meeting exceeded its discretion.[99] To determine a violation, the court may indirectly detect a misconduct of the board members. Hence, the plaintiff is required to present such a mismanagement violating obligations under the law or the articles of association.[100] Further, it is required that the general meeting had knowledge of the misconduct when making the relieving decision.[101]

The Appellate Court of Stuttgart held that every member of the supervisory board is obliged to properly comprehend the situation and to self-sufficiently analyze risks independently of the estimation by the management board.[102] Further, the court ruled that Dr. Piëch violated this duty through the Sardinia announcement simultaneously jeopardizing the solvency of P SE.[103]

Overall, the action to set aside resolutions relieving board members is a measure to protect minority shareholders. Nevertheless, §§ 243 I, 246 AktG do not serve to directly control the conduct of the boards. Therefore, the admission of such actions due to the breach of duties of the boards should be applied restrictively.[104] Otherwise, the action to set aside a resolution would indirectly initialize shareholders' actions which ordinarily must meet the requirements of § 148 AktG as evaluated below.

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[97] BGH, Judgment of 25 Nov. 2002, II ZR 133/01, BGHZ 153, 47, 51 f. = NJW 2003, 1032, 1033.

[98] *Decher*, Die gerichtliche Überprüfung der Entlastung durch die Hauptversammlung, in: FS für Klaus J. Hopt, 2010, p. 499, 501; *Spindler*, in: Schmidt/Lutter AktG, 2nd edition 2010, § 120 margin no 33.

[99] BGH, Judgment of 25 Nov. 2002, II ZR 133/01, BGHZ 153, 47, 52 = NJW 2003, 1032, 1033; OLG Stuttgart, Judgment of 17 Nov. 2010, 20 U 2/10, AG 2011, 93, 94.

[100] OLG Stuttgart, Judgment of 17 Nov. 2010, 20 U 2/10, AG 2011, 93, 94.

[101] OLG Köln, Judgment of 9 Sept. 2009, 18 U 167/08), NZG 2009, 1110, 1110 f.; OLG Stuttgart, Judgment of 17 Nov. 2010, 20 U 2/10, AG 2011, 93, 94.

[102] OLG Stuttgart, Judgment of 29 Feb. 2012, 20 U 3/11, margin no 165 (Juris).

[103] OLG Stuttgart, Judgment of 29 Feb. 2012, 20 U 3/11, margin no 185 (Juris).

[104] *Spindler*, in: Schmidt/Lutter AktG, 2nd edition 2010, § 120 margin no 33.

b) *Shareholders' action against board members, § 148 AktG*

Generally, the supervisory board is obliged to take action against misconduct of the management board being liable under § 93 II 1 AktG.[105] The supervisory board itself is liable under §§ 116 1, 93 II 1 AktG. Additionally, the boards are jointly and severally liable under § 117 II AktG if they got negatively influenced and violated the fiduciary duty. Basically, the general meeting is according to § 147 AktG entitled to take action against malfunction of the boards. To protect minority shareholders, § 148 AktG provides a defense action for shareholders holding one percent of the share capital or having €100.000 share value. Shareholders are enabled to consolidate within a shareholders' forum according to § 127a AktG to meet the required quorum.[106] The mere suspicion of improbity or the violation of the law or the articles of association suffices to justify an action.[107] Further, grounds are required for supposing that a damage has already occurred.[108] This requirement confirms the sanction character of this provision because actions against anticipated damages are not admissible.[109] Misconduct within the meaning of § 148 I 2 no 3 AktG covers criminal violations of the duty of loyalty, disloyalty according to § 266 StGB, and further violations of the fiduciary duty evidently exceeding the business judgment rule.[110] As a rare exception, the shareholders' action is not admissible if it contradicts overwhelming grounds of the corporation's welfare; for instance, low amounts of damages.[111]

Transferred to case study 1, plaintiffs accused Dr. Piëch and Dr. Porsche personally. Although this measure serves here for tactical means only,[112] the shareholders' action basically constitutes a strong instrument to review the conduct of the boards

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[105] BGH, Judgment of 21 April 1997, II ZR 175/95, BGHZ 135, 244, 245 = NJW 1997, 1926 – ARAG/Garmenbeck.

[106] *Wilsing, Ogorek*, Der Minderheitenantrag auf gerichtliche Bestellung eines Sonderprüfers gemäß § 142 II AktG, GWR 2009, 75, 76.

[107] Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), 14 March 2005, BT-Drs. 15/5092, p. 22; *Spindler*, Haftung und Aktionärsklage nach dem neuen UMAG, NZG 2005, 865, 867.

[108] *Arnold*, in: MüKo AktG, 4th edition 2018, § 148 margin no 33.

[109] *Spindler*, Haftung und Aktionärsklage nach dem neuen UMAG, NZG 2005, 865, 867.

[110] Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), 14 March 2005, BT-Drs. 15/5092, p. 22; *Spindler*, Haftung und Aktionärsklage nach dem neuen UMAG, NZG 2005, 865, 867.

[111] Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), 14 March 2005, BT-Drs. 15/5092, p. 22.

[112] *N.N.*, Hedge-Fonds will fast zwei Milliarden von Piëch und Porsche; FAZ.NET 2 Feb. 2014, available at http://www.faz.net/aktuell/wirtschaft/unternehmen/uebernahmeschlacht-hedge-fonds-will-fast-zwei-milliarden-von-piech-und-porsche-12781202.html (accessed 7 June 2018).

by the court and to engage board members to personally compensate damages. Consequently, board members are not immune by not pursuing any misconduct. They are bound to the shareholders' interest in a fair and dutiful management. In connection with the possibility of an imputation of knowledge through dual mandates as evaluated above, the shareholders' action delivers a sharp sanction against dual mandates.

c) *Civil law actions*

Besides corporate law sanctions, shareholders can bring actions under § 823 II BGB and § 826 BGB aiming for personal compensation. For this, the boards must either have violated a protection law or must have immorally damaged the shareholder. In case study 1, the Appellate Court of Stuttgart held that the standard of § 826 BGB is stricter than the one of ad-hoc publicity regarding the wrong press releases of P SE.[113] Besides, the court held that manipulation of the market according to § 20a WpHG (old version) constitutes no protection law concerning § 823 II BGB.[114] Consequently, the court dismissed shareholders' claim against P SE.[115]

2. *Case study 2 continued*

Besides suing VW AG, shareholders sued P SE within a model lawsuit[116] alleging that P SE violated the duty of ad-hoc publicity due to the personal connections to VW AG.[117] VW AG instructed an external law firm to clarify all discrepancies.[118]

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[113] OLG Stuttgart, Judgment of 26 March 2015, 2 U 102/14, AG 2015, 404, 405.
[114] BGH, Judgment of 13 Dec. 2011, XI ZR 51/10, BGHZ 192, 90, 100 ff. = NJW 2012, 1800, 1803; OLG Stuttgart, Judgment of 26 March 2015, 2 U 102/14, AG 2015, 404, 405.
[115] OLG Stuttgart, Judgment of 26 March 2015, 2 U 102/14, AG 2015, 404, 404.
[116] German convenience translation: "Kapitalanlegermusterverfahren nach KapMuG".
[117] *N.N.*, Porsche SE schon auf 898 Millionen Euro verklagt, Zeit Online 30 Sept. 2016, available at https://www.zeit.de/news/2016-09/30/auto-porsche-se-schon-auf-898-millionen-euro-verklagt-30164203 (accessed 7 June 2018).
[118] *Volkswagen* AG, „Information der Volkswagen AG über den Stand der umfassenden Untersuchung", press release of 22 April 2016, available at https://www.volkswagen-media-services.com/detailpage/-/detail/Information-der-Volkswagen-AG-ber-den-Stand-der-umfassenden-Untersuchung-im-Zusammenhang-mit-der-Diesel-Thematik/view/3414203/69b97805cd0a97185b940cf096fb4a34?p_auth=QMVJ0YUJ (accessed 7 June 2018).

The Appellate Court of Celle granted shareholders' request for special audit[119] to investigate the conduct of the boards of VW AG.[120] Prof. W resigned as the head of the management board of VW AG as well as of P SE.[121]

a) *Special audit, § 142 II AktG*

The right to initiate a special audit is a "sharp sword" [122] for minority shareholders because they can obtain information necessary to enforce their rights.[123] If the general meeting rejects the request for undertaking a special audit, the court may grant the request of shareholders holding one percent of the share capital or having €100.000 share value according to § 142 II AktG. The requirements of § 142 II AktG correspond to the ones of § 148 AktG[124] (see above): The plaintiffs must have been shareholders at the time the general meeting took place. They must allege facts justifying the suspicion of improbity or the violation of the law or the articles of association by the management. Plaintiffs are not required to prove the alleged facts.[125] Due to the low level of admissibility, the right to a special audit must be restricted to protect the management of the company.[126] The request must be definite within the basic elements.[127] Applying the general prohibition to abuse the law, the right to a special audit is denied when low damages are at stake[128], the facts are all clear[129], or the request aims for inadequate performances.[130]

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[119] German convenience translation: "Sonderprüfung".
[120] OLG Celle, Order of 8 Nov. 2017, 9 W 86/17, NZG 2017, 1381, 1381.
[121] *N.N.*, Winterkorn verlässt auch die Porsche-Familiengesellschaft, FAZ.NET 17 Oct. 2015, available at http://www.faz.net/aktuell/wirtschaft/diesel-affaere/martin-winterkorn-tritt-auch-aus-der-porsche-se-holding-zurueck-13862125.html (accessed 7 June 2018).
[122] *Wilsing, Ogorek*, Der Minderheitenantrag auf gerichtliche Bestellung eines Sonderprüfers gemäß § 142 II AktG, GWR 2009, 75, 75.
[123] OLG München, Order of 11 May 2010, 31 Wx 14/10, AG 2010, 457, 458; *Arnold*, in: MüKo AktG, 4th edition 2018, § 142 margin no 5.
[124] Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), 14 March 2005, BT-Drs. 15/5092, p. 18; *Spindler*, Haftung und Aktionärsklage nach dem neuen UMAG, NZG 2005, 865, 870 f.
[125] OLG Stuttgart, Order of 15 June 2010, 8 W 391/08, AG 2010, 717, 718.
[126] *Wilsing, Ogorek*, Der Minderheitenantrag auf gerichtliche Bestellung eines Sonderprüfers gemäß § 142 II AktG, GWR 2009, 75, 75.
[127] OLG Stuttgart, Order of 25 Nov. 2008, 8 W 370/08, AG 2009, 169, 171; LG München, Judgment of 31 March 2008, 5 HK O 20117/07, AG 2008, 720, 720.
[128] Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), 14 March 2005, BT-Drs. 15/5092, p. 22; *Arnold*, in: MüKo AktG, 4th edition 2018 § 142 margin no 90 f.
[129] *Arnold*, in: MüKo AktG, 4th edition 2018 § 142 margin no 92.
[130] *Wilsing, Ogorek*, Der Minderheitenantrag auf gerichtliche Bestellung eines Sonderprüfers gemäß § 142 II AktG, GWR 2009, 75, 76.

Besides, the effects of the special audit must be proportional to the burden of the company.[131] The special auditor has according to § 145 I – III AktG the comprehensive and unrestricted right of inquiry, insight, and disclosure to investigate internal processes. The results of the special audit report will be published according to § 145 IV – VI AktG.

With regards to case study 2, the court found that a qualified suspicion suffices to justify the encroachment on opposing interests of the company.[132] The internal investigations by the law firm do not satisfy the interests of minority shareholders protected by § 142 II AktG, particularly because the results are not accessible to shareholders.[133] The court concluded that it must be investigated how it was possible that the management board had not been informed about the sale of multiple vehicles equipped with the "defeat device".[134] The special audit aims to ascertain the exact time the management board obtained knowledge of the "defeat device". This is a crucial element of the success of many claims: On the one hand, shareholders' action against VW AG will have a turning point, on the other hand, shareholders' action against board members of P SE will be reasoned in combination with the imputation of knowledge through several dual mandates.

b) *Dismissal*

As a sanction directly against the position of a dual mandate carrier, shareholders can according to § 103 III 3 AktG request the dismissal of a member of the supervisory board. Information obtained through a special audit can be used to substantiate the required important reason.[135] The only way to dismiss a management board member is by the supervisory board according to § 84 III AktG. Prof. W avoided a possible procedure of dismissal by resigning voluntarily.

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[131] Gesetzesentwurf der Bundesregierung, Entwurf eines Gesetzes zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), 14 March 2005, BT-Drs. 15/5092, p. 18; OLG Düsseldorf, Order of 9 Dec. 2009, 6 W 45/09, AG 2010, 126, 127.
[132] OLG Celle, Order of 8 Nov. 2017, 9 W 86/17, NZG 2017, 1381, 1382 f.
[133] OLG Celle, Order of 8 Nov. 2017, 9 W 86/17, NZG 2017, 1381, 1383.
[134] OLG Celle, Order of 8 Nov. 2017, 9 W 86/17, NZG 2017, 1381, 1382.
[135] *Mock*, Schutzinteressen der Aktiengesellschaft und ihrer Aktionäre bei der Sonderprüfung, ZIP 2018, 201, 202.

c) *Criminal sanctions*

Criminal sanctions against corporations are laid down in the law of regulatory offenses.[136] According to § 30 OWiG, a corporation must pay a fine because of misconduct by a person in charge. Besides, a violation of proper supervision according to § 130 OWiG constitutes a criminal sanction which is according to § 9 OWiG applicable to board members.[137] In case study 2, plaintiffs accused board members of market abuse.[138] Further, disloyalty according to § 266 StGB could constitute a possible criminal sanction against misconduct of dual mandate carriers.[139]

3. *Conclusion*

Shareholders often do not have sufficient knowledge of processes in the boards to succeed in actions. The right to special audit according to § 142 II AktG provides them with the possibility to obtain crucial information to prepare actions against board members according to § 148 AktG, to request the dismissal of supervisory board members according to § 103 III 3 AktG, or to set aside the decision of the general meeting to relieve the boards according to §§ 243 I, 246 AktG. Besides, criminal sanctions are available showing the significance of board misconduct. This sanction system is of particular importance in cases involving dual mandates trying to avoid liability or disclosure of their mismanagement due to their split position. Eventually, succeeding sanctions may constitute an ignition to change the compliance system of the company avoiding mismanagement in the future.

C. Interface between German and Anglo-American law: Different corporate systems

To evaluate the problems of dual mandates in Anglo-American law, a fundamental distinction from the German corporate system must be presented. Whereas the German law is based on a two-tier system, the Anglo-American corporate law follows the one-board system.

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[136] *Grützner*, Unternehmensstrafrecht vs. Ordnungswidrigkeitenrecht, CCZ 2015, 56, 56.
[137] *Grützner*, Unternehmensstrafrecht vs. Ordnungswidrigkeitenrecht, CCZ 2015, 56, 56.
[138] *N.N.*, Staatsanwaltschaft ermittelt gegen Ex-VW-Konzernchef Winterkorn, Zeit Online 20.06.2016, available at https://www.zeit.de/wirtschaft/unternehmen/2016-06/staatsanwaltschaft-ermittelt-gegen-ex-vw-konzernchef-winterkorn (accessed 7 June 2018).
[139] *Brand/Hotz*, Der „VW-Skandal" unter wirtschaftsstrafrechtlichen Vorzeichen, NZG 2017, 976, 976.

The two-tier system grants a controlling supervisory board equated with the management board. The mutual control of decisions prohibits a simultaneous presence in both institutions. The Anglo-American one-board system guarantees a "superior flow of information".[140] However, stock-listed corporations must install an audit committee within their board to supervise management conduct including a risk assessment.[141]

D. Perspective under Anglo-American law within a comparative law approach

In Anglo-American literature, dual mandates are termed as "interlocking directorates".[142] First, the legitimacy of interlocking directorates must be determined.

I. Legitimacy of interlocking directorates

Within federal law, section 8 of the Clayton Act[143] prohibits interlocking directorates connecting two competing companies except those having capital of less than $10.000.000 or the competitive sales of either corporation are less than $1.000.000. In *United States v. Sears, Roebuck & Co.*, the court held that two companies are in competition when selling similar items at retail in interstate commerce.[144] The court in *American Bakeries Co. v. Gourmet Bakers, Inc.* asserted this rule by applying the "relevant market test" to determine whether corporations sell products which are physically or functionally identical within the same geographic area.[145] However, the court found that even two companies producing similar products are not in competition when one company is unable to fix prices or to allocate markets.[146] Section 8 of the Clayton Act applies to groups as well as to involved competing subsidiaries.[147]

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[140] *Jungmann*, The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems, 3 European Company and Financial Law Review, 426, 460–464 (2006).
[141] *Fey*, Corporate Governance – Unternehmensüberwachung bei deutschen Aktiengesellschaften, DStR 1995, 1320, 1321.
[142] *Mestmäcker*, Verwaltung, Konzerngewalt und Rechte der Aktionäre, p. 74.
[143] Clayton Act 15 U.S.C. § 19.
[144] United States v. Sears, Roebuck & Co., 111 F. Supp. 614, 615–620 (DC NY 1953).
[145] American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 980 (DC MD 1981).
[146] American Bakeries Co. v. Gourmet Bakers, Inc., 515 F. Supp. 977, 982 (DC MD 1981).
[147] Williams v. Pa. Co., 367 F. Supp. 1158, 1166–1168 (ED Pa 1973).

The Federal Trade Commission (FTC) and the Department of Justice (DOJ) are enabled to enforce violations of section 8 of the Clayton Act within litigation.[148] Besides the Clayton Act, neither federal law nor state law provide further regulations concerning interlocking directorates.[149]

Section 8 of the Clayton Act is almost the only provision in the world which bans interlocking directorates between competing companies per se without any analysis of the competitive effects of the interlock.[150]

II. Problems concerning interlocking directorates

Quoting U.S. Supreme Court Justice Luis Brandeis, the "practice of interlocking directorates is the root of many evils. […] Applied to rival corporations, it tends to the suppression of competition […]. Applied to corporations which deal with each other, it tends to disloyalty and to violation of the fundamental law that no man can serve two masters."[151] This quotation summarizes the problems resulting out of interlocking directorates concisely. Beginning with the compatibility with the fiduciary duty, these problems will be evaluated more detailed.

1. Consistency of interlocking directorates with the fiduciary duty

Directors, officers, and shareholders are obligated to respect their fiduciary duty.[152] Especially, directors must apply their freedom of decision within the business judgment rule in good faith and exclusively in favor of the company. They owe the shareholders unremitting loyalty.[153]

Generally, interlocking directorates do not inherently constitute a breach of the fiduciary duty.[154] In *Warshaw v. Calhoun*, the court developed the rule that interlocked directors owe the same duty of good management to the parent and the subsidiary corporation as well that "is to be exercised in the light of what is best for

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[148] Robert F. Booth Trust v. Crowley, 687 F.3d 314, 319–320 (7th Cir. 2012).

[149] *Borsdorff*, Interessenskonflikte bei Organmitgliedern, p. 103.

[150] *Rosch*, Commissioner, Federal Trade Commission, Remarks before the University of Hong Kong: Terra Incognita: Vertical and Conglomerate Merger and Interlocking Directorate Law Enforcement in the United States (Sept. 11, 2009) (transcript available at https://www.ftc.gov/sites/default/files/documents/public_statements/terra-incognita-vertical-and-conglomerate-merger-and-interlocking-directorate-law-enforcement-united/090911roschspeechunivhongkong.pdf).

[151] *Brandeis*, Other People' s Money and How the Bankers Use It 51(1914).

[152] *Merkt*, US-amerikanisches Gesellschaftsrecht, p. 467.

[153] Malone v. Brincat, 722 A2d 5, 10 (Del. 1998).

[154] Singer v. Carlisle, 26 N.Y.S.2d 172, 182 (N.Y. 1940).

both corporations."[155] Here, a distinction from German law can be determined. Whereas in German law, the dual mandate carrier must respect the interests of the company he is currently acting for, in Anglo-American law, the interlocked director must act to the favor of both companies equally.
In *Weinberger v. UOP, Inc.*, the court reasserted the above-mentioned rule stating that there "is no dilution of [the fiduciary] obligation where one holds dual or multiple directorships, as in a parent-subsidiary context."[156] This rule corresponds to the rule in Germany providing that a performance of an obligation owed to one company does not justify a breach of duty in the other company.
Later in *Anadarko Petroleum Corp. v. Panhandle Eastern Corp.*, the Delaware Supreme Court made an exception to the above-mentioned principles holding that interlocked directors serving for the parent corporation and a wholly-owned subsidiary do not owe a fiduciary duty to the subsidiary, but only to the parent corporation and the shareholders.[157]
Overall, the interlocked director must be vigilant in observing possible conflicts arising out of his split position[158] and must respect the interests of both corporations equally except in case of a wholly-owned subsidiary.

2. *Corporate opportunities*

A central problem of interlocking directorates is the question of how to deal with corporate opportunities. First, it must be evaluated how a non-interlocked director should act when he receives a corporate opportunity favorable for his company. Courts and literature have developed several tests to solve this problem. As a resulting general rule, "a director may not take an opportunity for himself if: (1) the corporation is financially able to exploit the opportunity[159]; (2) the opportunity is within the corporation's line of business[160]; (3) the corporation has an interest or

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[155] Warshaw v. Calhoun, 221 A.2d 487, 492 (Del. 1966); *Wells*, Multiple Directorships: The Fiduciary Duties and Conflicts of Interest that Arise When One Individual Serves More Than One Corporation, 33 J. Marshall Law Review 561, 565 (2000).
[156] Weinberger v. Uop, 457 A.2d 701, 710 (Del. 1983); *Wells*, Multiple Directorships: The Fiduciary Duties and Conflicts of Interest that Arise When One Individual Serves More Than One Corporation, 33 J. Marshall Law Review 561, 569 (2000).
[157] Anadarko Petroleum Corp. v. Panhandle Eastern Corp., 545 A.2d 1171, 1174 (Del. 1988).
[158] *Berchtold*, Dual Directorship: The Perils of Serving Two Masters, 11 Nevada Lawyer 8, 9 (2003).
[159] Alger v. Brighter Days Min. Corp., 160 P.2d 346, 350–351 (Ariz. 1945).
[160] Guth v. Loft, Inc., 5 A.2d 503, 511 (Del.1939).

expectancy in the opportunity[161]; and (4) by taking the opportunity, the director is placed in a position inimical to his duties to the corporation."[162]

Basically, this general rule is applicable to cases involving interlocking directorates as well.[163] If the opportunity cannot be attributed to one interlocked company, the interlocked director can decide whether he takes it for himself or he forwards it to a company.[164] However, once the opportunity can be attributed to one of the companies, the director is obliged to effectuate the opportunity in favor of the relevant company.[165] If the opportunity can be attributed to both companies, the director is situated in a conflict of interest. In such a case, the above-mentioned general rule can be applied: A performance of a duty in one corporation can never justify a breach of a duty owed to the other corporation.[166]

3. *Intercorporate transactions*

Another critical situation arises when an interlocked director participates in a transaction involving both interlocked companies. Such a contract could be void or voidable. Some states[167] have regulations providing that a contract is not void or voidable solely because of the participation of an interlocked director if (1) the material facts regarding the director's interest in the transaction are disclosed to the board of directors, the committee, or to the stockholders entitled to vote and the board, committee, or the stockholders are in good faith authorizing the contract or (2) the contract or transaction is fair to the corporation as of the time it is authorized, approved, or ratified by the board of directors, a committee, or the stockholders.[168]

Overall, the method of the Anglo-American law resembles § 27 WpÜG. Both provisions generally do not prohibit transactions involving interlocking directorates and correspond in avoiding the formation of an unfair transaction.

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[161] Pike's Peak Co. v. Pfunter, 123 N.W. 19, 20-21 (Mich.1909); *Merkt*, US-amerikanisches Gesellschaftsrecht, p. 522.

[162] *Berchtold*, Dual Directorship: The Perils of Serving Two Masters, 11 Nevada Lawyer 8, 9 (2003).

[163] *Borsdorff*, Interessenskonflikte bei Organmitgliedern, p. 104.

[164] Johnston v. Green, 121 A.2d 919, 923 (Del. 1956); *Borsdorff*, Interessenskonflikte bei Organmitgliedern, p. 104.

[165] Johnston v. Green, 121 A.2d 919, 923 (Del. 1956); *Borsdorff*, Interessenskonflikte bei Organmitgliedern, p. 104.

[166] *Borsdorff*, Interessenskonflikte bei Organmitgliedern, p. 104.

[167] Del. Code Ann. tit. 8, § 144 (2010); Nev. Rev. Stat., § 78.140 (2017).

[168] Del. Code Ann. tit. 8, § 144(a) (2010).

III. Exemplary case studies

The different approaches mentioned above provide a sense of how Anglo-American law deals with interlocking directorates. With reference to exemplary cases, the relevance of interlocking directorates within litigation will be presented.

1. Shaev v. Wyly

In *Shaev v. Wyly*, corporation A wholly owned its subsidiary B.[169] Four directors were interlocked between both companies.[170] The directors spun off its subsidiary and granted themselves options on 9.000.000 shares of the subsidiary B's stock.[171] Plaintiff, a shareholder of corporation A and prospective shareholder of the subsidiary B, brought a derivative suit alleging a breach of the fiduciary duty by the directors due to the excessive compensation and the absence of time devoted necessary to run the business of corporation B.[172]

In Anglo-American law, the central right protecting shareholders is the derivative action which is often treated as a special class action because a shareholder regularly sues on behalf of more shareholders.[173] To bring a derivative action, the plaintiff is required to be a shareholder of this company.[174] For instance, reasons to bring a derivative suit are violations of the fiduciary duty[175], the corporate opportunity doctrine[176], the prohibition of self-dealing[177], and generally cases of mismanagement.[178] Overall, the derivative suit protects shareholders against misconduct by interlocked directors as well. The court in *Shaev v. Wyly* held that the plaintiff is permitted to proceed with the claim without having standing due to the lack of shareholdership concerning company B.[179] Although the case ending in settlement, the court made a basic decision regarding the breach of fiduciary duties resulting "of the very nature of […] multiple directorships."[180] Due to the rarity of case law concerning interlocking directorships, a finding of liability in this case

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[169] Shaev v. Wyly, No. 15559-NC, 1998 Del. Ch. LEXIS 2, at *2 (Jan. 6, 1988).
[170] Shaev v. Wyly, No. 15559-NC, 1998 Del. Ch. LEXIS 2, at *3 (Jan. 6, 1988).
[171] Shaev v. Wyly, No. 15559-NC, 1998 Del. Ch. LEXIS 2, at *3 (Jan. 6, 1988).
[172] Shaev v. Wyly, No. 15559-NC, 1998 Del. Ch. LEXIS 2, at *3-4 (Jan. 6, 1988).
[173] *Merkt*, U.S.-amerikanisches Gesellschaftsrecht, p. 592, 633.
[174] *Merkt*, U.S.-amerikanisches Gesellschaftsrecht, p. 589.
[175] Hoffmann v. Optima Systems, Inc., 683 F.Supp. 865, 872 (Mass. Dist. Ct. 1988); Cowin v. Bresler, 741 F.2d 410, 413–418 (D.C. Cir. 1984).
[176] Doleman v. Meiji Mutual Life Ins., Co., 727 F.2d 1480, 1483 (9th Cir. 1984).
[177] Litwin v. Allen, 25 N.Y.S.2d 667, 677–679 (N.Y. Sup. Ct. 1940).
[178] *Merkt*, U.S.-amerikanisches Gesellschaftsrecht, p. 592.
[179] Shaev v. Wyly, No. 15559-NC, 1998 Del. Ch. LEXIS 2, at *14–15 (Jan. 6, 1988).
[180] *Wells*, Multiple Directorships: The Fiduciary Duties and Conflicts of Interest that Arise When One Individual Serves More Than One Corporation, 33 J. Marshall Law Review 561, 577 (2000).

would have been a precedent case.[181] It is questionable why there are so few cases involving interlocking directorates. The following case will dismantle this question.

2. *Robert v. Cowley*

In *Robert v. Cowley*, plaintiff brought a derivative suit against interlocked directors alleging that they violate section 8 of the Clayton Act.[182] The court held that "the prospect of future interlocks prevents the suit from being moot."[183] Notwithstanding, the court entered judgment for defendants because plaintiff abused the legal system to extort settlements including attorney's fees by unnecessarily bringing antitrust suits against interlocking directorates.[184] However, the court explained that antitrust enforcers avoid litigation. The FTC and the DOJ monitor interlocking directorates and check whether they are consistent with section 8 of the Clayton Act.[185] In case of improper overlapping of interlocks, the agencies contact the firm and ask for an explanation avoiding litigation.[186] Hence, corporations can remove the interlock or can eliminate the circumstances which make the interlock unlawful. Consequently, the legitimacy of interlocks is regulated beyond litigation.

Recent activities of the FTC confirm this approach. For instance, the CEO of Google, Inc. resigned from the board of Apple, Inc. due to public investigations by the FTC concluding that the interlock constitutes a violation of section 8 of the Clayton Act.[187] In England, the Company Directors Disqualification Act grants the Department of Trade and Industry the power to disqualify directors in case of severe violations of their duties.[188]

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[181] *Wells*, Multiple Directorships: The Fiduciary Duties and Conflicts of Interest that Arise When One Individual Serves More Than One Corporation, 33 J. Marshall Law Review 561, 577 (2000).
[182] Robert F. Booth Trust v. Crowley, 687 F.3d 314, 316 (7th Cir. 1012).
[183] Robert F. Booth Trust v. Crowley, 687 F.3d 314, 318 (7th Cir. 1012).
[184] Robert F. Booth Trust v. Crowley, 687 F.3d 314, 319–320 (7th Cir. 1012).
[185] Robert F. Booth Trust v. Crowley, 687 F.3d 314, 319 (7th Cir. 1012).
[186] Robert F. Booth Trust v. Crowley, 687 F.3d 314, 319 (7th Cir. 1012).
[187] *Federal Trade Commission*, Statement of Bureau of Competition director Richard Feinstein regarding the announcement that Google CEO Eric Schmidt has resigned from Apple's board, press release of Aug. 3, 2009, available at https://www.ftc.gov/news-events/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding (accessed 6 June 2018).
[188] Company Directors Disqualification Act 1986, c. 46, § 3 (UK); *Möllers*, Interessenskonflikte von Vertretern des Bieters bei Übernahme eines Aufsichtsratsmandats der Zielgesellschaft, ZIP 2006, 1615, 1620.

Consequently, common law systems with a one-board approach have a public agency supervising company boards, whereas civil law systems with the two-tier approach impose the burden of monitoring on the companies itself by the necessity of a supervisory board.

E. Overall conclusion

Under German law, courts and literature present sophisticated solutions to prevent and solve problems of dual mandates. Nevertheless, current cases show that immense damage can emerge although dual mandate carriers made use of abstention and respected their duty to reveal conflicts of interest. Consequently, sanctions are necessary to compensate for resulting damage. Shareholders' right to initiate a special audit in combination with the possibility of imputation of knowledge constitutes an effective way to implement actions against board members enforcing damages or dismissal. However, it is problematic to impose the burden on minority shareholders to press sanctions against misconduct of dual mandate carriers.

In Anglo-American law, courts evaluated solutions for problems of interlocking directorates as well and set rules determining the conduct of directors. Compared to the situation in Germany, the burden of pursuing critical interlocks rests with the public agencies FTC and DOJ. Due to the scarcity of cases brought to litigation, this approach seems to have success. Nevertheless, it is questionable whether such an approach is only viable within one-board systems. Transferred to Germany, the Federal Cartel Office, the relevant Chamber of Commerce and Industry, or a newly established public authority could be enjoined to supervise the boards being equipped with the right to impose sanctions or to litigate. Such a system would resemble the already existing supervisory control by the BaFin regarding capital market violations. Courts would be relieved and an independent agency could monitor boards equally.

Selbstständigkeitserklärung

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