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Information Duties

Japanese and German Private Law

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Ingo Saenger[*]

I. Introduction

In trade law as well as in company law we have to deal with a growing number of information and disclosure duties as well as transparency obligations. Professionals, merchants and companies are obliged to provide information to a whole range of stakeholders in many ways. German law, often of European origin in this field, implies various rules that force mandatory information provision, either on request or at least voluntarily. In this contribution, concerning trade law, the commercial register and its significance will be the centre of attention (II.), before moving to company law, which is characterized by members' information rights of a totally different scope (III.). Finally, trade and company law are overarched by various reporting provisions, which are essential for merchants and companies alike (IV.).

II. Trade Law

Disclosure is the cornerstone of trade law. In order to ensure this transparency, the German Commercial Code (GCC, *Handelsgesetzbuch – HGB*)[1]

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1 Of 10.05.1897 in the revised version published in the Official Journal of the Federal Republic of Germany *(Bundesgesetzblatt),* BGBl. III, Sect. 4100-1, as amended by Art. 1 of the Act of 10.5.2016, BGBl. I 2016, 1142.

contains provisions concerning the commercial firm name *(Firma)*[2] and the commercial register *(Handelsregister)*[3] as well as, needless to say, reporting.[4] Indeed, the rules concerning the publication in the commercial register, Sect. 15 GCC, are the centrepiece for disclosure in German trade law. Merchants and enterprises are not only obliged to register the company but also to disclose facts[5] which may be of relevance for commercial transactions.[6] Registrations are published by the court[7] by means of electronic information systems.[8] The online availability via the website of the central Business Register *(Unternehmensregister)*[9] since 2007,[10] has guaranteed that everybody can inspect the Commercial Register and the documents filed therein easily.[11] That has refined this instrument and increased its importance significantly in recent years.[12]

In contrast to capital market law, disclosure in this context aims to inform about the standing of an enterprise, its legal ownership, constitution and financial situation, and is not only aimed at disclosing specific legal acts.[13] This is all with the benefit of certainty and efficiency of trade.[14] On the one hand, the commercial register is the basis for the protection of trust-based commerce while on the other hand, it aims to be a publication organ for eliminating reliance[15] Cover is provided not only if a fact is registered. Also, a the lack of a registration or disclosure can be significant. As a consequence, Sect. 15(2) GCC states that "where a fact is registered and published, it may be asserted against a third party."[16] And in contrast to this "positive publication", Sect. 15(1) states that "as long as a fact requiring

2 Sects. 17 et seq. GCC.
3 Sects. 8 et seq. GCC.
4 K. SCHMIDT, Handelsrecht – Unternehmensrecht I (6th ed., Cologne 2014) § 11, para. 1.
5 Sect. 29 GCC.
6 M. HENSSLER, in: H. BROX/Handelsrecht (22nd ed., Munich 2016) para. 71.
7 Sects. 8 and 10 GCC.
8 Sect. 10 GCC.
9 *http://www.unternehmensregister.de,* cf. SCHMIDT, *supra* note 4, § 13, para. 11.
10 Sect. 8b GCC, cf. HENSSLER, in: Brox*, supra* note 6, para. 72.
11 Sect. 9 GCC.
12 For the situation in the past, see C.-W. CANARIS, Handelsrecht (24th ed., Munich 2006) § 4, para. 3 ff.
13 SCHMIDT, *supra* note 4, § 11, para. 1.
14 HENSSLER, in: Brox*, supra* note 6, para. 72.
15 CANARIS, *supra* note 12, § 5, para. 1.
16 For the translation (of the version of 1993) of the GCC cf. here and elsewhere *https://www.gesetze-im-internet.de/englisch_hgb/englisch_hgb.html#p0131* and M. PELTZER/J.J. DOYLE/M-T. ALLEN, Handelsgesetzbuch – Deutsch-englische Textausgabe (2nd ed., Cologne 1993).

registration in the commercial register is not registered and published, knowledge thereof cannot be asserted against a third party by the one to whom the entry pertains, unless the third party knew of such fact." Therefore, "negative", or failure to disclose becomes an element of prima facie liability.[17] This is complemented by the regulatory law concerning the commercial firm name.[18] Sect. 18(2) GCC states that the firm name may not include any information that may be deceptive as to the relevant circumstances of the business.

III. Company Law

Rather broad provisions apply for members of a partnership or a private company. By contrast, shareholders' rights of information are more restricted. Section 131 of the German Stock Corporation Act (GSCA, *Aktiengesetz – AktG*)[19] states that each shareholder shall, upon request, be provided with information (only) at the shareholders' meeting by the management board regarding the company's affairs, and (only) to the extent that such information is necessary to permit a proper evaluation of the relevant item on the agenda. To put it another way: If a topic is not on the agenda, there is no right to access information at all. Despite a broad number of accounting rules and securities laws, there remain subjects of both interest and importance that are not covered. This is why the GCC as well as the German Corporate Governance Code (GCGC, *Deutscher Corporate Governance Kodex – DCGK*)[20] provide detailed provisions on disclosure, especially in the context of transparency (in part 6) and on reporting and auditing (in part 7).

1. Members' Rights in General[21]

The ability to exercise a right as member of a company depends on the availability of participation rights. The right to attend the meeting, to argue and to vote are worthless if there is a lack of information. In other words: information influences voting or even is the indispensable prerequisite for it.

17 Canaris, *supra* note 12, § 5, para. 7.

18 Sects. 17 et seq. GCC.

19 Of 6.9.1965, Official Journal of the Federal Republic of Germany *(Bundesgesetzblatt),* BGBl. I 1965, 1089, as amended by Art. 5 of the Act of 10.5.2016, BGBl. I 2016, 1142.

20 *http://www.dcgk.de/en/code.html* <13.06.2016>.

21 See generally I. Saenger, Beteiligung Dritter bei Beschlussfassung und Kontrolle im Gesellschaftsrecht (Berlin 1990) 14 ff.

a) Individual information

A right of information is legally provided for every legal company form. In the broadest sense, it grants the individual member the possibility to gain knowledge about "matters of the company".[22] One may question whether this right of information really forms a part of the broader rights to administer the company. And indeed, some propose classifying the right of information and right of oversight as an independent membership right, unattached to the general administrative rights.[23] One can argue that this is due to the fact that the right of information is of relevance not only in relation to the membership in the company but also from a financial perspective. On the one hand, it grants the member access to information about the economic situation of the company which he would normally only receive at the end of the business year by means of the annual financial statement or in case of dissolution. Thereby, the right can also ensure the protection of monetary claims.[24] On the other hand, it offers an insight into current business and grants oversight over whether the managing partners and other company bodies comply with their legal and statuary duties. By having access to this information, a partner is supposed to be able to make an informed decision and take the appropriate steps to exercise his administrative rights. Therefore, the right of information is of particular importance in the process of decision making. Consequently, the right of oversight is most of all a manifestation of the individual's participation in the company's decision making process and is thus with good reason considered a part of the administrative rights.[25]

b) Collective information

Information duties of the responsible managers towards partners as a "collective" also foster the process of decision making.[26] For these obligations

22 Cf. Sect. 716(1) GCLC *(Gesellschaft bürgerlichen Rechts – GbR),* Sects. 118 and 161(2) GCC *(Offene Handelsgesellschaft – OHG, Kommanditgesellschaft – OHG),* Sect. 131(1) GSCA *(Aktiengesellschaft)* and Sect. 51a (1) LLCA (Limited Liability Company Act, *Gesellschaft mit beschränkter Haftung – GmbH*); cf. K. SCHMIDT, Informationsrechte in Gesellschaften und Verbänden. Ein Beitrag zur gesellschaftsrechtlichen Institutionenbildung (Heidelberg 1984) 32.

23 I. SAENGER, in: Hk-GmbHG (3rd ed., Baden-Baden 2016) Sect. 45, para. 4.

24 In this way also R. HEINSHEIMER, Über die Teilhaberschaft. Beiträge zum inneren Recht der Personalgesellschaften (Heidelberg 1930) 55; L. ZANDER, Die Ausübung der Gesellschafterrechte nach BGB durch Stellvertreter (Gießen 1948) 29.

25 R. FISCHER, in: Großkommentar HGB, 3rd ed., Sect. 118, para. 4; R. HEINSHEIMER, *supra* note 24, 55; identical in its conclusion Federal Court of Justice (BGH), Entscheidungen des Bundesgerichtshofes in Zivilsachen (BGHZ) 25, 115, 122.

26 K. SCHMIDT, Gesellschaftsrecht (4th ed., Cologne et al. 2002) § 21, 628 f.

to disclose information in the company meeting, the term 'collective right of information' is wide-spread. In contrast to each partner's individual right of information, the "collective right" does not originate from a *right* in the true sense but rather from the management body's *obligation* to inform about the progress of their tasks on their own initiative.[27]

There is a very significant difference between these two rights. Concerning the individual right of information, the partner can only demand information that he knows or at least suspects exists. So, it is necessary to have at least some basic knowledge in order to frame and specify the questions asked. In contrast, the collective right of information is broader. The managing partners or the management body are obliged to take the initiative. Of their own accord, they have to disclose information that a non-managing partner cannot inquire about due to his lack of knowledge. For example, it is necessary to get the relevant information to allow the exercise of the right to object, which is granted to every non-managing partner of a partnership.[28] The right of information in this situation will strengthen to a duty to inform.[29] But for the partner, it is not only important that the initiative to provide the information come from the obligated party, the temporal aspect can also be of importance. As an example, if a limited partner *(Kommanditist)* receives information from the collective right of information, this comparatively weak individual right would mean information is only provided at the end of the business year.[30]

Explicitly, the law only foresees a collective right of information for the German civil law partnership *(Gesellschaft bürgerlichen Rechts – GbR)* in the form of a reference to contract law.[31] It was controversial for a long time whether this provision[32] also applies to the general commercial partnership *(Offene Handelsgesellschaft – OHG)* and the limited commercial partnership *(Kommanditgesellschaft – KG).*[33] In corporate law, there is no comparable regulation. Nevertheless, the differentiation between collective

27 SCHMIDT, *supra* note 22, 16; C. SCHÄFER, in: Münchener Kommentar BGB (6th ed., Munich 2013) Sect. 713, para. 8–11.

28 Sect. 711-1 GCLC (German Civil Law Code, *Bürgerliches Gesetzbuch – BGB*) Sect. 115(1) GCC, cf. C. SCHÄFER, *supra* note 27, Sect. 711, para. 3; P. RAWERT, in: Münchener Kommentar HGB (4th ed., Munich 2016) Sect. 115, para. 20.

29 M. ENZINGER, in: Münchener Kommentar HGB (4th ed., Munich 2013) Sect. 118, para. 14; U. HAAS, in: Röhricht/Graf von Westphalen/Haas (eds.), HGB (4th ed., Cologne 2013) Sect. 161, para. 20.

30 Sect. 166(1) GCC; cf. H. GUMMERT, in: Henssler/Strohn (eds.), Gesellschaftsrecht (3rd ed., Munich 2016) Sect. 166, para. 19; B. GRUNEWALD, in: Münchener Kommentar HGB (3rd ed., Munich 2012) Sect. 166, para. 46.

31 Sects. 713, 666 GCLC.

32 See the referral in Sects. 105(2), 161(2) GCC.

and individual rights of information is commonly accepted, despite some controversial aspects.[34]

Concerning the collective right of information, the management body's duty to inform poses the question of how this duty is to be fulfilled. It is not sufficient that management related questions are answered, regardless of how thoroughly. Rather, the managing individuals have a duty, on their own initiative, to inform the non-managing partners about circumstances that are unknown to these partners. This duty is not limitless, but all the unknown information necessary to allow the other partners to assume their rights and make informed and considered decisions has to be provided.[35] Sect. 90(1) GSCA conveys an idea of what is required. It regulates the management board's duty to report to the supervisory board and thus constitutes a collective right of information, the supervisory board being at the receiving end.[36] The necessity of the management board's duty to report also emerges from Sect. 93(4)1 GSCA. Accordingly, a managing individual is not liable for actions based on a lawful resolution of the shareholders' meeting. How should the shareholders be responsible for such important decisions if the management board does not have a duty to report, on their own initiative, about all circumstances relevant to decision making?[37] This concept has become law for special cases in the form of a written report by the management body on the occasion of a capital increase with exclusion of subscription rights[38] and on the occasion of a transformation.[39] The same applies for the duty to report under Sect. 46 6 Limited Liability Companies Act (LLCA, *Gesetz betreffend die Gesellschaften mit beschränkter Haftung – GmbHG*) in order to effectively control the management body.[40]

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33 U. HUBER, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 1982, 539, 542 f.; GUMMERT, in: Henssler/Strohn, *supra* note 30, Sect. 166, para. 19.

34 C. WILDE, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 1998, 423, 426 ff.; C. SCHÄFER, *supra* note 27, Sect. 713, para. 9; SCHMIDT, *supra* note 22, 15; A. HUECK, Das Recht der offenen Handelsgesellschaft (4th ed., Berlin et al. 1971) 187, who sees the right of information towards the managing partner as a part of the rights provided by Sect. 118 HGB; P. HOMMELHOFF, Zeitschrift für Wirtschaftsrecht (ZIP) 1983, 383, 390; B. GRUNEWALD, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 146 (1982) 211, 225 f.; SAENGER, *supra* note 21, 17 ff.

35 H. SEILER, in: Münchener Kommentar BGB (6th ed., Munich 2012) Sect. 666, para. 5; HUBER, *supra* note 33, 539, 544.

36 M. ROTH, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2012, 343 ff.; SCHMIDT, *supra* note 22, 17 f.

37 P. KARL, Deutsches Steuerrecht (DStR) 1995, 940, 942; HOMMELHOFF, *supra* note 34, 383, 389.

38 Sect. 186(4)2 GSCA.

39 Sect. 8 German Transformation Act (GTA, *Umwandlungsgesetz – UmwG*).

2. Partnership

The personally liable partner's right of control is regulated in Sect. 716 German Civil Law Code (GCLC, *Bürgerliches Gesetzbuch*) for the civil law partnership and in Sects. 118,[41] 161(2) GCC for the general commercial partnership OHG and the limited commercial partnership KG. For the most part, the regulations are identical, differences only occur due to special accounting rules for commercial partnerships that lead to a divergent point of reference. The right grants the partner the opportunity to inform himself about company matters. Moreover, and here the regulations vary, the commercial partner is entitled to examine the accounting books and other company documents in order to compile an overview of the current company assets or a balance sheet and an annual financial statement.

In contrast to other administrative rights that a partner can only exercise through participation in the partners' meeting, the aforementioned right can also be exercised independently. Every personally liable partner is entitled to this right, even those in a non-managing capacity. Especially for the latter, this is an important aspect. Besides the information received through the partners' meeting and the collective right of information, it is the only opportunity to gain knowledge about current business matters while the managing partners have access to information in this respect at any time.[42]

In order to inform himself about company matters, the partner may enter the business premises, visit facilities, and examine account books as well as other relevant documents (e.g. contracts, correspondences, memos) and make transcripts of them.[43] A more extensive right of information is not granted by law. Courts and legal scholars acknowledge an advanced interest in information only if the business documents are incomplete and require further explanation.[44] Furthermore, a right of information shall be allowed if the business documents are complete but the partner is only able to form an opinion with difficulty and the managing partner could give the desired information without significant effort.[45]

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40 N. MEIER, Deutsches Steuerrecht (DStR) 1997, 1894 f.; K. SCHMIDT, in: Scholz, GmbHG (11th ed., Cologne 2013) Sect. 46, para. 114 and in distinction to that Sect. 51a, para. 1.

41 Cf. S. E. DE GROOT, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2013, 529 ff.

42 HUECK, *supra* note 34, 186 f.

43 HUECK, *supra* note 34, 187.

44 Imperial Court (RG) Juristische Wochenschrift (JW) 1907, 523; Court of Appeals (OLG) Hamburg JW 1921, 687; C. SCHÄFER, *supra* note 27, Sect. 716, para. 12.

45 W. VOGEL, Gesellschafterbeschlüsse und Gesellschafterversammlung (2nd ed., Cologne 1986) 114 f.

An increasing number of legal scholars wants to grant the personally liable partner an unlimited right of information, as that personal liability means business matters may become a personal concern at any time, and he should thus be able to inquire about the current state of business affairs.[46] However, even then a right of each partner to periodic reporting or previous notification about planned projects is not intended to be included.[47]

In principal, the partners' right of *insight* cannot be exercised during the partners' meeting as this would unreasonably disrupt its procedure. Exceptions are possible if business documents are of importance in the objective context of the agenda and for the partners' decision but prior examination was not possible. In the same way, *information* can only be demanded during the partners' meeting if it has an objective relation to the agenda and is suited to influence the partner's decision.[48]

However, a "limited partner" (Kommanditist) by Sect. 166(1) GCC may only demand a copy of the annual financial statement and test its correctness by inspecting books and documents. This right of information covers all the transactions that have been integrated in the balance sheet. Events of the finished business year can only be reviewed once per year. In contrast, the personally liable partner's right of information, even in a non-managing position, is temporally unrestricted and broader concerning the content as it is not limited to matters covered by the business books.[49] The limited partner's lower quality right of control can be explained with his limited liability. However, some think the limited partner has a right of information if the necessary information is not included in the company books or documents and the partner therefore is not able to obtain knowledge about the relevant business matters without the desired information.[50]

3. Corporation

a) Limited liability company

Since an amendment in 1980, the limited liability company (*Gesellschaft mit beschränkter Haftung, GmbH*) partner's right of information and control has been explicitly regulated in Sect. 51a LLCA. Every partner may request information about business matters and insight in business books

46 HUBER, *supra* note 33, 539, 546 ff.

47 KESSLER, in: Staudinger BGB (Berlin 2003) Sect. 716 para. 5.

48 VOGEL, *supra* note 45, 115.

49 Cf. Sect. 118(1) GCC; W. SCHILLING, in: Großkommentar HGB (5th ed., Berlin 2015) Sect. 166, para. 5, 8 f.

50 Federal Court of Justice (BGH), Wertpapier-Mitteilungen (WM) 1983, 910, 911; SCHMIDT, *supra* note 22, 69.

and documents at any time, even outside of a partners' meeting.[51] The notion of 'business matters' covers all circumstances related to the company and everything the company deals with.[52] Thus, this right of information goes beyond the scope of the shareholder's right who can only demand information within the shareholders' meeting and only insofar as it is necessary to adequately assess the topics of the agenda. This difference can be explained with the greater risk posed by involvement in a limited liability company *(GmbH)*.[53]

b) Stock corporation

In contrast to other legal company forms, the law on stock corporations not only provides for a shareholders' meeting (an assembly of all members) and an executive board (the management body, Sects. 95 et seq. GSCA) but also for a mandatory further institution, the supervisory board. By Sect. 111(1) GSCA, the latter has the duty to monitor the executive board.[54] In order to facilitate this task, the executive board has an extensive duty to report to the supervisory board.[55] Furthermore, there are information duties in the context of the invitation for the general meeting.[56] Due to this monitoring duty, the shareholder's right of information under Sect. 131 GSCA is less an instrument of control as it is one of providing facts. The shareholders are supposed to exercise their rights within the shareholders' meeting in an appropriate way and thus need all the information necessary to form their decision.[57] Additionally, the right of information is supposed to facilitate the shareholder's decision whether he wants to file an action of voidance[58] or assert other minority rights, e.g. a special audit.[59] Therefore, this is a right of each shareholder, even those not eligible to vote.[60]

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51 W. ZÖLLNER, in: Baumbach/Hueck (eds.), GmbHG (20th ed., Munich 2013) Sect. 51a, para. 1; H. G. KOPPENSTEINER/M. GRUBER, in: Rowedder/Schmidt-Leithoff (eds.), GmbHG (5th ed., Munich 2013) Sect. 51a, para. 10.

52 SCHILLING, in: Hachenburg (ed.), GmbHG (8th ed., Berlin 1992) supplemental volume, Sect. 51a, para. 11.

53 ZÖLLNER, *supra* note 51, Sect. 51a, para. 10.

54 Further to the details WILDE, *supra* note 34, 423, 426 f.

55 Cf. Sect. 90 GSCA; see also ROTH, *supra* note 36, 343 ff.; R. MANGER, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2010, 1255; K. VON SCHENCK, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2002, 64 ff.

56 Sects. 121 ff., 92 GSCA.

57 C. KERSTING, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2007, 319, 333; C. KERSTING, in: Kölner Kommentar AktG (3rd ed., Cologne 2010) Sect. 131, para. 6.

58 Sect. 245 GSCA.

59 Sects. 258 et seq. GSCA.

The fact that the shareholder's right of information can only be exercised within the shareholders' meeting, contrary to other legal company forms, can also be explained with the existence of a supervisory board.[61] This right is directed at information about company matters, like the right of information of the partner in a limited liability partnership *(GmbH),* but is restricted in the way that the information must be necessary to appropriately assess the topics of the agenda. This means that the request has to concern a specific item on the agenda that has not yet been settled.[62] The executive board has to disclose the requested information verbally.[63] However, this does not comprise a duty to prove or document the information given with certificates or local inspection, e.g. in the form of a visit of the company facilities.[64,65]

c) In particular: Corporate Governance

Starting with a purely voluntary and non-binding Corporate Governance initiative decades ago, recommendations of the "Government Commission German Corporate Governance Codex" were published in 2002 by the Federal Ministry of Justice in the official part of the Federal Law Gazette.[66] The GCGC, giving recommendations and suggestions that reflect the best practice of Corporate Governance, is based on the shareholder value-concept and follows the "comply or explain" model.[67] According to Sect. 161 GSCA, the management board and the supervisory board of a listed company have to declare annually that the recommendations have been and will be complied with, or which recommendations have not been or will not be applied and

60 C. H. BARZ, in: Großkommentar AktG (3rd ed., Berlin 1973) Sect. 131, annot. 2; KERSTING, *supra* note 57, Sect. 131, para. 6.

61 SCHMIDT, *supra* note 22, 49.

62 KERSTING, *supra* note 57, Sect. 131, para. 107.

63 BARZ, *supra* note 60, Sect. 131, annot. 23.

64 BARZ, *supra* note 60, Sect. 134, annot. 24.

65 Further information duties of the executive board exist towards the shareholders (e.g. information relevant to the calling of a shareholders' meeting, Sects. 121 ff.; 92 GSCA, relevant to substantial changes of the company, i.e. measures falling under the *Holzmüller/Gelatine* doctrine; relevant to the duty to transfer the entire assets of the, Sect. 179a GSCA), towards the supervisory board (Sect. 90 GSCA); towards the special auditor (Sect. 145 GSCA) as well as towards the public (e.g. announcements concerning the composition of the supervisory board, Sect. 97 GSCA; announcements about the end of a contesting action, Sect. 248a GSCA) and also in a group of companies (Sects. 20, 21, 293a, 312, 314 GSCA).

66 *www.dcgk.de/en*.

67 C. SCHRADER, Nachhaltigkeit in Unternehmen – Verrechtlichung von Corporate Social Responsibility, Zeitschrift für Umweltrecht (ZUR) 2013, 451, 453.

why. The mandatory declaration of conformity, that has to be continuously available to the public on the company's website, is the legal basis of the code. But it is far more than that. On several occasions, the code has been used as pattern for a legislative reform, or at least as a source for legal interpretation of the GSCA.[68] Furthermore, there are additional information duties for the management board arising from the GCGC, e. g. concerning the total compensation of each one of its members by name[69] or members' conflicts of interests to the supervisory board.[70] In its election recommendations to the general meeting, the supervisory board must disclose the personal and business relations of each individual candidate within the enterprise, the executive bodies of the company, and with a shareholder holding a material interest in the company.[71] Finally, there is the recommendation that the management board and the supervisory board report each year on Corporate Governance and publish this Corporate Governance report in connection with the statement on Corporate Governance.[72]

4. Collective Information as a General Principle

These considerations lead to the general principle that the management body, i.e. the managing partner in a (limited liability) partnership or the executive board, on its own initiative, has a duty to provide the deciding body and its members with all the company related information necessary for a carefully considered decision.[73] The flow of information resulting from the *collective* right of information also affects the *individual* right of information. The more intense the management body's reporting, the less important the individual partner's right of information becomes.[74]

The collective right of information's scope, however, can vary and depends on the existence of a special supervisory body as recipient of the information. This is especially the case for stock corporations. For this legal form, a collective right of information can only be in place within

68 J. J. DU PLESSIS/I. SAENGER, An Overview of the Corporate Governance Debate in Germany, in: du Plessis et al., German Corporate Governance in International and European Context (3rd ed., Berlin 2017) 2.6.7.

69 Art. 4.2.4 GCGC.

70 Art. 4.3.3 GCGC.

71 Art. 5.4.1 GCGC.

72 Cf. H. M. ANZINGER, Neue Zeitschrift für Gesellschaftsrecht (NZG) 2015, 969, 971.

73 This basic principle is explicitly acknowledged by SCHMIDT, *supra* note 22, 17, and HOMMELHOFF, *supra* note 34, 390.

74 HOMMELHOFF, *supra* note 34, 291 f.; M. LUTTER, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 1982, 1, 8; SCHMIDT, *supra* note 22, 17 f.

narrow limits.[75] In partnerships and limited liability companies *(GmbH),* such supervisory bodies do usually not exist. Then, and in cases when a collective right of information is granted despite a supervisory body being in place, the duty to report can result in detailed statements delivered to each member, e.g. by submitting reviews or newsletters, or the duty to convene an extraordinary shareholders' meeting.[76] As a rule, the duty to report (based on the collective right of information) will be complied with as part of the decision making process for the ordinary shareholders' meeting.[77] Thus, the collective right of information is part of the basis for the discussion in the members' meeting and can therefore be categorized as a participation right.

IV. DISCLOSURE[78]

Reporting has been of importance for European legislation from the beginning. Directive 68/151/EEC "on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community"[79] dates back to 1968. This "First Company Law Directive on Disclosure" concerns company registrations, transactional validity, the effect of ultra vires transactions, or transactions by improperly incorporated businesses. Although the Directive was only applicable for corporations, or in other words, companies with limited liability, it comprises the basic information duties under trade law entirely. The recital states that (1st) "the basic documents of the company should be disclosed in order that third parties may be able to ascertain their contents and other information concerning the company, especially particulars of the persons who are authorised to bind the company", (2nd) "the protection of third parties must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid" and (3rd) that "it is necessary, in order to ensure

75 WILDE, *supra* note 34, 423, 440; SCHMIDT, *supra* note 22, 20; KERSTING, *supra* note 57, Sect. 131, para. 8.

76 Cf. for the partnership only SCHÄFER, *supra* note 27, Sect. 713, para. 8, and for the corporation K. SCHMIDT, in: Scholz, GmbHG (11th ed., 2013) Sect. 49, para. 13; SCHMIDT, *supra* note 22, 20.

77 SCHÄFER, *supra* note 27, Sect. 713, para. 9.

78 This paragraph is based on I. SAENGER, Gesellschaftsrecht (3rd ed., Munich 2015) para. 981 ff.

79 Official Journal of the European Union, OJ L 65, 14.03.1968 [English special edition: Series I Volume 1968 (I) 41–45].

certainty in the law as regards relations between the company and third parties, and also between members, to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity, and to fix a short time limit within which third parties may enter objection to any such declaration." This shows that information duties under trade law aim to protect not only members of a company and potential contractual partners but also the general public.

Today, a corporation[80] or a partnership without any personally liable member like the *GmbH & Co. KG*,[81] and other large enterprises,[82] have to follow the strict regulations concerning financial reporting and disclosure.[83] Slightly less strict rules are in place for the smallest, small, and medium-sized enterprises.[84] Therefore, there is an interrelation between the duty to disclose and the limitation of personal liability.

The annual financial statements of companies with a duty of disclosure have to be submitted to the German Federal Gazette's operator in electronic form. Each merchant in the sense of the GCC has a duty to compile a balance sheet at the beginning of the business year.[85] Furthermore, he is also obliged to prepare a profit and loss statement.[86] The balance sheet is a comparison of assets and liabilities, while the profit and loss statement shows income and expenses.[87] Corporations and partnerships with limited liability[88] have a duty to add notes to their annual financial statement.[89] These have to explain the balance sheet as well as the profit and loss statement and, if necessary, correct and complete them or even incorporate some of their details to lessen the their complexity.[90]

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80 Sect. 325 GCC.

81 Sect. 264a GCC.

82 Sect. 1 German Disclosure Act *(Publizitätsgesetz, PublG)*.

83 See also S. H. SCHNEIDER, Informationspflichten und Informationssystemeinrichtungspflichten im Aktienkonzern. Überlegungen zu einem Unternehmensinformationsgesetzbuch (Berlin 2006) 44 ff.

84 Less strict rules for small business sole proprietorships are imposed by Sects. 241a, 242(2) GCC; the basic regulations applicable to all merchants (Sects. 238–263 GCC) are complemented by special regulations for corporations (Sects. 264–335 GCC); in the latter case, it has to be further distinguished according to the size of the company (Sect. 267 GCC); cf. SCHMIDT, *supra* note 4, § 15, para. 10.

85 Sect. 242(1) GCC.

86 Sect. 242(2) GCC.

87 B. GROßFELD/C. LUTTERMANN, Bilanzrecht (4th ed., Heidelberg 2005) no. 28–31 and 37–38.

88 Sect. 264a GCC.

89 Sect. 264(1)1 GCC.

90 J. BAETGE/H.-J. KIRSCH/S. THIELE, Bilanzen (13th ed., Düsseldorf 2014) chapter XIV 1 (p. 731 f.).

Financial reporting serves the purpose of documenting the business circumstances. This fosters "independent sourcing of information" on the one hand, and accountability on the other.[91] The notes' information that comments and interprets parts of the balance sheet, e.g. by naming the accounting or valuation method, have *interpretative function*.[92] Legislatively, the notes' *corrective function* can be found in Sect. 264(2)2 GCC. If a balance sheet and profit and loss statement do not convey a realistic picture of the company's assets, revenues, and its financial situation, this may be corrected by introducing additional information in the notes. This potential "outsourcing" of specific information enhances the significance and clarity of the notes, the balance sheets and profit and loss statements, with the result that the notes possess a *relieving function*. Furthermore, information that belongs neither to the balance sheet nor the profit and loss statement but is still relevant for an evaluation of the company's assets, revenues, and its financial situation, can be published in the notes *(complementing function).*

Large and medium-sized corporations as well as partnerships without a natural personally liable person have to add a management report according to Sect. 289 GCC on top of the notes.[93] While the notes are part the annual financial statement, the management report is an independent element of financial reporting. Its purpose is to describe the course of business and the state of the corporation "in such a way that it provides a factually accurate picture". This includes going into the risks of future development.[94] Meanwhile, the revision of the German Accounting Standard No. 20 (GAS 20 Management Reporting)[95] is intended to strengthen the so called opportunities reporting.[96] Lastly, especially market listed companies have to issue an explanation concerning Corporate Governance according to Sect. 289f GCC, forming its own paragraph in the management statement. Altogether, at the end of the day these revisions have the consequence that the management report is no longer just a financial instrument but will provoke the compulsion to adopt an increasing number of Corporate Governance recommendations.[97]

But disclosure requirements are expanding enormously. The latest development is marked by "Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity

91 SCHMIDT, *supra* note 4, § 15, para. 3.

92 Sect. 284(2)1 GCC; BAETGE/KIRSCH/THIELE, *supra* note 90, chapter XIV 3 (p. 739 f.).

93 Sects. 264(1)1,4 and 264a GCC. For the latest development see FINK/SCHMIDT, Der Betrieb (DB) 2015, 2157 ff.

94 C. RINKER/J. DITGES/U. ARENDT, Bilanzen (14th ed., Herne 2012) 252 f.

95 Deutscher Rechnungslegungs Standard Nr. 20 (DRS 20) – Konzernlagebericht.

96 K. EISENSCHMIDT/J. SCHERNER, Deutsches Steuerrecht (DStR) 2015, 1068 ff.

97 C. FINK/R. SCHMIDT, Der Betrieb (DB) 2015, 2157, 2164 f.

information by certain large undertakings and groups",[98] often abbreviated just as "Corporate Social Responsibility (CSR)-Directive". One may discuss whether it is appropriate to justify this Directive with the primary aim of increasing investor as well as consumer trust.[99] But nevertheless, EU Member States were forced to create provisions to improve the CSR reporting practices by 6 December 2016.[100]

Despite that, today already more than half of German corporations are committed to CSR.[101] Shareholders, investors and the public are obviously interested in whether a company is following the law and, furthermore, whether there is an effective Compliance Management System (CMS) – or in other words, whether it behaves like a "good corporate citizen".[102] CSR may also provide important benefits to companies in risk management, cost savings, access to capital, customer relationships, human resource management, and their ability to innovate. Understandably enough, it is of importance whether social, environmental, ethical, consumer, and human rights concerns are integrated into the business strategy and operations. According to communication operatives, a survey of 2013 has stated that CSR-communication exercises substantial influence over corporate reputation (30.1 %), employee relations (17.7 %), stakeholder relations (15.5 %) and customer relations (14 %) as well. In contrast, the relevance for shareholder value is negligible; the impact on stock prices is quoted at 1.2 %.[103] One may be sceptical as to what will be the benefit of a provision which expressly confesses not to provide a distinct guideline but allows "high flexibility of action, in order to take account of the multidimensional nature of corporate social responsibility […] and the diversity of CSR policies".[104] Even up to the present day, nobody has a clear understanding of what is meant by a "'sufficient level of comparability' that "meet(s) the needs of […] stakeholders as well as the need to provide consumers with easy access to information on the impact of businesses on society."[105] It does not improve matters that

98 OJ 2014 L 330/1.

99 Directive 2014/95/EU, recital 3.

100 Directive 2014/95/EU, Art. 4 para. 1. Cf., in particular, Sects. 289b–e GCC by the Law of 11.04.2017, Official Journal of the Federal Republic of Germany *(Bundesgesetzblatt),* BGBl. I 2017, 802.

101 Cf. *http://de.statista.com/statistik/daten/studie/*168058*/umfrage/verbreitung-von-csr-in-unternehmen-*2010.

102 J.J. DU PLESSIS, Disclosure of non-financial information: A powerful Corporate Governance Tool, (New York 2016) 34 Company and Securities Law Journal (C&SLJ) 69 (71).

103 *http://de.statista.com/statistik/daten/studie/*255075*/umfrage/einfluss-der-csr-kommunikation-auf-unternehmensbereiche* <13.06.2016>.

104 Directive 2014/95/EU, recital 3.

the EU Commission had to prepare non-binding guidelines on the methodology for reporting non-financial information by the end of 2016.[106]

It is doubtful whether hard law, especially in this field, will be an effective way of ensuring that corporations act responsibly and adhere to good corporate governance principles or really improve corporate governance practices significantly. This opinion is shared by *Lutz Strohn,* the long-standing Vice President of the Company Law Senate of the Federal Court of Justice. In an editorial, he reflects upon the relation of moral behaviour and CSR. He even goes a step further and brings up the question of whether increasing regulatory density has precisely the opposite effect, limiting the options for moral behaviour. *Strohn* believes that a director has not to be just a mere manager but an "honest merchant" who can be expected to behave morally and act as a socially responsible member of the community, independent of any regulation.[107] So the latest Directive may be taken as what it is: Another European compromise and a nice declaration of intent that will produce no more than much ado and enormous costs.[108]

V. Conclusion

All in all, German Trade Law provides various duties to inform, that should be complied with to avoid liability. In contrast, German Company Law contains mostly rights of information but rarely foresees duties due to reasons of private autonomy. However, a duty to inform may exist in order to enable partners or shareholders to even exercise their rights of information. Especially in Stock Corporation Law, mandatory duties to inform have become more and more important. In reference to information for the general public, this also applies to accounting duties concerning financial reporting *(accountability)*. Recent developments have led to a duty to disclose non-financial information with statements concerning Corporate Social Responsibility being a major aspect.

105 Directive 2014/95/EU, recital 3.

106 Directive 2014/95/EU, Art. 2 and recital 17; see also A. Eufinger, Die neue CSR-Richtlinie – Erhöhung der Unternehmenstransparenz in Sozial- und Umweltbelangen, Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2015, 424, 428. Cf. Communication from the Commission "Guidelines on non-financial reporting (methodology for reporting non-financial information) (2017/C 215/01)", published 05.07.2017, Official Journal of the European Union C 215/1.

107 L. Strohn, Moral im Geschäftsleben – verdrängt durch das Recht?, Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR) 180 (2016) 2 (5-6).

108 To take it as a 'low-cost approach', as D.G. Szabó/K.E. Sørensen, New EU Directive on the Disclosure of Non-Financial Information (CSR), European Company and Financial Law Review (ECFR) 2015, 307 (340) do, can be considered as the result of extreme carelessness.