Germany
Minority Shareholder Rights
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SOURCES OF PROTECTION AND ENFORCEMENT

Please provide an overview of the sources of protection for minority shareholders in your jurisdiction. Who enforces these rights?

The laws of the Federal Republic of Germany provide for protection to minority shareholders in different ways in the following types of company:

- German stock corporation (*Aktiengesellschaft* or AG),
- European stock corporation (*Societas Europaea* or SE),
- German partnership limited by shares (*Kommanditgesellschft auf Aktien* or KGaA*)* and
- German limited liability company (*Gesellschaft mit beschränkter Haftung* or GmbH).

The primary source for the rights and protections of minority shareholders is statutory law, principally:

- the German Stock Corporation Act (*Aktiengesetz* or AktG);
- the German Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung* or GmbHG);
- the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz* or WpÜG); and
- the German Reorganisation of Companies Act (*Umwandlungsgesetz* or UmwG).

However, a certain number of the protective statutory rules contained therein can be modified in the company's articles of association in favor of majority shareholders. Such modification generally requires shareholder approval of at least 75 per cent.

Also, minority shareholders may derive protection from German case law, which should be given due consideration alongside applicable law and the statutes.

Finally, listed companies and their shareholders that reach, exceed or fall below certain thresholds with regard to their shareholdings are subject to a number of additional requirements, in particular in the range of disclosure and transparency, which are mainly enacted in the German Securities Trade Act (*Wertpapierhandelsgesetz* or WpHG).

Basically, minority shareholders must enforce their rights individually. To the extent that the management of the company is supervised by a supervisory board, its monitoring of the management may also entail protection of minority shareholders. As a minimum, proper fulfilment of disclosure obligations by listed companies is publicly regulated, ie by the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht or BaFin), which is also to the benefit of minority shareholders.

PROTECTION AGAINST DILUTION

Are there any mechanisms in your jurisdiction to protect against dilution of shareholdings? For example, are existing shareholders granted any rights on the issue of new shares in a company?

Shareholders in a German AG and GmbH are afforded several different kinds of protection to help ensure that the value of their shareholdings is maintained relative to other current shareholders in the same company. Although these rights and protections are afforded to all shareholders, they nonetheless operate to protect minority shareholders facing the risk of being diluted:

First, resolutions on capital increases must generally be approved with a qualified majority of at least 75 per cent, which relates in a GmbH to the votes cast and in an AG to the present and represented registered share capital. Reduction of majority requirements by the articles of association is not permitted in a GmbH at all (section 53, paragraph 2, GmbHG) and, in general, the AktG only allows the provision of higher majorities in the articles of association (section 182, paragraph 1, AktG). These requirements also apply to resolutions on the creation of authorised capital (*genehmigtes Kapital*), as well as contingent capital (*bedingtes Kapital*) and to the issuances of bonds (*Schuldverschreibungen*).

Shareholders in an AG and a GmbH have pro-rata subscription rights to newly issued shares and bonds (section 186, paragraph 1, AktG; section 55, paragraph 3, GmbHG), which they must waive to allow dilution of their shareholding. This effectively grants them first rights to new shares. In a German AG, the exclusion of subscription rights is also statutorily permitted in certain scenarios; however, only subject to the following strict requirements (section 186, paragraphs 3–4, AktG):

- Subscription rights may be excluded by way of resolution of the general meeting, which must be passed with a qualified majority of at least 75 per cent of the present and represented registered share capital, and which must be accompanied by a written report from the executive board explaining the reason for the exclusion and the issue price of the new shares in question.
- In the case of listed AGs, the exclusion of subscription rights is allowed if the capital increase does not exceed 10 per cent of the then-registered share capital of the AG and the issue price of the newly issued shares does not fall substantially short of the stock price.

In cases in which the executive board is authorised to issue new shares by executing authorised or contingent capital, such authorisations must provide for explicit scenarios in which the executive board is permitted to exclude subscription rights. Also, these authorisations must be resolved by the shareholders with a qualified 75 per cent majority.

Subscription rights of shareholders of an AG are, in addition, statutorily protected against potential agreements and undertakings of the company vis-à-vis third parties regarding the (future) issuance of new shares (section 187, AktG). In cases of different classes of issued shares, shareholders of preferred stock may also have an approval right.

Minority shareholders may challenge a resolution on the capital increase (under exclusion of subscription rights), if the issue price in favor of the subscriber was unreasonably low (section 255, paragraph 2, AktG).

RIGHTS TO APPOINT DIRECTORS

Do minority shareholders have any special rights to appoint directors to safeguard their interests? Are other protections available to minority shareholders in this context (such as general duties of directors)?

The German corporate governance rules provide for the so-called 'two-tier system', with a management level (in an AG an executive board (*Vorstand*), and in a GmbH the managing directors (*Geschäftsführer*)) and a supervisory board.

A supervisory board is statutorily provided for every AG and must be implemented in a German GmbH only in case co-determination is required due to an excess of a certain number of employees in the GmbH or its group of companies. The one-tier system is only possible in a SE. As a basic principle, minority shareholders have neither special rights to appoint members of the executive board or managing directors nor to appoint members of the supervisory board.

Members of the supervisory board are generally elected and dismissed by the general meeting. Elections require a simple majority of the votes cast (section 101, paragraph 1; section 133, AktG). The articles of association may provide for other requirements (section 133, paragraph 2, AktG). Dismissals generally require at least a 75 per cent majority of the votes cast; however, the articles of association may provide for simpler requirements (section 103, paragraph 1, AktG).

Subject to the articles of association, one-third of the members of the supervisory board may be delegated to and re-delegated out of the supervisory board by shareholders. Even if this delegation right in the articles of association mainly benefits majority shareholders, in individual cases it may also entail protection to minority shareholders.

Members of the executive board must be appointed and dismissed by the supervisory board (section 84, paragraphs 1 and 3, AktG). Thus, no shareholder has the right to participate in decisions on the appointment or dismissal of members of the executive board.

Conversely, the shareholders meeting of a GmbH has the power to decide upon managing directors, as long as the GmbH is not required to incorporate a supervisory board due to co-determination rules. Appointments and dismissals must be approved by the shareholders with a simple majority of the votes cast (sections 45 and 47, GmbHG), unless the articles of association require higher majorities.

There are no specific rules that board members or managing directors must explicitly consider the position of minority shareholders. However, as a general duty, they must consider the principle of equal treatment of all shareholders (section 53a, AktG). This duty aims to discourage directors to act in such a way that favors their appointers – respectively, the shareholder sphere of their appointers.

PROTECTION AGAINST TAKEOVER BIDS FOR THE COMPANY

Do minority shareholders have any protection in your jurisdiction where the company is the subject of a takeover bid?

Where a takeover offer is made in relation to a German company whose shares are traded on a regulated market (such as the Prime Standard segment of the Frankfurt stock exchange (Frankfurter Wertpapierbörse)), the bidder and target company will be subject to the WpÜG.

The WpÜG differentiates between voluntary takeover offers (*freiwilliges Übernahmeangebot*) and mandatory offers (*Pflichtangebot*, section 35, WpÜG). Whereas a bidder for a voluntary takeover bid intends to achieve the acquisition of 30 per cent or more of the voting rights in a target company (ie control, section 29, paragraph 2, WpÜG), any party (directly or indirectly) acquiring control has to launch a mandatory offer to the remaining shareholders of the target company after the excess of the 30 per cent shareholding.

In cases of both a voluntary and mandatory takeover offer, the bidder has to offer appropriate consideration to all shareholders of the target company. The minimum price must be the higher of:

- the weighted domestic stock price of the shares during the last three months prior to the publication of the announcement to launch an offer (section 5, paragraph 1 of the ordinance to implement the WpÜG); and
- the highest price paid by the bidder (either alone or acting in concert) in acquisitions during the last six months prior to the publication of the offer document (section 4 of the ordinance).

If, within one year following the consummation of the tender offer, a bidder pays a higher purchase price for shares in the target company in acquisitions outside the stock exchange, the bidder must subsequently pay the difference between the offer price and the subsequently paid higher price to all shareholders that have accepted the tender offer (section 31, paragraph 5, WpÜG).

The bidder is not allowed to grant or commit to grant cash or other benefits to members of the executive and supervisory board. Thus, board members are obliged to treat (minority) shareholders and the bidder equally.

In mandatory takeover offers, protection to minority shareholders goes further. Mandatory takeover offers may not be subject to conditions precedent, and in particular may not be subject to the achievement of certain acceptance periods. Mandatory takeover offers must always apply to all outstanding shares.

However, minority shareholders not wishing to exit the company in this situation may still be ‘squeezed out’ according to the provisions provided for in the AktG, the merger-specific squeeze-out according to the UmwG or the takeover-related squeeze-out according to the WpÜG. Alternatively, minority shareholders must be offered cash compensation for their shares through other measures integrating the target company into the (group of companies of the) bidder, such as entering into a domination and profit and loss transfer agreement between bidder and target company.

The takeover-related squeeze-out (*Übernahmerechtlicher Squeeze-out*, section 39a, paragraph 1, WpÜG) gives the bidder the right to judicially file for the acquisition of the remaining minority shareholders’ shares within three months following consummation of the takeover offer, if it holds 95 per cent or more of the voting rights thereafter. If the bidder has acquired 90 per cent of the shares by way of or in the context of the takeover offer, the offer price shall be statutorily deemed to also be appropriate for the squeeze-out. However, case law has stated that minority shareholders may

nevertheless prove that the offer price was inappropriate. Thus, bidders must be very wary of disputes. Since then, the takeover-related squeeze-out is no longer attractive from a bidder's perspective and thus in practice not relevant.

The general squeeze-out (*Aktienrechtlicher Squeeze-out*, sections 327a et seq, AktG) entitles any shareholder who holds 95 per cent or more of the registered share capital of an AG to buy out the remaining minority shareholders in return for appropriate cash compensation, if the general meeting approves the squeeze-out with a simple majority of votes cast. The cash compensation must be determined by way of the earning capacity value method/discounted cash flow method in accordance with the so-called 'IDW S1' standard.

A shareholder who holds 90 per cent or more of the registered share capital of an AG has the right to buy out the remaining minority shareholders' shares within three months after entering into a merger agreement with the target company (*Verschmelzungsrechtlicher Squeeze-out*, section 62, paragraph 5, UmwG). Moreover, such a squeeze-out is subject to the same provisions as the general squeeze-out.

In other integration measures like entering into a domination and profit and loss transfer agreement, minority shareholders must be offered cash compensation for their shares which must generally be calculated on the basis of the IDW S1.

An issuer is only allowed to file for a delisting at the respective stock exchange(s) on which its shares are traded, if an offer to purchase the share capital of the company pursuant to WpÜG is submitted (section 39, paragraph 2, German Stock Exchange Act (*Börsengesetz* or BörsG)). The price must amount to at least the weighted average market price of the shares during the last six months prior to the publication of the delisting decision.

If minority shareholders are of the opinion that the cash compensation offered in a squeeze-out, an integration measure or a delisting is too low, they can file a legal challenge for higher compensation in court (*Spruchverfahre*n). However, minority shareholders cannot appeal underlying resolutions passed by the general meeting arguing that the pay-off is not appropriate in their view.

ACTIONS AND SEEKING REMEDIES ON BEHALF OF THE COMPANY

Are shareholders in your jurisdiction able to bring actions and seek remedies on behalf of the company? For example, is there any mechanism for a judicial or other official representative to oversee or intervene in the management of the company?

Shareholders of an AG are generally only entitled to bring actions or seek remedies in regard to their individual shareholder's rights and not in regard to rights on behalf of the company. However, subject to the following statutory procedures, certain minority shareholders can do the following.

The general meeting can – with a simple majority of the votes cast – appoint a special auditor (*Sonderprüfer*) to analyse certain specified decisions of the executive and supervisory board (section 142, paragraph 1, AktG). Shareholders who together hold at least 5 per cent of the registered share capital, or a nominal value of at least €500,000, may require a topic to be added to the agenda for a general meeting (such as the resolution to appoint a special auditor, section 122, paragraph 2, AktG).

If the general meeting rejects the motion to appoint a special auditor, and if facts and circumstances justify severe breaches of tasks and duties by the management, minority shareholders who together hold at least 1 per cent of the registered share capital or a nominal value of at least €100,000 can file for the appointment of the special auditor in court (section 142, paragraph 2, AktG).

Minority shareholders may also influence the assertion of damage claims against executive and supervisory board members following breaches of tasks and duties of statutorily specified decisions if, in a first instance, the general meeting resolves with a simple majority to assert such claims. Minority shareholders who together hold at least 10 per cent of the registered capital or a nominal value of at least €1m can then judicially file for the appointment of a special representative (*besonderer Vertreter*) to assert these claims (section 147, paragraphs 1–2, AktG).

Minority shareholders who together hold at least 1 per cent of the registered share capital or a nominal value of €100,000 or more can also apply in court for admission to assert these claims of the company in their own name (section 148, paragraph 1, AktG).

RIGHTS TO PARTICIPATE IN DECISION-MAKING

To what extent do minority shareholders have rights to participate in the decision-making of companies in your jurisdiction?

Shareholders of an AG who together hold at least 5 per cent of the registered share capital are entitled to request convocation of a general meeting. Shareholders who together hold at least 5 per cent of the registered share capital or a nominal value of €500,000 or more may also require a supplement to the agenda of a general meeting which has already been called (section 122, paragraphs 1–2, AktG). Shareholders of a GmbH are entitled to do this if they hold at least 10 per cent or more of the registered share capital (section 50, GmbHG).

(Minority) shareholders of a German GmbH are entitled to instruct the managing directors by way of shareholder resolution, to be passed with simple majority of the votes cast (unless the GmbH has a compulsory supervisory board), and thereby can considerably influence the decision-making of the company.

The shareholders of an AG only have the right to receive information during the general meeting on matters concerning the company and its group, if such information is necessary for the proper assessment of the general meeting's agenda item (section 131, paragraph 1, AktG). In contrast, the rights of a shareholder in a German GmbH to request management information are very broad (section 51a, GmbHG).

RIGHTS WHEN A COMPANY IS EXPERIENCING FINANCIAL DIFFICULTIES

Do minority shareholders have any particular rights or protections when a company is experiencing financial difficulties? For example, are they able to demand that the company be wound up?

Minority shareholders have no right to demand the liquidation of the company.

For good cause, shareholders of an AG who together hold at least 5 per cent of the registered share capital, or a nominal value of €500,000 or more, may file for a liquidator to be appointed by court in order for them to wind up the company (section 265, paragraph 3, AktG). In a GmbH, a shareholding of at least 10 per cent is necessary for a shareholder to do so (section 66, paragraph 2, GmbHG).

However, if the management assumes that the company has incurred a loss amounting to half of the registered share capital of the company, shareholders will have to be informed accordingly in a shareholders meeting as management is bound to convene a shareholders meeting (section 92, paragraph 1, AktG; section 49, paragraph 3, GmbHG).

RIGHTS ENFORCEABLE AGAINST OTHER SHAREHOLDERS

Do minority shareholders have any rights or protections which are enforceable against other shareholders; for example, where the majority of shareholders act in contravention of the company's articles of association?

Any shareholder who holds a single share may raise legal challenges against resolutions of the general or shareholders' meeting for breach of law or the company's articles of association. Another objection minority shareholders can try to bring forward in such lawsuits is the violation of the (majority) shareholder's duty of good faith. As these duties are not statutorily defined, the chances of success are based on case law. The fefendant is the company, not the other shareholder(s) who has (have) voted in favor.

By filing such objection and voidance claims in court, minority shareholders can block the completion – ie, entry into the commercial register – of, for example, corporate and integration measures. Registration will take place when the minority shareholders' court challenges are overcome by a so-called release proceeding, which the company must file (*Freigabeverfahren*, section 246a, AktG).

The company will prevail in the release proceeding and thereby achieve registration in the commercial register if minority shareholders cannot prove that they hold more than a nominal value of €1,000 of the registered share capital of the company since the announcement of the convocation of the general meeting.

SUMMARY OF RIGHTS

Below is a table providing a brief summary of the rights of minority shareholders in Germany, organised according to the percentage threshold at which the various protections become available.

Shareholding (per cent)	Description	Reference
25	Minority shareholders can prevent amendments to the articles of associations.	Section 179, paragraphs 1–2 AktG; section 53 GmbHG
	Minority shareholders can prevent the obligation to transfer all of the company's assets.	Section 179a, paragraph 1, AktG
	Minority shareholders can prevent capital increases and authorisations to create contingent or authorised capital	Sections 182 et seq, 192 et seqs, 202 et seq, AktG; sections 55 et seq, GmbHG
	Minority shareholders can prevent capital decreases with the exception of simplified capital decreases.	Sections 222 et seq, AktG; sections 58 et seq, GmbHG
	Minority shareholders can prevent the conclusion or amendment of domination and/or profit and loss transfer agreements.	Section 293, paragraph 1, AktG
	Minority shareholders can prevent restructuring measures like changes of the legal form, mergers and spin-offs.	According to the Reorganisation of Companies Act (*UmwG*).
	Minority shareholders can prevent asset sales, measures of mediatisation of their influence on the company's assets and comparable cases.	*Holzmüller/Gelatine* case law
10	Merger-related squeeze-out requires majority shareholder who holds 90 per cent of share capital; therefore impossible if remaining shareholders hold more than 10 per cent.	Section 62, paragraph 5, UmwG
	Minority shareholders can file for court appointment of a special representative in order to claim compensation, if the general meeting previously agreed on assertion of claims.	Section 147, paragraph 2, AktG
	Minority shareholders can ask for a separate vote concerning the discharge of executive and supervisory board members.	Section 120, paragraph 1, AktG

	Minority shareholders can demand a resolution on the election proposal for supervisory board members made by a shareholder prior to the resolution on proposals made by the supervisory board.	Section 137, AktG
	Minority shareholders can prevent the waiving or settlement of claims for damages against board members.	Section 93, paragraph 4, s 3, AktG
	Minority shareholders can contradict the waiving or settlement of claims against the founders and members of the supervisory and management board.	Section 50, s 1 AktG
	Minority shareholders of a GmbH can ask for a convocation of a shareholders' meeting and supplements to an agenda for a shareholders' meeting.	Section 50, GmbHG
	Minority shareholders of a GmbH can file for judicial appointment or dismissal of a liquidator for good cause.	Section 66, paragraph 2, GmbHG
5	Minority shareholders of an AG can request convocation of a general meeting and supplements to the general meeting agenda.	Section 122, AktG
	Minority shareholders can demand that the court appoint or dismiss the liquidator for good cause.	Section 265, paragraph 3, AktG
	General squeeze-out only if main shareholder holds 95 per cent; therefore impossible if remaining shareholders hold more than 5 per cent.	Section 327a et seq, AktG
	Squeeze-out according to takeover law only if bidder directly holds 95 per cent.	Section 39a, paragraph 1, WpÜG
	Minority shareholders can require a court decision on the substitution of auditors.	Section 318, paragraph 3, HGB
1	Minority shareholders can obtain judicial appointment or replacement of special auditor.	Section 142, paragraphs 2 and 4. AktG
	Minority shareholders can obtain judicial admission of liability claims for payment to the company.	Section 148, AktG
	Minority shareholders can obtain judicial appointment of special auditors for inadmissible undervaluation of annual financial statements items.	Section 258, AktG
One share	Minority shareholder can prevent the establishment of additional obligations for shareholders.	Section 180, paragraph 1, AktG
	Right to subscribe for new shares.	Section 186, paragraph 1, AktG
	Right to appeal resolutions of the general or shareholders' meeting.	Section 245, no 1 and 2, AktG