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**TOPIC III
CORPORATE PERSONALITY IN NATIONAL AND INTERNATIONAL
LEGAL PRACTICE**

REPORT FOR GERMANY

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Part I

I.

Legal persons under private law

1. Elements which legal persons under private law have in common

A. General legal personality

a) Concept

The term '*legal person*' refers to a supra-individual organisational unit, which is assigned its own legal capacity by the legal order¹. The legal person derives intellectually from the physical person, the human being. § 1 of the Civil Code (BGB) postulates the human being's legal capacity, i.e. the person as a legal subject is the bearer of rights and obligations. Legal relationships with differing content can arise between natural persons through legal transactions or due to legal stipulations.

If several physical persons associate to fulfil a joint purpose it can also be useful if the community created in this way also has legal capacity in turn, i.e. can also be an independent bearer of rights and obligations. If, like a person, this community has its own legal capacity apart from its members and independent of the assets or a change of membership, we refer to it as a legal person. The legal person is an artificial object, as it can equally be a holder of rights and obligations like a physical person when detached from individual physical persons. This facilitates the pooling of resources by several people, without creating liability for individuals; at the same time their participation in legal transactions is made easier and the legal person achieves a type of 'immortality' through its independence from its members.

The members of the legal person are only involved in it in terms of property rights whereas an involvement in or personal liability for the legal person's rights or obligations by the members is excluded in principle. Apart from the rights and legal transactions (citizenship, marriage, drawing up of wills) available solely to physical persons, the legal person can act in legal affairs like any other person. Larenz² refers to an analogy with the physical person, which, like every analogy, can only be limited. This limitation highlights the fact that merely limited legal capacity is actually assigned to the legal person. Only a physical person enjoys unrestricted legal capacity in its own sense, whereas the legal capacity of the legal person derives in a certain sense from the legal personality of the members³. Thus, according to Art. 19 Paragraph 3 of the Constitution (GG) the basic legal capacity of the legal person is restricted in the respect that fundamental rights for legal

¹ Coing in Staudingers Kommentar zum Bürgerlichen Gesetzbuch/*Commentary on the Civil Code*, 11. 1954 edition, Introduction to § 21, Item 2.

² Larenz/Wolf, Allgemeiner Teil des bürgerlichen Gesetzbuches/*General section of the Civil Code*, 8. 1997 edition, § 9 Item 12.

³ Schwab, Introduction to Civil law, 2002, Item 138.

persons can only be exercised insofar as they are applicable to the legal person by virtue of their nature.

Limited legal capacity should not be confused with the *ultra vires* doctrine, which is not applied in German civil law⁴. In principle, the legal person's legal capacity is independent of the object for which the legal person has been created according to its articles of association⁵. A restriction with an external effect can only apply to a capacity to act, insofar as this is legally stipulated. A legal provision in this sense only exists for a legally capable association (§ 26 Paragraph 2 p. 2 BGB).

A further essential characteristic of the legal person is the presence of organs. Apart from the general meeting, the executive board exists as a compulsory organ. The legal person participates in legal affairs through its executive board. The organ's acts are not assigned to the legal person as some type of representation; the legal person acts itself through its organs. The former conflict between organ theory and representative theory has thus been decided in favour of the organ theory by the legislator – at least in the area of the § 31 BGB⁶. Legal capacity and capacity to act cannot be separated in the legal person⁷.

A special case arises with the legally capable foundation, which does not have any members. It comprises a legally capable special asset which solely has organs to fulfil its imposed tasks. Terminologically, legal persons which have members are referred to as associations. Associations which have been set up for a specific duration, act externally as a unit and enjoy legal capacity are referred to as corporate bodies⁸.

b) Basis

Legal persons are distinguished from other personal communities and special assets (without legal capacity)⁹ here¹⁰¹¹. Primarily these include the civil law company (GbR, c.f. §§ 705 ff BGB) as a basic model, the general partnership, (oHG, c.f. §§ 105 ff Commercial Code, HGB) and the limited partnership (KG, c.f. §§ 161 ff HGB). They also include the non-registered association (eV, § 54 BGB), European Economic Interest Association (EEIA), a partnership under the partnership law of 23 July 1994, the marital community of property (§§ 1415 ff BGB), a community of heirs (§§ 2032 ff BGB), the partnership of ship owners (§ 489 HGB) and the joint copyright community (§ 8 copyright law, UrhG). In all of the above-mentioned personal societies the persons involved are in an overall relationship

⁴ However, this restriction of legal capacity is recognised for legal persons under public law, cf. Hadding, in Soergel, Kommentar zum Bürgerlichen Gesetzbuch/*Commentary on the Civil Code*, 13th edition 2000, Vor § 21 Item 25 m. w. N.

⁵ Karsten Schmidt, *Gesellschaftsrecht/Company law*, 2nd edition 1994, S. 184.

⁶ Differentiating, Karsten Schmidt, loc. cit., S. 212 ff (215 f).

⁷ Hadding, loc. cit., Vor. § 21 Item 22.

⁸ Larenz/Wolf, loc. cit., § 9 Item 2.

⁹ Foundation without legal capacity, insolvency mass

¹⁰ No consideration is given here to other society or company forms such as the percentage community (§§ 741 ff BGB), the silent company (§§ 230 ff HGB), creditor and debt majorities (§§ 420 ff BGB).

¹¹ Cf. Karsten Schmidt, loc. cit., p. 176 ff.

with each other (*community of joint owners*).

- The members' mutual relationship

An important demarcation criterion involves the fact that according to the legal guideline the community of joint owners does not provide for any a free change of members, but will be dissolved through the death of a partner for example (see § 727 BGB for the civil law company). The background is the contractual justification of the association of persons¹². This also reflects the principle of the integrity of the entity, whereby all partners are jointly entitled and obliged to engage in management and representation (cf. §§ 709, 714, BGB for the civil law company, §§ 2038 Paragraph 1, 2040 BGB for the community of heirs). This means that in an association of persons a legal relationship is created between the individuals and the association on the one hand and among the individual members on the other. In the case of the legal person, while a legally binding foundation¹³ of the memorandum articles of association¹⁴ is taken as a starting point under current modified standard theory, the memorandum and articles created in this way are treated as objective law¹⁵. This means that only a legal relationship between the individual members relative to the legal person exists, but not however among the individual members. In this case the majority principle is as essential a term in the legal person as the principle of unanimity is in other associations of persons. Moreover this leads to the legislator's stipulation that the legal person must designate two organs in principle: the general meeting of members along with the executive board. The general meeting of members must decide on all affairs, insofar as the law or the articles have not transferred this function to a different organ. The rights of the members are expected to be safeguarded by the general meeting of members as otherwise no corresponding forum would exist in the absence of a mutual legal relationship among the members.

- Relationship of the members to the association of persons

In principle, there is no personal liability of members in the legal person; inversely, the legal person is not liable for the commitments of its members (*separation principle*)¹⁶. The breaching of the separation principle known as direct personal liability or direct personal liability of the shareholders only exists on an exceptional basis. Personal liability can exist,

¹² As a result this does not apply to the community of heirs, which is created by virtue of law and which is solely oriented towards their settlement; the Federal Court of Justice also agreed on legal capacity for the community of heirs with this justification; Federal Court of Justice of 11.9.2002, Az. XII ZR 187/00 = www.dnoti.de (court rulings relevant for notaries can similarly be called up under the heading 'database' in full text).

¹³ Compare Schwarz in Bamberger/Roth, comment on BGB, 2003, for § 21 Item 28 m. w. N.

¹⁴ Corresponding to the contract theory justified by von Thur, see von Thur, *Der allgemeine Teil des bürgerlichen Gesetzbuches/The General Part of the Civil Code*, 1st volume, 1910, §§ 34 I, 35 II (quoted according to Schwarz loc. cit.).

¹⁵ Corresponding to the standard theory justified by von Gierke, cf von Gierke, *das Wesen der menschlichen Verbände/The Essence of human Bonds*, 1902, S. 29 ff (quoted according to Schwarz, loc. cit.).

¹⁶ c.f. BGHZ 21, 378; 22, 226; 26, 31 (33); 61, 380 (383); 68, 312 (314); 78, 318 (333); BSG NJW 1984, 2117.

if the members of the legal person abuse the legal form of the legal person in law and the result violates fairness and good faith¹⁷. The key terms here are cases of mixing of assets, under-capitalisation and group liability¹⁸.

In contrast to the legal person, where rights and obligations are assigned to the legal person only and not to its members, the essence of the community of joint owners is that the rights and obligations are fully assigned to the joint owners as such. Thus, for example, each partner along with the other partners is the owner of the property belonging to the society and not just a percentage. The rights of each joint owner extend to the entire joint property; they are restricted by the rights with the same scope held by the other joint owners¹⁹. Measures relating to this property can only be adopted by all of the holders jointly. Inversely, the joint owners are also liable personally for the society's commitments in addition to the property bound by the joint ownership relationship²⁰. The common property can be a legal subject itself and not just a bound asset held by the joint owners²¹.

- Legal capacity and partial legal capacity

Communities of owners can also have their own legal capacity; this is not just reserved for legal persons. § 14 Paragraph 2 BGB deems this self evident, insofar as it provides a definition of a personal society with legal capacity²². § 124 Paragraph 1 HGB postulates the legal capacity of the OHG²³ and thus the same for the KG via § 162 Paragraph 2 HGB. The European Economic Interest Association, the partnership and the ship owning partnership are also assigned legal capacity²⁴. In a much considered ruling, the Federal Court of Justice²⁵ also endorsed the legal capacity of the civil law partnership – in principle, it can adopt any legal position once special reasons do not prevent this, and in this sense is legally capable without being a legal person²⁶. On the other hand legal

¹⁷ For the details compare Karsten Schmidt, loc. cit., p. 186 ff; Schwarz, loc. cit., Vor § 21 Item 13 ff m. w. N; Hadding, loc. cit., Vor. § 21 Item 35 m. w. N.

¹⁸ Finally, we can again see a correction here which not least takes account of the earlier criticism of sole traders and instruction-dependent bodies (cf profit transfer and management contracts), compare with Däubler, BGB kompakt 2002, Item 59 ff and the ruling by the Reich court, in which a management contract was found to be immoral (RGZ 81, 308).

¹⁹ See Schwarz, loc. cit., Vor § 21, Item 6.

²⁰ In addition to unrestricted personal liability in principle there are also cases, in which individual partners are only liable to a limited extent (thus a partner in a limited partnership is only liable for his liable contribution).

²¹ Schwarz, loc. cit., § 54 Item 13 for the non-legally capable association, rejecting for the community of heirs Federal Court of Justice of 11.09.2002, Az. XII ZR 187/00 = www.dnoti.de.

²² 'A legally capable personal company is a personal company equipped with the capacity to acquire rights and to enter into commitments.'

²³ 'The general partnership can acquire rights and make commitments, acquire property and other physical rights to sites, sue in court and be sued under its company name.'

²⁴ Däubler, loc. cit., Item 76a.

²⁵ BGH v. 29.01.2001, Az. II ZR 331/00 = BGHZ 146, 341 = NJW 2002, 1207 = www.bundesgerichtshof.de.

²⁶ Schwab, loc. cit., Item 145.

capacity is also assigned to the unincorporated association (§ 54 BGB)²⁷. This actual obvious contradiction is solved through the fact that a distinction from the legal person is merely made through the unincorporated association label; the unincorporated association's own legal subjectivity is also used as a concept. But insofar as the legal capacity of the community of joint owners is referred to and it is viewed as approaching a legal person, the term partial legal capacity is applied to make a distinction from the legal person. The term partial legal capacity designates an assignment of legal capacity for certain areas without legal capacity for the other areas being automatically excluded by virtue of the nature of the matter; this is simply considered unnecessary. A legal person is assigned full legal capacity, subject to limits which arise solely due to the nature of circumstances.

Because the legal person is only assigned partial legal capacity in a certain sense, the characteristic of legal capacity is only conditionally suitable as a distinguishing criterion²⁸. A legal person assumes the existence of legal capacity, but not every (partly) incorporated association of persons is a legal person²⁹.

- A legal person under public law

A legal person under private law must also be distinguished from a legal person under public law. The decisive difference lies in the situation at formation: while the legal person under civil law is established on a commercial law basis, the legal person under public law is created by a sovereign act³⁰.

- Summary

The characterising differences between communities of joint owners and legal persons can thus be established with three points. On the one hand, in addition to the commonly holding related property the members must take responsibility for the community's commitments, while the members of a legal person are not personally liable in principle³¹. On the other, the legal person is characterised by the fact that it is independent of its membership, whereas associations of persons depend on their members in principle. Finally, the legal person has full legal capacity, while the community of joint owners is partly legally capable at most.

c) Importance and arrangement

The legal person under private law is very popular. In the commercial law area, the private limited company (GmbH) is the form which is appreciated by business people of all types due to its limitation of liability compared with the sole trader arrangement, GbR, OHG and

²⁷ Schwarz loc. cit.

²⁸ Hadding loc. cit. Vor. § 21, Item 17, completely rejects legal capacity as the demarcating criterion in contrast. Also compare Schwarz, loc. Cit for § 21 Item 6.

²⁹ At this point account must also be taken of the fact that in the framework of the BGB preliminary work there was an opinion favouring restricting legal persons' legal capacity for asset capacity; comp. Coing, loc. cit., Item 14.

³⁰ Hadding loc. cit., § 89 Item 12.

³¹ This is also disputed, compare Schwab, loc. cit., Item 154.

KG. It has the advantage of greater flexibility and easier usability when compared with the public limited company (AG).

This can also easily be understood with the help of statistical surveys. Of the 985,168 commercial law companies³² existing on 1 January 2003, 784,334 were in the legal form of the GmbH, 17,281 were in the legal form of the public limited company and only 167 in the legal form of a mutual insurance association. Partnerships practically play no role in comparison in practice. Although a total of 153,501 limited partnerships existed on the date concerned, account must be taken of the fact that of these 122,633 were so-called GmbH & Co. KGs, where the position of the full partner was assumed by a private limited company.

Apart from commercial law, the registered association in the form of the non-profit making association is the organisational form in which wide areas of cultural life play a role. These range from the proverbial associations of rabbit breeders via promotional associations (e.g. in the schools area) to political parties, which are also organised as associations as a rule.

In contrast, foundations still linger in the shadows; it is estimated that approximately 10,000 foundations currently exist³³.

B. The legal personality of legal persons

a) The origin of the legal personality of legal persons

The derivation of the legal person from the natural person has allowed the legal person to appear as an artificial product. This artificiality is reflected in the explanation models, which above all things in the nineteenth century reflect the attempt to clarify the heavily disputed question on the essence of the legal person. However, this conflict of theories has no meaning for legal practice, as the legal person has developed into a recognised and usable category which jurists use as a matter of course³⁴. Nonetheless, the two most important theories³⁵ should be mentioned briefly here if only for the sake of completeness. Thus the *Fiction theory* (most important representative: Carl Friedrich von Savigny³⁶) assumes that the legal person is a purely fictional object. As such, it is only a legal technique: a legal personality is fabricated. This contrasts with the '*real bond person*' theory (most important representative: Otto von Gierke³⁷). This theory assumes that the legal person is a composite person made up of physical persons

³² Source: Chamber of Industry and Trade

³³ The foundation in civil and tax law, Conference of the specialist institute for notaries, Cologne 18 October 2003.

³⁴ Karsten Schmidt, loc. cit., S. 158.

³⁵ On the development of this doctrine: Karsten Schmidt, loc. cit., S. 159 ff; Larenz/Wolf, loc. cit. § 9 Item 7 ff, jew. m. w. N.

³⁶ System des heutigen Römischen Rechts/*The current Roman law system*, volume 2, 1840, p. 236, 239 (quoted from Schwarz, Vor. § 21 Item 2).

³⁷ Deutsches Privatrecht/*German private law*, volume 1, 1895, p. 470 (quoted from Schwarz, loc. cit.).

which derives its legal capacity from physical persons. Thus, it is a real existing person, which means that in the legal person the legislator is only recognising something that already exists.

The *theory of object assets*, *enjoyment theory* and the *theory of the supra-individual effectiveness unit*³⁸ also exist.

b) Ways of acquiring legal personality by legal persons

Legal persons cannot be founded at will, but are bound by a type constrictio – only the legal persons set out by the legislator can become an object³⁹.

German law does not have any free body creation system (the legal person is created without a further inspection once the legally standardised prerequisites have been fulfilled); a combination of a concession system and system of normative provisions are involved⁴⁰.

According to the concession system the association acquires legal capacity through state awarding, to which no legal claim exists. The competent administrative authorities decide on awarding on the basis of their own independent discretion. This system applies to commercial and foreign associations (§§ 22, 23 BGB) and the mutual insurance association (§ 15 VAG). The foundation is an exception to this (§ 80 BGB). Since the entry into force of the law on modernising private foundation law on 1 September 2002⁴¹ a claim for the issue of recognition has existed if the legal prerequisites have been met⁴².

This system plays no major role in practice given the low number and practical importance of the legal persons created under this system.

According to the normative provisions system there is a legal claim to the establishment of a legal person, if the legal prerequisites have been fulfilled. Fulfilment of the legal prerequisites is checked by the state and as a rule confirmed by an entry in an official register. This system applies to ideal associations (§§ 21, 55 ff BGB), the private limited company, (§ 9c GmbHG), the public limited company (§ 38 AktG) and cooperative (§ 11a GenG). It incorporates a scale of inspection of varying degrees of severity, meaning that checking must be undertaken individually for each legal person. This system is absolutely predominant due to the large number of legal persons in this system and their importance in practice.

³⁸ c.f. Hadding, loc. cit., Vor. § 21 Item 11ff m. w. N.

³⁹ Däubler, loc. cit., Item 155.

⁴⁰ Karsten Schmidt, loc. cit., S. 164

⁴¹ BGBl. 2002, 2635.

⁴² Also compare Andrick/Suerbaum, Das Gesetz zur Modernisierung des Stiftungsrechtes/*The law on modernising foundation law*, NJW 2002, 2905 (2907).

II.

Differences between various categories of legal persons under private law

1. Listing of the various categories and sub-categories

In principle a difference is made between legal persons under civil law and those under public law. In turn, persons under civil law sub-divide into

- corporate bodies (associations in the broadest sense) and
- foundations (§§ 80 ff BGB, the details arise from the federal states' foundation laws⁴³).

Corporate bodies are legal persons organised under membership (corporate body) law, while foundations are assets dedicated to a goal with their own legal personality.

Corporate bodies include

- the civil law association,
- joint stock companies
- the cooperative,
- the mutual insurance association.

The association sub-divides into three sub-forms:

- the non-profit-making association ("ideal association"), § 21 BGB
- the profit-making association, § 22 BGB,
- the foreign association, § 23 BGB.

Among joint-stock companies a further distinction is again made between small and large joint-stock companies as regards the annual report (§ 267 HGB).

Joint-stock companies include

- the public limited company,
- the private limited company,
- the mutual insurance association.

In turn, the Law on share companies makes a distinction between the:

- 'listed' public limited company (traded on the exchange)
- 'unlisted' public limited company
- partnership limited by shares

⁴³ Details with source proofs in Damrau/Wehinger, Overview of minimum foundation assets according to federal state law, ZEV 1998, 178 (179).

In addition to the mutual insurance association insurance supervision law recognises a further sub-form, the so-called 'smaller association'.

The sub-divisions made above concern the distinctions made on the basis of the legal provisions. Legal practice also include further sub-divisions among joint-stock companies, which are known as type variations⁴⁴, which have their origin in the partly stipulating legal provisions concerned. The differentiations are shown here in the case of the most important practical case – the GmbH:

- the capitalist GmbH
- the personalised GmbH
- the common utility GmbH
- the full partner GmbH (acts as the personally liable partner in a limited partnership)
- the foundation GmbH.

The situation appears similar with the foundation, as various sub-categories have formed in legal practice in accordance with the foundation's purpose:

- common utility foundations
- company-related foundations
- family foundations.

2. Essential characteristics of the individual legal persons in private law, differences and justifying reasons⁴⁵

a) The association

The main form of the association is the ideal association. In contrast to both other forms (commercial/foreign association) it acquires its legal capacity through entry in the register of associations, to which the founders have a legal claim if the legally stipulated foundation prerequisites have been met. In contrast to this, both other forms of association acquire their legal capacity under the normative system.

The profit-making association is oriented towards the exercise of a commercial business operation. According to fundamental legislative thinking, associations with commercial goals should use the commercial law forms available for legal-transaction safety reasons, especially creditor protection⁴⁶. As forms stipulated by commercial law are better than those under association law (there are no provisions relating to minimum capital funding, a balance sheet, advertising and audit obligations and no non-restrictable power of action of the representative body), the permit⁴⁷ required for establishment is only granted if the foundation of a joint-stock company or cooperative is impossible or unfeasible⁴⁸.

In the case of the foreign association in the sense of § 23 BGB it is a non-legally capable

⁴⁴ Karsten Schmidt, loc. cit., P. 43

⁴⁵ To avoid repetitions please refer to Part 2 of this report for the details.

⁴⁶ Stöber, Handbuch zum Vereinsrecht/*Manual of associative law*, 8th edition 2000, Item 49.

⁴⁷ Certain authorities are responsible for the issue of the permit in accordance with the law of the state where the association has its seat; for the details see Stöber loc. cit., Item 887.

⁴⁸ cf Part 2 Figure 2.2

association, which has its seat outside the state⁴⁹. It acquires domestic legal capacity by being awarded this by the state⁵⁰.

b) Joint-stock companies

Joint-stock companies are companies under commercial law. The GmbH (private limited company) and AG (public limited company) are essentially distinguished from each other through varying flexibility in the organisation of their articles. The special aspect of the Partnership limited by shares/silent partnership is that it has a personally liable partner under its legal concept, for whom management and representation competence is reserved.

c) Mutual insurance associations (VVAG)

A mutual insurance association is an insurance firm organised on a membership basis.

d) Registered cooperative (eG)

The registered cooperative is a special form of the profit-making association with the goal of organising self help through an association, whose object can only be a specific cooperative goal.

e) Type variations of joint-stock companies using the GmbH as an example

The GmbH was created by the legislator in 1892 as a lighter legal form compared to the AG without a historical model, as the strict provisions applying to the AG were meaningful and necessary for large companies but not for small firms with a restricted circle of partners⁵¹.

The basic legal type of GmbH is the so-called "capitalist" GmbH: the partners are only involved in the GmbH in terms of property rights; they only exercise their rights through resolutions adopted in the general meeting of partners. However, the most frequently found form in practice is the so-called "personalised" GmbH: in this instance, the partners are not only involved in property rights; the existence of the GmbH is based on the involvement of the individual partners. The principle of foreign organs (i.e. the executive director does not have to be a shareholder) is rarely used here; the partners are usually named as organs of the company. The law permits an inclusion of partners in the company beyond a simple stake in the capital. According to § 3 Paragraph 2 GmbHG the partners can impose more extensive as well as highly personal exceptional obligations. Inversely, the articles can also create a special right for partners to be appointed as an executive director. The company is made closer to a partnership through the exploitation of dispositive law provisions: bound share disposal clauses restrict free exchanges of partners, withdrawal of shares/entry provisions work against the free inheritance of the stakes – there are only a few GmbH law provisions which are not dispositive. Notarial advice and organisation is aimed here precisely at 'tailoring' the company optimally to the needs of the parties involved.

Another form of organisation is the non-commercial GmbH (common-interest GmbH =

⁴⁹ The recognition of foreign legally capable associations is based on the provisions of international private law (IPR); see following provision on this. Associations founded by foreigners within the state are not covered by these provisions; special provisions of the association law apply here (§§ 14, 15). For all see Stöber, loc. cit., Item 84 ff.

⁵⁰ The Federal Minister of the Interior is responsible, Art 125, 129 Constitution (GG), see Hadding loc. cit., § 23 Item 3.

⁵¹ Hueck, *Gesellschaftsrecht/Company law*, 19th edition 1991, p. 322 ff.

gGmbH). It enjoys tax exemption if it pursues common-interest, charitable or church purposes⁵².

The so-called full partner GmbH (with the GmbH as the personally liable partner in a limited partnership) must also be mentioned. This is a company, whose sole task is to take over the position of the personally liable partner in a limited partnership. This means that this company (although as a partnership it is not a legal person) comes quite close to being one with the result that the partner bears no personal liability for the company's commitments in practice: due to the GmbH's position as the sole full partner, liability is restricted to the full partner GmbH's 'personal' liability.

3. **Essential characteristics, differences and sub-categories of the individual legal persons under private law**

In accordance with the above statements and its legal capacity, the essential characteristics of the legal person under private law comprise the independence of the individual members ('immortality'), the need for an own name ('company name') and a corporate organisation, which in addition to articles of association also requires at least two organs: an executive board or management on the one hand and the general meeting of members on the other.

The foundation, which as a legally capable special asset has no members, has a special position.

Legal persons are also distinguished according to their purpose:

- exercise of a commercial business
- exercise of a non-commercial activity.

The legislator has attached major importance to protecting legal transactions during the exercise of commercial business. Thus there are compulsory provisions about the contribution and maintenance of the authorised share capital; the power of representation of the executive board cannot be restricted in the external relationship and companies are bound by certain disclosure provisions.

III.

Origin and establishment of legal personality with special consideration of the different categories of legal persons

1. **Various types of establishment and recognition of legal personality**

Establishment prerequisites are distinguished by the procedure to be followed and by how legal capacity is acquired.

⁵² Wrede in Münchner Handbuch des Gesellschaftsrechts/*Munich Company law manual*, Volume 3 GmbH, 1996, § 59, Item 15 f.

The establishment of the legal person and the drawing up of articles can be partly arranged by private document; in the majority of cases the deed of establishment must be declared through recording via a notarial deed.

Legal capacity is acquired either through a state permit or through entry in a register. If the entry is made in a register, the signatures of the executive board must always be certified notarially on entry in this register. In some cases notarially confirmed names must be presented and penalty-bound affirmations (relating to the suitability of the company's executive board and to the authorised share capital) previously presented to a notary must be submitted.

2. Material and formal prerequisites for the establishment of individual legal persons

a) Association

The act of formation for non-profit-making associations and establishment of the articles are arranged by private document. The association obtains legal capacity through entry in the register of associations, which is arranged by the lower district court where the association has its seat. In legal terms the notary's involvement is restricted to certifying the signatures of the members of the executive board on application for registration. In practice this frequently leads to objections by the court, because the articles often do not meet compulsory legal provisions and therefore must be adjusted. An obligation to obtain certification from a notary here would lead to an unburdening of the courts. In practice, entry in the register of associations is almost always drawn up by a notary.

The competent authorities approve the establishment of profit-making associations or award legal capacity to foreign associations instead of the register of associations.

b) Foundation

A foundation is established through an act of formation based on a private document (§ 81 Paragraph 1 BGB). The foundation obtains its legal capacity through its recognition. Recognition is issued by the federal state in which the foundation has its seat⁵³.

c) GmbH, AG, Partnership limited by shares

In the case of joint-stock companies the establishment of the legal person must be declared by notarial recording or a dictated statement. Legal capacity is acquired through entry in the commercial register at the company's seat⁵⁴. The application for registration is made by all management/ executive board members or executive directors, and their signatures under the notification must be certified by a notary. In addition they must present their signature to the court (sample name), which also has to be confirmed notarially. Finally, the executive board or executive director must ensure in the application for registration that the authorised share capital has been contributed in full (or in accordance with the provisions of the articles of association), is freely available to them legally and not – with the exception of

⁵³ For details see Damrau/Wehinger, loc. cit., S. 179.

⁵⁴ According to § 125 FGG (Law on the affairs of the voluntary jurisdiction) the commercial register is maintained in principle in the district in which the state court has its seat by the lower district court since 1 January. The prerequisite in each case is electronic maintenance of the register, so that electronic inspection is possible via the providing lower district courts.

certain establishment costs whose maximum scale must be anchored in the articles – reduced by prior encumbrances. In addition, they must ensure in the application for registration that no prior penalties or other binding decisions exist, which would stand in the way of their appointment as an organ entitled to engage in representation. A deliberate or negligently false assurance is an offence. The courts may only demand proofs that the declarations or affirmations by the registering executive board are right for justified reasons; it is up to the notary to work towards the correctness of declarations through his advice and instructions.

d) Mutual insurance association (VvAG)

The establishment of a mutual insurance association must be declared by notarial recording or noting⁵⁵. Legal capacity is acquired through approval from the supervisory authority.

e) Registered cooperative (eG)

A registered cooperative is founded by an act of formation based on a private document. Legal capacity is obtained through state recognition.

3. **Special content and formal prerequisites apply to the foundation of agricultural enterprises/state trading businesses, lending institutes, companies for the extraction of mineral resources as well as companies whose activity requires a state permit.**

Legal persons require a special state permit for the exercise of certain activities on being established. In individual cases, the exercise of an activity is forbidden in a certain legal form or certain conditions for the content of the articles are imposed within the context of approval of the company object. The following approval requirements exist in detail:

Senior citizens' home	§ 6 Home law
Plant with harmful environmental effects	§ 4 Federal Emissions law
Chemist's shop/Pharmacist	not allowed as a legal person, § 8 law on pharmacy
Employee transfer	Art. 1 § 1 AÜG
Medicines, production and trading	§ 13 Medicines law
Emigration	§§ 1,11 Emigration law
Banks	§ 1, 32 KWG
Supervision of construction, property developers	§ 34 c GewO
Mining	
Mining	§ 6 Mining
Surveillance	§ 34 a GewO
Loan intermediation	§ 34 c GewO
Honours and orders	Sales, § 14 OrdenG
Retailing	§ 3 Paragraph 1 Retailing law

⁵⁵ Exception: the 'smaller association', § 53 VAG

Railways	§ 4 Paragraph 2 General Railways law
Driving schools	§ 10 Driving instructor law
Telecommunications	§ 2 Telecommunications law
Correspondence courses	Law on correspondence courses & tele-learning
Finance broking	§ 34 c GewO
Restaurants	§ 2 Catering premises law
Poisons trading, poisons	§ 4 Paragraph 1 and 2 Chemicals law
Road haulage	Goods transport law Long-distance transport § 8 Short-distance transport § 80 Scheduled transport § 90
Crafts	§§ 7 Paragraph 4 Crafts regulation
Natural healer	§ 1 Paragraph 1 HPG
Collection agency	§ 1 Paragraph 1 Nr. 4 RechtsberG
Capital investment	§ 2 KAAG plus § 32 KWG; broking, § 34 GewO
Hospitals	§ 30 GewO
Lottery	§ 33 h GewO
Air transport	Aircraft § 2 Air transport law Airports § 6 Air transport law Air transport enterprise § 20 Air transport law
Broker	Sites, capital investments, loans, lending § 34 c GewO
Waste disposal	Waste disposal plants, § 7 Waste law Collection and transport, § 12 Waste law § 2 Waste elimination regulation
Orthopaedic shoes	§ 30 b GewO
Staff agency	§ 23 AFG
Passenger transport (Taxi firms, omnibuses, etc.)	§ 2 PersBefG
Surety provider	§ 34 GewO
Post	Post forwarding, § 2 Paragraph 2 PostG
Legal affairs	§§ 59 c Paragraph 1, 59 g BRAO, § 1 Paragraph 1 RechtsberG
Travel businesses	§ 55 Paragraph 2 GewO
Exhibition of persons	§ 33 a GewO
Exhibitor	§ 55 Paragraph 1 Nr. 2 GewO
Sea transport	Sea freight activities, § 55 ff HGB Passenger transport by sea, §§ 665 ff. HGB
Casino	§ 33 h GewO § 1 Paragraph 1 Law on licensing of public casinos
Gambling machines and games with possibilities of winnings	§§ 33c, 33 d GewO
Tax consultancy	§§ 49 ff Tax consultancy law
Amusement arcade	§ 33 i GewO
Explosives	§§ 7, 27 Explosives law
Petrol stations	§ 9 Regulation on flammable fluids

Animal experiments	§ 8 Animal protection law
Corporate stakes	§ 1 UBGG. A corporate stakeholding company can only be operated in the legal form of an AG, § 2 Paragraph 1 UBGG
Auctions	§ 34 b GewO
Insurance transactions	insurance company: § 5 VAG; impossible as GmbH legal form, § 7 VAG
Weapons	Weapons manufacturing, § 7 Weapons law Shooting ranges, § 44 Weapons law War arms, §§ 2 ff. Military weapons law
Forward commodities trading	§ 1 Paragraph 1 Nr. 5 KWG
Securities trading	§ 2 Law on securities trading
Audit firms	§ 1 WPO

IV.

Administrative and representative bodies of legal persons under private law

1. Listing and presentation of executive directors and representatives of legal persons (physical and legal persons)

In principle, a distinction is made between legal representation and representation by powers of attorney during the representation of legal persons⁵⁶. In legal transaction representation the representative is issued authorisation through a legal transaction; he represents the authorisation provider within the framework of the issued authorisation. A special case of legal transaction representation is "full power of attorney" (§ 48 ff HGB). It can be entered in the commercial register or register of cooperatives; proof of power of representation is provided through inspection of the register.

In addition to the already described special feature of organ representation there are two further essential differences:

- organ power of representation is non-transferable
- liability by the legal entity for the illegal action of the organ.

For their part, the organs of legal persons can issue legal transaction powers of attorney, but cannot transfer their organ power of representation. Jurisprudence has drawn the conclusion from this that that organ representatives cannot issue general power of attorney either⁵⁷.

The legal person must take responsibility for the criminal acts of its organ representatives without restriction, without exculpation being possible as it would be with vicarious agents (compare § 831 BGB).

⁵⁶ Compare with organ theory above 1. A. a.

⁵⁷ BGHZ 34, 27; Federal Court of Justice in NJW 1977, 199.

Organ representatives are known as 'executive directors' in the GmbH (§ 35 GmbHG), and as the 'executive board' in the remaining legal persons.

2. **Legal nature of the organs, representatives and the executive directors of legal persons**

Organ representatives of legal persons can only be physical persons (c.f. § 76 Paragraph 3 P. 1 AktG). In principle, they do not have to be a member shareholder of the legal person (principle of foreign organisation); however, the situation is different with the example of the cooperative (§ 9 GenG).

3. **Legal competences of the organs and representatives and the duration of the executive directors and representatives of legal persons' term of office. Essential characteristics, formal prerequisites and notarial involvement.**

The power of representation of organ representatives cannot be restricted in the external relationship (e.g. compare § 81 Paragraph 1 AktG, § 37 Paragraph 2 GmbHG); only the power of representation of the association's executive board can be restricted in the articles (§ 26 Paragraph 2 S. 2 BGB).

In principle, organ representatives are appointed until revocation. An exception to this is the executive board of an AG, which can be appointed for a maximum of 5 years (§ 84 AktG), with repeated appointment permissible.

The organ representatives are appointed through a decision by the general meeting of members; the executive board is only appointed by the supervisory board in the public limited company and the mutual insurance association. The organ representatives must be entered in the corresponding register or notified to the approval authorities. Entry is merely declaratory; appointment by the competent body is constitutive in effect.

The notary's involvement is limited to the application for registration of the new executive board or executive director, insofar as these are to be entered in a register. He

- prepares the corresponding declaration,
- checks whether the appointment has been made in a regular manner,
- takes the corresponding sworn assurances which are prescribed in certain cases,
- instructs the parties concerned where applicable about the importance of organ representation and
- ensures completion of the entry under register law.

V.

Amendment of the articles of association

1. **Most important amendment of articles of association**

If the legal person is entered in a register, amendment of the articles must also be noted in the

register. Entry is constitutive (e.g. see § 54 Paragraph 3 GmbHG). In the case of joint-stock companies certain amendments of articles must be published (e.g. see § 10 GmbHG: company name, seat, object, diverging journal of publication and duration if the company has not been founded for an indefinite period).

Some amendments of the articles of association require approval. The introduction of an altered business year requires approval from the tax authorities subject to circumstances. A change in the object may also require a permit depending on the object (see above II Figure 3).

Special regulations apply to amendments of the articles of association of joint-stock companies that affect the original share capital (capital increase or reduction).

2. Substantive and formal prerequisites and notarial involvement

The substantive and formal prerequisites correspond to those applicable during establishment.

3. Effects of an amendment of the articles on the legal personality or legal capacity of a legal person.

An amendment of articles cannot have any effect on the legal personality or legal capacity of a legal person in principle.

4. Effects of an amendment of the articles of association on the management and representation of a legal person.

The articles stipulate how the organ representative(s) are to be organised (individual or joint representation). As a rule, the articles specify common representation; however they do empower the meeting of partners to assign individual representatives competence in this area as a rule. If the corresponding provision in the articles is changed, the way the organ representatives carry out representation can also change, although not the legal transaction authorisations once issued.

VI.

The legal person under private law within the framework of international private law

1. Recognition of the legal personality of foreign legal persons in the Federal Republic of Germany

In German international private law there is no generally valid legal standard for linking up corporate regimes. The fundamentals of international corporate law are as disputed as its details, not least due to the absence of a legal regulation.

German jurisprudence as well as prevailing scientific teaching follow the so-called 'seat theory'⁵⁸. According to this view, the company law regime is governed by the law of the state in which the company has its administrative seat. The actual effective administrative seat is, i.e. the location where the headquarters (management) are located, is decisive here and is therefore not necessarily the location stated in the articles of association.

The seat theory prevailing in Germany thus recognises the legal capacity of a legally existing foreign company anyhow without further requirements once it retains its effective management seat in the state concerned. In contrast, a problem arises if the company has been effectively founded in a different state and then transfers its effective administrative management seat to a different state, especially the Federal Republic of Germany. The once acquired legal capacity does not continue without further ado in Germany; this is much more a question of whether the company continues to exist under the law of the founding state and whether it enjoys legal capacity according to German law⁵⁹. The legal capacity of the foreign company, which has transferred its effective administrative seat to Germany, is not recognised under the view prevailing in Germany up to now. However, this does not mean that a foreign company is viewed as completely non-existent, if it transfers its actual seat into the state. Instead, the seat theory merely does not recognise the legal form selected by the incoming legal person abroad, which again can lead to liability problems for the partners⁶⁰. Thus in a recent ruling⁶¹ on a 'limited company' established under Island of Jersey law which nonetheless had its effective management seat in Germany, the Federal Court of Justice found that it was actively and passively capable of being a party from a German viewpoint as a civil law company before the German courts and could have acquired rights effectively in Germany in this capacity.

The company law regime defined in accordance with the seat theory is a uniform regime in prevailing opinion⁶². The company law regime applies absolutely to the company from its foundation to its termination and in every relationship (including liability and organisational law)⁶³. Thus it neither requires a recognition procedure nor a separate act by the state. Instead, each company, which is a legal person according to its articles of association is recognised as such by German law in principle.

The general provision of Art. 4 EGBGB applies to international private law collision regulations, with German asset law being applicable from a German viewpoint if foreign collision law refers back to or from German law. Backward or onward references to German law are not considered if the state in which the company has its effective seat also follows the seat theory. In contrast, if a company founded under German law moves its effective seat to a different country whose law follows the foundation theory, a reference is made back to German law, which accepts this backward reference (*renvoi*)⁶⁴.

⁵⁸ Just compare BGHZ 53, 181/183; BGHZ 97, 269/271; BGH NJW 2003, 1607/1608 as well as the bibliography in *Michalski*, GmbHG, Syst. Darst. 2 Item 4.

⁵⁹ Recently Federal Court of Justice, ruling of 29.01.2003, NJW 2003, 1607/1608.

⁶⁰ Just compare *K. Schmidt*, *Gesellschaftsrecht/Company Law*, 4th edition, p. 27 f. with further proofs.

⁶¹ Ruling of 18.07.2002, DnotZ 2003, 147.

⁶² Just compare BGH, ruling of 05.11.1980, NJW 1981, 522/525 f. with further proofs.

⁶³ Just compare *Rowedder*, GmbHG, Einl. Rz. 301, and BGH loc. cit.

⁶⁴ Compare *Rowedder*, GmbHG, Einl. Rz. 305.

Somewhat of a shift from seat theory towards foundation theory has emerged in the German perspective as well due to recent rulings by the European Court of Justice for companies which exercise their business in a EU member state different from the EU Member State (state of origin) where their statutory seat was legally established⁶⁵. Under these rulings, in principle, European Community law requires EU members to recognise the legal capacity and capacity to be a party in a law-suit of companies founded effectively in a different EU Member State. In a further ruling in the 'Inspire Art' case of 30.09.2003⁶⁶ the European Court of Justice confirmed its interpretation and also decided that EU Member States were prohibited from subjecting a company founded legally under the law of a different Member State to certain national protection provisions (e.g. concerning the minimum capital or management liability). Only a close inspection for abuse is permissible in the individual case. With the Inspire-Art ruling, the European Court of Justice has now made it clear that an EU Member State must not just evaluate a company moving from a different Member State as regards its capacity to act as a party and in law, but generally to consider this company as a whole in accordance with the company law of its foundation state. This therefore excludes in particular the use of special national rules by the host state concerning e.g. company name, minimum capital or liability in order to maintain national protection standards⁶⁷.

For reasons of completeness a reference is made here to the Brussels EEC agreement on reciprocal recognition of companies and legal persons of 29.02.1968. According to its wording foundation theory is to be used in principle in the relationship between treaty states, insofar as the law, business and commercial capacity of a company or legal person founded effectively in a different Member State is concerned (Art. 6 of the agreement). However, according to Art. 4 Paragraph 1 of the agreement a reservation in favour of their own compulsory law is granted to treaty states, insofar as the de facto seat of a company founded in a different treaty state is located in their jurisdiction; the Federal Republic of Germany made use of this reservation in its approval law of 18.05.1972. Nonetheless, the agreement has not entered into force yet due to ratification by the Netherlands being outstanding.

Whether and to what extent the previously described jurisprudence relating solely to EU territory also calls for a move away from the seat theory prevailing in Germany and a move towards foundation theory cannot be predicted by any means today. In its ruling of 29.01.2003⁶⁸ the Federal Court of Justice did not recognise such a move yet anyhow in cognisance of the Centros and Überseering rulings by the European Court of Justice and merely acknowledged that deviation from the seat theory was only possible on the basis of bilateral or multilateral state treaties, e.g. in Germany's relationship to the USA.

2. Applicable law

German law does not make any of its own requirements as regards the form or content of the establishment process of a foreign legal person. A legal person established and existing

⁶⁵ EuGH, Ruling of 09.03.1999, NJW 1999, 2027 [*Centros Ruling*] and of 05.11.2002, NJW 2002, 3614 [*Überseering ruling*].

⁶⁶ DNotI Report 2003, 166 = NJW 2003, 3331.

⁶⁷ Zimmer NJW 2003, 3585 ff.

⁶⁸ NJW 2003, 1607.

effectively under foreign law is recognised in Germany, apart from the exceptions described in Part VI.1. The same also applies to later amendment of articles, including a change in legal form as well as the appointment of the representation organs; if such legal transactions have been performed effectively under applicable foreign law, they will be recognised without further prerequisites from a German viewpoint. According to an early ruling by the Federal Court of Justice only the foreign law applicable under seat theory determines prerequisites governing how the legal person is founded, lives and expires⁶⁹. In particular, the company law regime also determines the entire organisation law of a company, and is therefore comprehensive for its internal constitution and organisation⁷⁰. If the formal requirements of the applicable foreign law are fulfilled, this is sufficient from a German viewpoint without additional form requirements being created.

3. Inter-state agreements, contracts or treaties

As already shown in Part VI. Figure 1, because of freedom of establishment (Art. 43 ff. EEC Treaty) applicable in the EU legal territory, EU Member States are bound in principle to recognise any company (including its legal personality) founded validly under the law of a different Member state, even where the company's business is carried out in a different EU Member State rather than the state of founding. Each Member State therefore has to evaluate and accept a company moving in from another Member State on an overall basis according to the company law of its foundation state. In this respect German law follows foundation theory due to European law stipulations in deviation from the seat theory applicable in principle, even though this is restricted to companies from EU legal territory.

For the remainder, various bilateral agreements are in place. Insofar as such agreements exist with other EU Member States (e.g. with Spain (Establishment treaty of 23.4. 1970) or Great Britain (London agreement on German foreign debt of 27.02.1953)), with the agreements on reciprocal recognition of companies being based on foundation theory, these agreements have lost importance due to the most recent jurisprudence of the European Court of Justice, as already shown in Part VI. 1, because foundation theory is generally applicable as regards reciprocal recognition of foreign companies between individual Member States.

The most important bilateral agreement in practical terms with a state outside the European Community is the friendship, trade and shipping treaty between Germany and the USA of 29.10.1954⁷¹. Art. 25 Paragraph 5 Sentence 2 of this treaty statutorily establishes the reciprocal recognition of companies, which are set up in accordance with the laws and other regulations of the other treaty state in its territory. Accordingly, a company founded effectively under the law of an individual USA state with legal capacity in Germany is to be viewed as having legal capacity, regardless of where its effective management seat is located. Under prevailing opinion, other provisions apply (in recognition of national customary law 'genuine link' requirements) in the case of pseudo-foreign corporations only; these are companies founded in the USA, which have no actual relationships with the USA and develop their business exclusively in Germany. The reader should refer to Münch Komm. BGB/Kindler, Int. Company law Rz. 241 ff. for further details.

⁶⁹ BGHZ 25, 134/144.

⁷⁰ RGZ 73, 366/367.

⁷¹ BGBl 1956 II, S. 487.

According to various capital protection agreements the Federal Republic of Germany is obliged to recognise the companies from treaty partner states insofar as these have registered their seat abroad, independently of which connecting factor theory the state where the seat is located follows (seat or foundation theory). In contrast if the effective administrative seat of the company from the treaty partner state is located in Germany, recognition in Germany will be refused on the basis of contractually reserved regulations under German international corporate law⁷². Such agreements exist with Bolivia, Ghana, Honduras, India, Indonesia, Yugoslavia, Cameroon, Cuba, Romania, Senegal and Chad, among others.⁷³

There are also many other bilateral agreements, which do not have any collision-law importance, as they have been reached with states which follow the seat theory just like the Federal Republic of Germany, thus linking the reciprocal recognition of companies with the effective seat of the company. Such agreements exist with Egypt, Argentina, Brazil, Chile, Ecuador, the Ivory Coast, Morocco, Nicaragua, Paraguay, Russia, South Africa, Togo, Ukraine, Uruguay, Venezuela, etc.⁷⁴.

4. Proof of existence and representation of foreign legal persons for use in the Federal Republic of Germany

German international private law does not contain any collision standard concerning the proof of the existence and representation competences of foreign legal persons.

As regards domestic legal persons proof is primarily provided by a certified extract from the judicial register with decisive competence for the legal person, insofar as the legal person has to be entered in a register. For legally capable associations this is the register of associations, the commercial register for joint-stock companies (public limited company, private limited company, partnership limited by shares/silent partnership), and mutual insurance associations (VvaG) and the register of cooperatives for cooperatives. Insofar as legal persons obtain their legal capacity by being granted state recognition (foundations, profit-making associations, foreign associations) proof of existence and representation is provided by official certification from the recognising authorities. Notarial certification in accordance with § 21 Federal Regulation on Notaries, which has the same evidential proof as a public register extract, is assigned major practical importance in Germany. The notary can draw up such certification about any legal relationships involving a legal person (or also another trading company) registered in a public register, insofar as knowledge is acquired of the matter through an inspection of the corresponding register. A model of a notarial certification of this type in German, French and English can be found in Notarius International issue 1-2, 2002, P. 97 f.

Insofar as a foreign legal person is entered in a public register, proof of existence and representation relationships are accepted in German legal practice through a current official extract or print from this register; a translation into German by a sworn translator can be demanded in this instance. The question of whether certification of existence and representative capacity from a foreign notary equipped with his official seal is adequate for

⁷² *Kindler* loc. cit., Rz. 239.

⁷³ Individual listing in *Kindler* loc. cit., Rz. 239.

⁷⁴ Individual listing in *Kindler* loc. cit., Rz. 240.

official use (especially as a proof for German authorities, courts, registers, state registries, etc.) cannot be answered uniformly. Legal practice especially in German commercial registers and land registries is completely non-uniform. Insofar as they are based on inspection in an official register, corresponding certificates from the area of the Latin notarial profession are relatively generously recognised in practice. The form and procedure for such certifications is guided by foreign law in each case, whereby it is assumed from the principle of experience that they have been registered competently and regularly⁷⁵.

For legal persons from countries in which an official register, especially a commercial or company register, does not exist or does exist but does not provide information about all of the legally relevant questions, proof of existence and representation is much more problematic for use in Germany. This also applies in particular to legal persons from the Anglo-American legal sphere. As a rule there will be a demand for an official 'certificate of incorporation' (issued by the Secretary of State in the USA) as proof of existence and a representation certificate (equipped with a seal where possible) provided by the competent person under foreign law (e.g. the company 'secretary' in the USA). This competent person should confirm the content of the representation certification it has prepared before a notary (also a notary public) and have the signature certified subject to this confirmation⁷⁶.

5. Certification of authenticity of foreign documents.

The question of whether a certificate of existence or representative capacity issued by foreign authorities, a foreign court or a foreign person awarded public trustworthiness (especially a notary) is recognised as genuine in Germany without further ado, is not regulated by law and is treated on a non-uniform basis in practice. Nonetheless, bilateral agreements exist with some states, on whose basis a release from further proof requirements is issued (in various ways). On the basis of such agreements, documents and certificates issued by local authorities, courts and notaries are recognised without further certification of genuineness in legal transactions with Belgium, Denmark, France, Italy and Austria. In relations with Switzerland this also applies in principle, although an apostille is stipulated for notarial certification.

Apart from this, legalisation in the sense of Art. 2 Sentence 2 of the Hague Convention of 05.10.1961 (i.e. a formal confirmation of authenticity by the foreign representation of the Federal Republic of Germany - where applicable after provisional certification by one or more authorities in the state of establishment) can be sought for official or notarial certification. In relations with states which, like Germany, joined the Hague Convention of 05.10.1961 on releasing foreign deeds from legalisation, confirmation of authenticity from the competent authorities of the establishing state in the form of the apostille is adequate.

Insofar as official or notarial documents or certification are drawn up in a foreign language, translation by a sworn interpreter or translator into German can be demanded.

⁷⁵ cf regional court of appeal, Cologne, *Rechtspfleger* 1989, 66.

⁷⁶ As regards details of US and UK companies see *Heinz* in ZNotP 2000, 410 ff., *Langheine* in NZG 2001, 1123 ff. and *Fischer* in ZNotP 1999, 352 ff.

Part II

Questionnaire

Question 1:

State the applicable legal regulations for legal persons under private law in your country. Is there a law that applies to the entire national territory or are there individual regional laws in the area?

Answer:

Largely uniform legal norms for the most varied forms of legal persons exist under private law in Germany. Regional implementation regulations only exist for the foundation with legal capacity, whose general fundamental principles are fixed on a binding basis in the national Civil Code (BGB, §§ 80 to 88) due to the foundation laws of the individual states. However, these legal differences are more procedural rather than essentially substantive in scope.

The most important uniform federal laws for legal persons under private law are the Civil Code for the legal form of the association (§§ 21 ff. BGB) and the foundation (§§ 80 ff. BGB), the Law on share companies (AktG) for the legal form of the public limited company (AG) and the partnership limited by shares/silent partnership (KG aA), the law on private limited (liability) companies (GmbHG) for the legal form of the private limited liability company (GmbH), the Act on purchasing and trading cooperatives (the Cooperative Act: GenG) as well as the insurance supervision law (VAG) for the legal form of the mutual insurance association (VVaG).

Question 2:

Which different categories of legal persons under private law does the German legal system recognise? Name the essential characteristics in each case.

In principle, legal persons under private law can be divided into the member-less special fund with legal capacity represented by the foundation and bodies organised under membership law. In particular the latter include the civil-law association, joint-stock companies (especially the public limited company and private limited company), the cooperative and the mutual insurance association (VVaG).

2.1. Foundation (§§ 80 to 88 BGB)

The foundation is a legal person created to achieve certain special goals (frequently common utility purposes). In contrast to other legal persons under private law, it is not made up of a related group of people and thus does not have any members. The foundation therefore comprises a legally capable special fund. It acquires legal capacity with recognition by the competent state foundation authorities in the federal state where it has its seat (§ 80 Paragraph 1 BGB).

German foundation law is characterised by minimum legal regulation and extensive organisational freedom for the founder. The legal form of the foundation allows the broad perpetuation of the founder's will on a lasting basis.

German foundation law only stipulates the executive board as a compulsory organ (§§ 86, 26 Paragraph 1 BGB), although the foundation articles usually provide for the establishment of advisory committees, boards of trustees or similar features in practice.

The foundation must be recognised as legally capable if the act of foundation meets the legal minimum requirements of § 81 Paragraph 1 BGB (see Point 4.1 on this topic), the lasting and sustainable fulfilment of the foundation goal appears to be ensured and the foundation object does not endanger the common good (§ 80 Paragraph 2 BGB).

Legally capable foundations under private law are subject to state foundation supervision by the competent federal state authorities. On the one hand, this supervision serves to maintain the laws and on the other the fulfilment of the founder's will as well as the maintenance of the foundation articles.

When a foundation ceases to exist its assets go to the persons defined in the articles, and in the absence of such a provision in the articles to the tax authorities of the federal state in which the foundation had its seat (§ 88 BGB).

2.2. Associations (§§ 21 to 79 BGB)

The German civil code makes a distinction between the 'non-profit-making association' (§ 21 BGB), also called the 'ideal association', whose object is not oriented to a commercial business and which acquires legal capacity through entry in the register of associations maintained by the lower district court competent for the seat, and the 'profit-making association' (§ 22 BGB) which is rather infrequently found in practice and acquires its legal capacity through state conferring by the federal state where the association has its seat. According to § 23 BGB a foreign association which does not have its seat in Germany can be granted legal capacity through recognition by the competent Federal Minister of the Interior. The provision in § 23 BGB has hardly any practical importance, as it only affects foreign associations that do not enjoy any legal capacity in their state of origin (associations, which are legally capable according to the foreign state with the seat are viewed as legally capable without further ado in accordance with the general rules of German international private law) and are looking for legal capacity under German law (see *MünchKomm.BGB/Reuter* § 23 Rz. 1). Because only one case of this type is known in Germany in recent practice (*MünchKomm. BGB loc. cit*) and the practical relevance of § 23 BGB thus tends to be zero, this form of appearance of legal persons under private law will not be examined further.

At least seven members are required to found a non-commercial registered association (e.V.), while at least two members are needed to set up a profit-making association.

Legal capacity is only granted to a profit-making association if it is unfeasible or forbidden for special reasons for the founders to organise themselves as a public limited company, private limited company or cooperative (BVerwG NJW 1979, 2261; BGHZ 85, 89).

The members of the association establish associative articles for themselves, which must fulfil certain minimum legal requirements.

The association has two legally imposed organs, namely the management committee, which represents the association judicially and extra-judicially (§ 26 BGB), and the general meeting of members, which settles the association's affairs, insofar as they are not looked after by the executive board or another organ stipulated by the articles (§ 32 BGB).

If the association is dissolved, the association's assets go to the persons defined in the articles; otherwise they revert to the tax authorities in the federal state where the association has its seat (§ 45 BGB).

2.3. Joint-stock companies

Joint-stock companies are legal persons with a legally stipulated minimum capital. The scale of the guarantee capital, which must be at least equal to the legally stipulated minimum capital, is established in detail by the articles.

German joint-stock company law distinguishes between the two main forms of public limited company (AG), whose legal basis is the Shares Act (AktG) and the private limited liability company (GmbH), whose legal basis is regulated in the private limited liability company law (GmbHG) (for the details also see *Hertel, Les différentes types de sociétés du droit allemand, in Revue Hellénique de Droit International 2001, 189 ff.*).

2.3.1. Public limited company/corporation (AG)

A public limited company/corporation can be set up by one or more persons (including legal persons) (§ 2 AktG). Establishment of the public limited company including the definition of the articles must be certified/ recorded by a notary (§ 23 AktG). The initial capital, which can be contributed in cash or in fixed assets, must amount to at least EUR 50,000 and is to be divided into unitary shares or nominal value shares. A public limited company must have three organs:

- the general meeting (§§ 118 ff AktG), i.e. the shareholders' meeting, whose essential tasks are to appoint members of the supervisory board as well as to decide on allocation of the balance sheet profit, discharging members of the supervisory board and executive board, appointing the statutory auditor as well as the amendment of articles including capital measures (capital increase or reduction);
- the executive board (§§ 76 ff. AktG), whose members are appointed by the supervisory board for a maximum of 5 years (reappointment is possible, § 84 Paragraph 1 AktG) and whose task it is to manage and represent the company, i.e. to manage the company under their own responsibility;
- the supervisory board (§§ 30, 95 ff. AktG), whose members are appointed by the general meeting (insofar as these are not delegated by the employees due to legal

employee joint decision-making rules) and whose main tasks are to appoint, dismiss and constantly supervise members of the executive board as well as to represent the company judicially and extra-judicially vis-à-vis the members of the executive board (§§ 84, 111 Paragraph 1, 112 AktG). Participation by employee representatives in the AG's supervisory board is required in the following cases due to the legal regulation on employee participation in decision-making: in mining, iron and steel enterprises with more than 1,000 employees the supervisory board must comprise 5 shareholder representatives and 5 employee representatives as well as another 'neutral' member (coal and steel joint decision-making law 1951). Public limited companies with more than 2,000 employees, for which no coal and steel worker joint decision-making provision exists are bound by parity joint decision-making under the joint decision-making law of 1976, i.e. the supervisory board must have an equal number of shareholder and employee representatives. In public limited companies with more than 500 and fewer than 2,000 employees that are neither bound by the coal and steel joint decision-making law of 1951 nor the joint decision-making law of 1976, the supervisory board must comprise two thirds of shareholder representatives and one third employee representatives (one-third parity, industrial relations law of 1952).

2.3.2. Private limited (liability) company (GmbH)

Just like a public limited company/corporation, a private limited company (GmbH) can be founded by one or more people (§ 1 GmbHG). The memorandum and the articles of association requires the notarial form (§ 2 GmbHG). The original share capital, which can equally contributed in cash or in fixed assets must amount to at least EUR 25,000.00; it is divided into original contributions by the individual shareholders. In principle the GmbH only has two compulsory bodies, namely the general meeting of shareholders and the management:

- According to § 46 GmbHG the general meeting of shareholders notably bears responsibility for drawing up annual accounts and allocating the result, claims for outstanding sums payable to the original contributions, the appointment, release and discharge of the executive directors, measures for inspecting and monitoring the management, representing the company vis-à-vis its executive directors as well as changes to the memorandum including a capital increase or reduction under GmbH § 53.
- The executive directors represent the company judicially and extra-judicially (§§ 35 Paragraph 1, 36 GmbHG). Unless the articles stipulate otherwise, they are appointed and released by the general meeting of shareholders (§ 46 Nr. 5 GmbHG); unlike the position under the Law on share companies a legal time limit is not stipulated for their term of office. The executive directors must abide by the restrictions imposed on them by the memorandum or decisions by the shareholders (§ 37 Paragraph 1 GmbHG). They are therefore subject to the shareholders' competence to instruct. However, this restriction of the representation competence only applies within the company's internal relationships, not the external relationships with third parties (§ 36 Paragraph 2 GmbHG).

- A supervisory board is not stipulated for the GmbH by the GmbHG, but can be provided for by the articles of association (§ 52 GmbHG). However, the obligation to establish a supervisory board can also arise for a GmbH from the legal provisions governing employee participation. It is bound by the industrial relations law model of ensuring one-third parity if it employs more than 500 employees (corporate statutes law 1952), 'almost parity' workers participation normally if it has more than 2,000 employees (co-determination law 1976) and parity coal and steel employee participation as a rule if there are more than 1,000 employees working in the steel and coal sector (steel and coal co-determination law 1951).

2.3.3. Making a direct comparison between the public limited company (AG) and private limited company (GmbH), the AG tends to be more capital oriented, especially via the opportunity for capital flotation, whereas the GmbH can be viewed as more person-oriented in legal practice due to the legally established flexibility. In contrast to AG shareholders, the shareholders in the GmbH are competent to issue orders to management. Due to the strict separation between the circle of the capital owners (shareholders) and management (key term: foreign organs) the company's independence vis-à-vis the legal person and capital owners is much more pronounced with the AG than with other legal forms, especially also the GmbH. The shareholders in the GmbH have extensive freedom to arrange the articles of association, while an AG's articles can only deviate from the strict provisions of the Law on share companies insofar this is permitted in the Law on share companies itself (§ 23 Paragraph 5 AktG).

Both company forms, AG and GmbH, have the shared feature that they initially acquire a legal personality with their entry into the commercial register.

2.4. Cooperative

The registered cooperative (eG) is a special form of the profit-making business association. Its legal relationships are regulated in the 'Law on purchasing and trading cooperatives' (Cooperative law, GenG).

In § 1 GenG cooperatives are described as 'companies with a non-closed number of members, aimed at promoting member purchasing or economic interests through joint business activities'. For example, the following are named in § 1 GenG among others:

- Credit associations (cooperative banks),
- Associations for the joint sale of commercial or craft products (sales cooperatives such as wine-grower cooperatives),
- Associations for the production of objects and their sale for joint account (productive cooperatives),

- Associations for the joint purchase of living or economic requirements on a wholesale basis and sale on a retail basis (consumer cooperatives),
- Associations to acquire agricultural or craft goods and for their use for common account,
- Housing associations (housing construction cooperatives).

The special legal form of the cooperative is based on the thinking underlying associatively organised self-help. Unlike the AG or GmbH the legal form of the eG cannot be used for just any object, but can only be selected for a specific cooperative purpose.

A cooperative is set up by at least seven people (§ 4 GenG) via written agreement on its articles (Articles, § 5 GenG). Legal persons can also be members of a cooperative.

The cooperatives law stipulates three compulsory organs for the legal form of the registered cooperative:

- an executive board as the management and representation organ, comprising at least two members and which is elected by the general meeting (§ 24 GenG),
- the supervisory board as a supervisory organ, comprising at least three members, which is elected by the general meeting (§ 36 GenG) and whose tasks are the supervision of the executive board and representation of the cooperative vis-à-vis members of the executive board (§§ 38, 39 GenG),
- the general meeting (§ 43 GenG) as an assembly of members; in societies with more than 1,500 members the articles can also stipulate that the general meeting's rights can be exercised by a meeting of representatives whose members are elected by the members (§ 43a GenG).

Both the members of the executive board and (insofar as the co-determination law (see 2.3.2. above) does not stipulate any employee involvement) members of the supervisory board must be members (§ 9 Paragraph 2 GenG).

Cooperatives are subject to a special regular inspection concerning establishment of commercial relationships and the regularity of management (§ 53 GenG) by a state-recognised inspection association. The Cooperative must belong to an inspection association of this type (§ 54 GenG, compulsory membership).

The cooperative acquires a legal personality with its entry in the register of cooperatives competent for the cooperative's seat maintained by the lower district courts (§ 13 GenG).

2.5. Mutual insurance association (VVaG)

Insurance for members provides the basis for the special VVaG form. Here, (physical and/or legal) persons come together to pool their risks and to cover claims from a joint fund. The legal basis is set out in the insurance supervision law (VAG).

The VVaG is a special type of profit-making association. It is established by notarially confirmed of the notarially-certified articles by the founders (§§ 17, 18 VAG). It acquires a legal personality through a permit from the authorities (§ 15 VAG). A person can only become a member on establishing an insurance relationship with the association (§ 20 Sentence 2 VAG), although the VVaG can also establish insurance relationships with non-members if the articles allow this (§ 21 Paragraph 2 VAG).

The founders of a VVaG must establish a founding stock (§ 22 VAG); a loss reserve is to be established from the business (§ 37 VAG). A person who joins a VVaG subsequently does not have to contribute to the guarantee capital as a rule.

The VVaG is organised similarly to the cooperative (see above 2.4.). The executive board is the management and representation organ, although this is appointed by the supervisory board in the VVaG. The supervisory board elected by the meeting of members supervises the management. The general meeting of members (frequently the 'members' representation' in large VVaGs, which is comparable to the cooperative's meeting of representatives) is the 'supreme organ' (§ 29 VAG) in the VVaG.

Question 3:

Are there sub-types within the individual categories?

3.1. Foundation

There are no special sub-categories in German foundation law as regards the legal establishment prerequisites and other civil law conditions.

Nonetheless, an essential difference is made under the foundation's object between

- public benefit foundations, the commonest type found in practice (approximately 95 % of all foundations in Germany), and which exclusively enjoy tax relief because of pursuing common utility, charitable or church purposes (§ 51 ff. Tax code, AO),
- company-related foundations: these are foundations which themselves operate a company (company bearer foundations), or foundations whose assets include a stake in a partnership or joint-stock company,
- family foundations: another practical example of the foundation, set up here on behalf of a family (for example, the motives may be to perpetuate the entrepreneur's will after death, protect assets against division, support, promote and care for family members, etc.).

However, it must be pointed out once again, that all of these types of foundation are not special legal forms of the foundation, but various practical exploitation forms of the uniform legal type of the legally capable civil law foundation.

3.2. Associations

The distinction between a non-profit-making association, which is also called an 'ideal association' and a profit-making association has already been presented above under Figure. 2.2.

Further special sub-categories do not exist, although many varied practical forms of application exist here as well. The majority of legally capable associations pursue common utility, tax benefiting purposes, especially for the promotion of sport, culture, science or charitable goals.

3.3. Joint-stock companies

Both forms of joint-stock company, the public limited company/corporation (AG) and the private limited company (GmbH) have already been described in figure 2.3.

3.3.1. Public limited companies can be further sub-divided into 'listed' public limited companies (listed AG) and 'small' public limited companies (unlisted AG).

The public AG (listed AG) corresponds to the historical type of public limited company most closely. It is the suitable legal form for companies oriented towards scattered holdings by a broad range of investors.

Since 1994 the Law on share companies has provided special regulations for the so-called small AG (unlisted AG). These are public limited companies that are not listed on the stock exchange (§ 3 Paragraph 2 AktG), i.e. one man (sole trader) AGs or AGs with a closed circle of shareholders. Certain alleviations apply to this sub-type of the public limited company. Thus, unlike a public AG, decisions by the general meeting only have to be notarially certified when the law stipulates a three-quarters or larger majority; for all other decisions a record signed by the chairperson of the supervisory board is sufficient (§ 130 AktG). The small AG is not bound by the obligation on the executive board and supervisory board to make an annual declaration on the use or non-use of recommendations in the 'Government commission for the German Corporate Governance Code' (§ 161 AktG).

A special co-determination law feature applies to 'family AG's', which are public limited companies whose shares are fully held by a family. In companies founded since 10.08.1994 with fewer than 500 employees the supervisory board can be made up solely of shareholder representatives; involvement by employee representatives is therefore not required here (§ 76 Paragraph 6 Company constitution law 1952).

3.3.2. Another special form is the partnership limited by shares/silent partnership (KGaA), although this is still rather rare in practice. The legal basis for this special form is found in §§ 278 ff. of the Law on share companies.

§ 278 Paragraph 1 AktG defines the essence of the KGaA as follows: 'a company with its own legal personality, where at least one partner bears unrestricted liability to the company

creditors (personally liable partner) and the remainder are involved in the initial capital divided into shares, without being liable personally for the company's commitments (limited liability partners). The KGaA is a mixed form of limited partnership and public limited company, in which the personal credit and self organ capacity of the personally liable partner is combined with the capital funding of the public limited company and the stock market flotation capacity open to its shares.

The KGaA must have at least one personally liable partner/full partner, which according to the jurisprudence of the Federal Court of Justice (BGHZ 134, 394) can also be a joint-stock company and especially a GmbH in contrast to the previously prevailing interpretation (also see 279 Paragraph 2 AktG). The personally liable partner can contribute an investment to the company's assets, but does not have to do so. This contribution can be made to the initial capital (but does not have to be); if it is made to the initial capital the personally liable partner is simultaneously a limited partner shareholder.

The personally liable partner is the KGaA's business management and representation organ. Comprehensive restriction of the power of representation by the articles is impossible in principle (§§ 278 Paragraph 2 AktG, 161 Paragraph 2, 114 ff., 126 Paragraph 2 HGB). The personally liable partner is subject to a prohibition on competition (§ 284 AktG). Otherwise, he essentially bears the executive board's rights and obligations under the Law on share companies (§ 283 AktG). The personally liable partner bears unrestricted liability for the company's commitments; several personally liable partners are liable jointly.

The rights of the limited liability partners/silent partners are determined in accordance with Law on share companies provisions (see § 278 Paragraph 3 AktG). In the general meeting, the personally liable partners only have a voting right (even though restricted), if they are simultaneously limited partner shareholders (§ 285 Paragraph 1 AktG). However, general meeting decisions that affect the company's basis require approval from the personally liable partners in accordance with § 285 Paragraph 2 AktG.

As with the public limited (liability) company a supervisory board must be established as well for the KGaA, which means that the information on the public limited (liability) company can be referred to in this instance. The supervisory board implements the decisions of the general meeting and represents all of the limited liability partners in legal disputes versus the personally liable Partner (§ 287 AktG). As the KGaA must be represented by the personally liable partner, the supervisory board is not competent to appoint the company's representation organ, unlike in the case of the public limited company.

At least five founding persons are required to set up a KGaA; these must have the articles confirmed by notarial deed.

- 3.3.3. Apart from the sub-division into single person/sole trader GmbHs and multiple person GmbHs, which nonetheless do not differ fundamentally from each other in principle as regards legal requirements, there are no special sub-types of the legal form of the private limited (liability) company. However, differences may exist depending on the company object and/or partner structure under the memorandum organisation of the GmbH, which enjoys extensive contractual freedom.

- 3.4. There are no special sub-types of the registered cooperative legal form either.
- 3.5. In the case of the mutual insurance association (VVaG) the law in § 53 VAG provides for the special 'smaller associations' type. These are associations, which have a restricted circle of effects professionally, locally or personally and which are eligible for certain alleviations of the strictly standardised set of regulations governing the VVaG. Only members of the association can be allocated insurance in the 'small association'; outside third parties cannot be insurance policyholders.

Question 4:

What are the essential substantive prerequisites for establishing the different types or sub-types of legal persons under private law?

4.1. Foundation

An act of formation is firstly required for the establishment of a legally capable foundation (§ 80 BGB).

The act of formation is arranged via a unilateral legal procedure involving living persons or a disposition by last will by the deceased in the case of a foundation to manage a legacy (§ 83 BGB). It must contain a binding statement by the founder that he is dedicating assets for the fulfilment of a goal stated by him (§ 81 Paragraph 1 Sentence 2 BGB).

The foundation must be assigned articles by the act of formation which according to § 81 Paragraph 1 Sentence 3 BGB, have to contain regulations on the foundation's name, the seat, object and assets as well as the composition of its executive board.

If the act of formation does not fulfil these requirements, the competent foundation authorities can supplement the articles accordingly (§§ 81 Paragraph 1, 83 BGB). As a rule the federal states' foundation laws stipulate the funding of the foundation with a certain minimum capital (as a rule between 25,000 EUR and EUR 50,000) as a prerequisite for recognition of the foundation.

In addition to the foundation object, the act of foundation must primarily regulate the organisation of the foundation. In this respect § 86 BGB refers to various association law provisions. According to these the foundation is to have an executive board as a management organ which represents it externally. The foundation articles frequently grant the founder or close associates the right to appoint the executive board. In addition to the executive board, the foundation articles often provide for a board of trustees as a supervisory organ which is frequently assigned the function of a supervisory board (as in the public limited company, for example).

If the act of formation fulfils the legal minimum requirements under § 81 Paragraph 1 BGB and the lasting and sustainable fulfilment of the foundation object appears to be safeguarded, the competent state authorities must recognise the foundation and thus grant it legal capacity if the foundation object does not endanger the common good (§ 80 Paragraph 2 BGB).

If the act of formation arises from a disposition due to decease, the foundation authorities are entitled to eliminate any shortcomings in the act of formation, and especially to draw up or supplement the articles (§ 83 BGB).

4.2. Associations

4.2.1. Profit-making association

Profit-making associations (§ 22 BGB), which arise in practice extremely infrequently and acquire their legal capacity through state awarding by the competent federal authorities, require at least two members for foundation.

Profit-making associations can comprise:

- Business associations, which act as suppliers in a market on a planned paid basis (e.g. private schools, tourist associations acting as hotel agencies, etc.)
- Associations with a commercial activity in a domestic market (e.g. consumer associations, purchasing centres, information associations etc.)
- Cooperative associations for engaging in commercial cooperation (e.g. private medical settlement offices, radio-taxi centres, copyright exploitation companies, etc.),

where once again it should be pointed out that in legal practice awarding of legal capacity is linked as a rule to the proviso that it is unfeasible or non-permissible for the founders to organise themselves as an AG, GmbH or registered cooperative due to specific circumstances (BVerwG NJW 1979, 2265; BGHZ 85, 89).

4.2.2. Non-commercial registered association (e.V.)

A registered association, whose goal is not oriented towards a commercial business and which achieves legal capacity through entry in the register of associations maintained by the locally competent lower district court (§ 21 BGB) must be founded by at least seven members (§ 56 BGB).

The articles, for which the simple written form is sufficient, must have the association's object, name and seat as a minimum requirement and also announce that the association should be entered in the register of associations (§ 57 Paragraph 1 BGB). According to § 58 BGB these should also contain provisions about the entry and exit of members, as well as whether members must pay a fee and of which amount, the composition of the

executive board, the conditions governing the convening of the general meeting, as well as the form of convening and the recording of its decisions. If one of the requirements set in §§ 56 to 58 BGB is not met the register of associations must reject the entry (§ 60 BGB).

4.3. Joint-stock companies

4.3.1. Public limited company

A public limited company (AG) can be founded by one or more persons who take over shares in return for contributions (cash or fixed asset contributions) (§ 2 AktG). The company is founded by the articles being drawn up by the founders in notarially certified form (§§ 2, 23 Paragraph 1 AktG). AGs can be set up for every legally permissible purpose.

The minimum content of the memorandum and articles of association is stated in § 23 Law on share companies (AktG). The memorandum must state: the founders, the nominal value of the acquired nominal shares or in the case of unit shares the number taken up by the founders as well as the paid up initial capital (§ 23 Paragraph 2 AktG).

According to § 23 Paragraph 3 AktG the memorandum and articles must specify:

- the company name and seat;
- the company object (in the case of industrial and trading companies also the type of products and goods that are to be manufactured or distributed);
- the level of initial capital, which must amount to a figure of at least EUR 50,000 expressed in euros (§§ 6, 7 AktG);
- the division of initial capital either into nominal or unitary shares (in the case of nominal shares their nominal value and the number of shares for each nominal value, the number in the case of unit shares); moreover if several types of shares exist, the type of shares and the number of shares for each type;
- whether the shares have been issued by holder or by name;
- the number of members of the executive board or the rules governing this number.

Furthermore, the articles must contain provisions about the company's announcements (§ 23 Paragraph 4 AktG).

In practice the memorandum usually contain many more provisions. However, account must be taken of § 23 Paragraph 5 AktG which states that deviations of the articles from the Law on share companies provisions are only possible if this is explicitly allowed by the law. In contrast, supplementary provisions are possible, unless the law contains a conclusive regulation (§ 25 Paragraph 5 Sentence 2 AktG).

The subscription of the shares (drawing) occurs with the establishment of the articles, which then leads to the establishment of the public limited company (§ 29 AktG). All shares must be taken up by the founders; an issue on the capital market or a drawing by the company itself is excluded at this stage. A subscription of shares obliges the founders to ensure performance of the contributions. If fixed assets are contributed, their specific nature, the person from whom the company acquires the fixed assets and the nominal value (or in the case of unit shares, the number being issued) are to be established in the articles (§ 27 AktG).

The founders must appoint the first (provisional) supervisory board as well as the auditors for the first full or partial business year in a form certified by a notary (§ 30 Paragraph 1 AktG); the legal provisions concerning employee involvement in the supervisory board do not (yet) have to be applied (§ 30 Paragraph 2 AktG), which means that the first supervisory board only comprises representatives of the shareholders.

The first (provisional) supervisory board thus appoints the company's first executive board (§ 30 Paragraph 4 AktG).

The founders must draw up a founding report on the progress of the formation (§ 32 AktG). This must include the essential circumstances for the suitability of contributions in kind for any contribution in kind; it must also indicate whether and to what extent shares have been taken up by a member of the executive or supervisory board during founding and/or whether such persons are granted other advantages.

According to § 33 Paragraph 1 AktG also the members of the executive and supervisory boards must check the progress of the formation. Moreover, one or more external formation auditors (audit firms or persons with adequate training or experience of accounting, § 33 Paragraph 4 AktG) appointed by the competent lower district court must check the circumstances of the formation, if

- (1) an executive board or supervisory board member is one of the founders or
- (2) shares are taken up on incorporation on behalf of an executive or supervisory board member or
- (3) an executive or supervisory board member has reserved a special advantage, remuneration or compensation for himself in connection with incorporation or its preparation or
- (4) incorporation is being arranged using a contribution in kind/ fixed assets.

In the cases of the above-mentioned figures (1) and (2) the formation audit can also be undertaken by the certifying notary (§ 33 Paragraph 3 AktG). In particular, the formation audit report must cover the completeness and correctness of the founders' details as regards the initial capital, take-up of shares, contributions to the initial capital, special advantages and the contributions in kind. The formation audit report is to be submitted to the competent lower district court/commercial register, where it can be consulted by everyone (§ 34 Paragraph 3 AktG).

4.3.2. Partnership limited by shares (KGaA)

A KGaA must be founded by at least five physical and/or legal persons in notarially certified form (§ 280 Paragraph 1 Sentence 1 AktG). At least one partner must bear unrestricted liability to the company creditors (personally liable partner); the other partners (limited partnership shareholders) are involved in the initial capital divided into shares and are liable up to the extent of their contribution (§ 278 Paragraph 1 AktG).

Apart from the special feature of the exclusive management and representation competence of the personally liable partner(s) (§ 278 Paragraph 2 AktG) the incorporation provisions applicable to the public limited company apply accordingly to the KGaA (§ 278 Paragraph 3 AktG). The same requirements as those applying to the AG are stipulated for the articles of the KGaA, with the exception of the rules on the executive board (§§ 281 Paragraph 1, 23 Paragraph 3 and 4 AktG); see above under 4.3.1. Insofar as personally liable partners contribute assets which are not payable into capital, these also have to be established in the articles according to type and scale.

4.3.3. Private limited (liability) company (GmbH)

A GmbH is founded by one or more physical or legal persons by drawing up a memorandum requiring certification in notarial form (§§ 1, 2 GmbHG). A GmbH can be set up for every legally permissible purpose (§ 1 GmbHG).

According to § 3 GmbHG the minimum content of the memorandum must contain: the company's name and seat, the corporate object, the amount of the original share capital (at least EUR 25,000, § 5 GmbHG) and the original contribution payable by each partner to the original share capital (at least EUR 100, § 5 GmbHG). If contributions in kind are made, the object of the contribution in kind and the amount of the original contribution covered by the asset investment must be set out in the memorandum (§ 5 Paragraph 4 GmbHG); in this case the partners must also present essential circumstances for the suitability of the contribution in kind in an asset foundation report (§ 5 Paragraph 4 Sentence 2 GmbHG). If the duration of the company is to be limited to a certain period or if further obligations vis-à-vis the company are placed on the partners apart from the payment of their original contribution, this must also be included in the memorandum.

The organisational freedom offered by the memorandum of a GmbH stretches much further than with a public limited company. In contrast to an AG, GmbH law is not bound by the principle of formal strictness of the articles. Thus, for example, regulations on secondary obligations as well as subsequent payment obligations (§ 26 ff. GmbHG) can also be incorporated. Transfer of shares in the business can be made more difficult by the memorandum or even excluded (§ 15 Paragraph 4 GmbHG). Shareholders can safeguard the management or voting majority (voting majority right) through special or preferential rights, for example. Regulations for the death of a shareholder can be made, which can extend as far as excluding certain or all heirs from the company. Provisions on the compulsory exclusion of shareholders or competitive restrictions on shareholders are also possible.

4.4. Registered Cooperative (eG)

At least seven people are required to found a cooperative (§ 4 GenG). The articles established by them require the written form (§ 5 GenG).

The object of the cooperative is to 'promote the purchasing or commerce of its members through joint business activities' (§ 1 GenG); see the details above under 2.4.

The articles must at least contain (§ 6 GenG):

- the eG's name and seat,
- the company object,
- provisions concerning any post-payment obligation on the members in the event of the eG's insolvency,
- provisions on the convening of the general meeting of members, certification (recording) of the general meeting and the chairing of the general meeting,
- provisions concerning the cooperative's public announcements.

The articles must also contain (§ 7 GenG):

- the amount to which the individual members can become involved through contributions (share in the business), as well as the payments on the share which each member is obliged to make (the contributions must come to an overall amount of at least one tenth of the share depending on amount and time),
- provisions concerning the establishment of a legal reserve which should cover a balance sheet loss.

Moreover, the articles can stipulate that a member can be involved in more than one share and also set a corresponding maximum number (§ 7a Paragraph 1 GenG). They can also stipulate that members with several shares must be involved (compulsory involvement, § 7a Paragraph 2 GenG), in which case the principle of equality of treatment has to be taken into account. According to § 8 GenG the articles can also contain provisions relating to a temporal limit on the cooperative, a business year that deviates from the calendar year, the requirement for qualified majorities in decision-making items during the general meeting, and also whether membership is to be linked to the member having a certain domicile or whether extension of the business to non-members is permitted. In cooperatives with more than 1,500 members the articles can also stipulate that the general meeting is to be made up of member representatives (meeting of representatives) (§ 43a Paragraph 1 GenG); the meeting of representatives must comprise at least fifty representatives elected by the members from their circles (§ 43a Paragraph 2 and 3 GenG).

4.5. Mutual insurance association (VVG)

The VVG is set up in two legal processes: on the one hand via the act of formation, and on the other through permission from the competent supervisory authorities. The deed of establishment incorporates agreement by the founders on the establishment of the association including the definition of the articles (§§ 17 ff. VAG) and the appointment of the association organs (executive board, supervisory board, general meeting of members or member representatives, §§ 29, 34, 35, 36 VAG). Even where a specific number is not stipulated by law, at least two (physical or legal) persons are legally required, who according to § 20 Sentence 2 VAG must have the will to found an insurance relationship with the association. The articles must be certified notarially according to § 17 Paragraph 2 VAG. The articles must at least contain:

- the association's name and seat,
- the establishment of a so-called foundation stock for the association, which is expected to cover the cost of setting up the association as well as acting as a guarantee stock,
- provisions on the contribution obligation,
- provisions on the association's public announcements,
- provisions on the establishment of the organs: executive board, supervisory board and meeting of the members or member representatives,
- provisions on the establishment of a reserve fund (loss reserve) and on the distribution of the surplus (§§ 18, 20, 22, 24, 28, 29, 37, 38 Paragraph 2 VAG).

The provisions covering the public limited company apply accordingly to representation (§§ 34 Paragraph 1 VAG, 78 Paragraph 2 and 3 AktG), with the executive board having to comprise at least two people. The Law on share companies provisions largely apply accordingly to the other organs (supervisory board and member or member representative meeting) (§§ 35 ff. VAG).

Moreover, the establishment of the VVG assumes permission from the competent supervisory authorities to do business as a mutual insurance association (§ 15 VAG). The VVG acquires legal capacity with this permission from the authorities and not initially with entry in the commercial register (§§ 30 ff. VAG).

Certain alleviations apply to so-called 'smaller associations', i.e. associations which have a limited circle of effectiveness professionally, locally or personally according to their sphere of activity (§ 53 VAG). For example, the articles do not require notarial form and an entry of the association in a register is not required. A supervisory board does not have to be set up, but can be. As regards organisational constitution, § 53 VAG essentially refers to the legal provisions of §§ 24 to 53 BGB on the association.

Question 5:

Which are the formal requirements for founding the individual types or sub-types of legal persons under private law?

5.1. Foundation

The formal prerequisite for acquisition of the legal personality of a civil law foundation is recognition by the competent authorities of the federal state in which the foundation has its seat (§ 80 Paragraph 1 BGB). The foundation laws of the individual federal states determine which authorities are responsible (e.g. state ministries, district authorities, borough councillor's offices).

According to § 80 Paragraph 2 BGB the competent authorities must recognise the foundation as legally capable if the foundation business meets the legal requirements of § 81 Paragraph 1 BGB (see 4.1. above), the lasting and sustainable fulfilment of the foundation goal appears to be secured and the foundation goal does not endanger the common good.

An application for recognition by the founder or his/her commissioned representative is required for foundations involving living persons. In the case of foundations created to manage a legacy, recognition is arranged by the probate court if the heirs or executors do not act.

The following are to be enclosed with the application as a rule:

- the deed concerning the establishment of the foundation (act of formation),
- the foundation's articles,
- proofs or sureties for the preparation of the foundation assets.

5.2. Associations

5.2.1. Profit-making association

A profit-making association acquires legal capacity through conferring by the state (§ 22 BGB). The federal state in which the association has its seat is responsible for the conferring; as a rule the awarding authorities are a state ministry.

§ 22 BGB restricts the conferring of legal capacity explicitly to cases in which other civil law provisions on acquisition of legal capacity cannot be used. Ultimately this means that the competent state authorities can and should only grant legal capacity if the association cannot be expected to assume the legal form of a joint-stock company or cooperative or to waive acquisition of legal capacity. The competent state authorities also check whether the other legal prerequisites for founding an association have been met (see 4.2.1.).

5.2.2. (Non-commercial) registered association (e.V.)

The executive board of the newly founded association, i.e. all of the members entitled to represent the association, must notify the association for entry in the register of associations kept by the lower district court in whose territory the association has its seat (§§ 59 Paragraph 1, 55 BGB). Notification must be made in publicly certified form, i.e. in principle in notarially certified form (§ 77 BGB).

According to § 59 Paragraph 2 BGB the notification in the register of associations is to be accompanied by the articles in an original copy and duplicate plus a copy of the deed(s) appointing the executive board entitled to represent the association (as a rule a record of the incorporation meeting). The articles must be signed here by at least seven members and contain the date they were established (§ 59 Paragraph 3 BGB).

5.3. Joint-stock companies

The joint-stock companies AG, KGaA and GmbH have the common feature that the company must be registered in the commercial register responsible for their seat. The commercial register is maintained under the judicial responsibility of the lower district courts. The corresponding application for registration as well as the required provision of the signatures of organ members with entitlement to represent the firm are to be submitted to the commercial register in publicly certified form, i.e. in principle in notarial form (§ 12 HGB, § 129 BGB); the notary must correspondingly certify the declaring parties' signatures.

5.3.1. Public limited company (AG)

According to § 36 Paragraph 1 AktG a public limited company is to be notified in the commercial register by all the founders as well as all members of the supervisory and executive boards in publicly certified form.

Insofar as cash contributions are involved notification is first permissible when the demanded sum is paid, although this must be at least a quarter of the nominal value of the shares taken up and, if the shares are issued at an figure (premium) above the nominal figure, the premium has also been contributed (§§ 36a Paragraph 1, 54 AktG). Insofar as no material transfer is required for the fulfilment of the contribution obligation (e.g. a permit to use plant and equipment), contributions in kind are to be made in full before application for registration; if the contribution in kind requires transfer of an asset to the company materially, this performance must occur within 5 years of the company's entry in the commercial register (§ 36a Paragraph 2 AktG). If the AG is set up by only one person, the founder must provide a surety (e.g. bank pledge) for the portion of the financial investment which exceeds the demanded amount (§ 36 Paragraph 2 Sentence 2 AktG).

The application for registration is to state that the stipulated contributions required for application have been made; at the same time, it must be proved that the amount payable

for the shares is definitely freely available to the executive board (§ 37 Paragraph 1 Sentence 1 and 2 AktG). If the amount is to be paid into a company account (which is the case as a rule) proof must be provided by corresponding confirmation from the lending institution holding the account for whose correctness it is responsible (§ 37 Paragraph 1 Sentence 3 and 4 AktG).

The executive board members' representation competence is to be stated in the application for registration (§ 37 Paragraph 3 AktG).

The executive board members also have to affirm that they have not been condemned for an insolvency offence (§§ 283 to 283d Criminal Code, StGB) and that the exercise of a profession, branch of a profession, trade or branch of a trade is not forbidden to them due to a court ruling or executable administrative ruling (§§ 36 Paragraph 2, 78 Paragraph 3 Sentence 3 and 4 AktG).

According to § 37 Paragraph 3 AktG the following documents are to be enclosed with the application:

- the articles and the declaration by the founders on subscription of the shares,
- in the event of the allocation of special advantages under § 26 Paragraph 1 AktG or contributions in kind under § 27 AktG, the contracts concluded for the corresponding provisions or for their execution,
- a calculation of the foundation expense to be borne by the company,
- deeds concerning the appointment of members of the executive board and supervisory board,
- the founders' founding report (§ 32 AktG), and the audit reports by members of the executive and supervisory boards as well as by the formation auditors (§§ 33, 34 AktG) and the associated documents,
- insofar as the corporate object or another article provision requires a state permit, the corresponding permit deed (see Part I Figure III. 3.).

All executive board members must sign their name signature for retention by the court (commercial register) in publicly certified form, i.e. in principle in notarially certified form (§ 37 Paragraph 5 AktG).

5.3.2. Partnership limited by shares (KGaA)

The KGaA must also apply for entry to the commercial register competent for its seat. The statements relating to a public limited company apply accordingly to the registration (see 5.3.1.), unless something else arises from the absence of an executive board (§ 278 Paragraph 3 AktG). Nonetheless, the personally liable partners and their representational

competence are to be stated in the commercial register application instead of the (absent) executive board members in the KGaA (§ 282 AktG).

5.3.3. Private limited company (GmbH)

The GmbH is to be registered by all executive directors (§§ 7 Paragraph 1, 78 GmbHG) with the court in which the company has its seat, in publicly (notarially) certified form for entry in the commercial register.

Registration is first permissible when any contribution in kind is complete (§ 7 Paragraph 3 GmbHG) and the cash contributions amount to at least one quarter (§ 7 Paragraph 2 Sentence 1 GmbHG), although together the contributions in kind and in cash must amount to at least EUR 12,500 (§ 7 Paragraph 2 Sentence 2 GmbHG). Contributions in kind must be transferred to the company's ownership before registration. Moreover, if a single person private company GmbH is concerned, a security (e.g. in the form of a bank surety) is to be drawn up for the part of the cash contribution not produced at the time of registration (§ 7 Paragraph 2 Sentence 3 GmbHG).

In the notification the executive directors must ensure that the stipulated original contributions required for registration have been made and the object of the payments is finally freely available to the company's executive directors (§ 8 Paragraph 2 GmbHG). If a one single person private company GmbH is involved and the financial contributions have not been made in full, it must also be ensured that the stipulated surety for the non-paid up portion of the financial contribution is provided (§ 8 Paragraph 2 Sentence 2 linked to § 7 Paragraph 2 Sentence 3 GmbHG).

As with the AG, the representation competence of the executive directors is also to be registered for the GmbH (§ 8 Paragraph 4 GmbHG) and the executive directors must give an assurance that have neither been lawfully condemned for an insolvency offence (§§ 283 to 283 d StGB), nor that a ban on exercising a profession or business has been imposed on them by a judicial or administrative authority decision (§ 8 Paragraph 3 GmbHG).

According to § 8 Paragraph 1 GmbHG the following documents are to be enclosed with the registration:

- the memorandum & articles and authorisations where applicable, if the representatives have participated in concluding the memorandum & articles,
- the deeds relating to the appointment of the executive directors, insofar as these have not already been appointed within the memorandum,
- a list of the partners signed by the executive directors, stating the surname, first name, date of birth and domicile of the individual shareholders as well as the amount of the individual original contribution subscribed by each of them,

- in the case of contribution in kind the contracts supporting the corresponding investments or which have been concluded for their execution (contribution contracts),
- in the case of contribution in kind again a report on formation by subscription in kind as well as documents (e.g. expert opinion, attestation by an accountant or tax advisor) signed by the shareholders stating that the value of the contributed asset reaches the amount of the original contribution subscribed in return for it,
- if the company object requires state approval, the corresponding approval certificate (see First Figure III.3. for details).

All executive directors must also provide their signature for retention by the court (commercial register) (§ 8 Paragraph 5 GmbHG).

5.4. Registered cooperative (eG)

The eG is to be registered in the register of cooperatives in the area where the eG has its seat (§ 11 Paragraph 1 GenG) by the executive board. The register of cooperatives is maintained by the lower district court competent to manage the commercial register (§ 10 Paragraph 2 GenG).

The right of representation of executive board members is to be stated in the application for registration (§ 11 Paragraph 3 GenG). The executive board members must submit evidence of their signature in publicly certified form (in principle notarial form) to the register of cooperatives (§ 11 Paragraph 4 GenG).

The following are to be included with the application for registration (§ 11 Paragraph 2 GenG):

- an original and copy of the articles signed by the members,
- a copy of the deeds concerning the appointment of the executive board and supervisory board,
- certification by an inspection body that the cooperative is admissible, as well as an expert opinion by the inspection body on whether the interests of the cooperative members or creditors are endangered due to personal or commercial circumstances, and especially the cooperative's asset position.

5.5. Mutual insurance association (VVG)

According to § 15 VAG the VVG acquires its legal capacity with permission from the competent supervisory authorities to carry on business as a 'mutual insurance association'. Legal capacity is therefore granted by an administrative deed.

Furthermore, even when not required as a prerequisite for acquisition of legal capacity, the association must be submitted for entry in the commercial register competent for the

association's seat by all the members of the executive and supervisory boards (§ 30 Paragraph 1 Sentence 1 VAG). The application for registration is to state the representative competence held by the executive board members (§ 30 Paragraph 1 Sentence 2 VAG). The supervisory authorities responsible for the VVaG must inform the competent court registry if it has granted permission for a VVaG to conduct business (§ 30 Paragraph 2 VAG).

According to § 31 Paragraph 1 VAG submissions to the commercial register are to be enclosed as an original copy or as a certified copy: these include the deed awarding permission from the competent supervisory authorities to undertake business, the association's memorandum & articles, the deeds appointing the executive and supervisory boards; they also incorporate the deeds establishing the founding stock plus a declaration by the executive and supervisory boards on how much and how the foundation stock has been paid up and asserting that the paid up amount is finally freely available to the executive board. Furthermore, the executive board members must provide a signature for retention by the court (§ 31 Paragraph 2 VAG). The signatures of the registering and signing executive board and supervisory board members are to be certified publicly, i.e. in principle notarially, according to § 12 HGB.

Smaller associations in the sense of § 53 VAG (see 3.5. and 4.5.) merely require permission from the competent supervisory authorities; entry in the commercial register is not required.

Question 6:

Is a register required for the act of formation, amendment or the appointment of executive directors or representatives of legal persons under private law?

6.1. Foundation

There is no uniform federal national directory of foundations. The directories of foundations kept in some federal states are not registers in the legal sense; in particular their entries do not offer any protection of bona fides. Legal capacity is only granted to the foundation via a state act of recognition and not entry in a register of foundations.

Most state foundation laws stipulate that the composition and each alteration of the foundation bodies entitled to represent it are to be notified to the competent foundation authorities, although without this notification does not enjoying constructive validity.

6.2. Associations

6.2.1. Profit-making association

There is also no federal register or directory for profit-making associations, whose practical importance is relatively minor; this nonetheless does not preclude the fact that individual federal states maintain corresponding directories. However they do not have any constitutive effect.

The profit-making association acquires legal capacity exclusively through a state awarding deed issued by the competent state authorities.

6.2.2. Registered association (e.V.)

A registered association acquires legal capacity with its entry in the register of associations, maintained by the lower district court competent for the seat of the association (§ 55 BGB). The association itself, the executive board members entitled to represent it and the type of right of representation they have as well as amendments to the association's articles and composition of the executive board are entered in the register of associations (§§ 64, 67, 71 BGB).

6.3. Joint-stock companies

Joint-stock companies, i.e. AG, KGaA and GmbH, acquire legal capacity on entry into the commercial register, which is administered by the competent local district courts under judicial responsibility. The company itself, the organs competent to represent it and the type of right of representation they have as well as amendments to the memorandum & articles and composition of the organs entitled to represent the firm are entered in the register.

The entry in the commercial register must include the abstract, general power of representation held by the organs (executive board in the AG, personally liable partners in the KGaA, executive directors in the GmbH) and if the concrete representational competence of individual organ members deviates in a specific case from the abstract representation regulation, also the concrete, special representation competence of the corresponding organ members (§§ 39 Paragraph 1 Sentence 2, 81, 282 Sentence 2 AktG; §§ 10 Paragraph 1 Sentence 1, 39 GmbHG).

The legal basis for entry in the commercial register can be found in §§ 38 ff. AktG for the AG, in § 281 AktG for the KGaA as well, and for the GmbH in §§ 9 c, 10 GmbHG.

6.4. Registered cooperative (eG)

The eG also acquires its legal capacity with its entry in the register of cooperatives competent for it. Like the commercial register, this is maintained by the lower district court (§§ 10, 13 GenG).

The cooperative's articles as well as the members of the executive board and their representative competence including later modifications must be entered in the register of cooperatives (§§ 10, 12 Paragraph 2 Nr. 3 GenG).

6.5. Mutual insurance association (VVaG)

As already described under 4.5., mutual insurance associations (with the exception of 'small associations' in the sense of § 53 VAG) must be entered in the profit-making association responsible for the association's seat, although entry of the VVaG in this register does not award the association legal capacity to engage in business; only prior permission from the competent supervisory authorities grants this (§ 15 VAG).

Question 7:

Is a classification or audit undertaken in a register of this type prior to an entry of the act of formation, alteration or appointment of the executive directors or representatives of legal persons under private law?

7.1. Foundation

According to § 80 Paragraph 2 BGB the competent state authorities have to recognise the foundation's legal capacity if the foundation transaction fulfils the legal prerequisites of § 81 Paragraph 1 BGB (see 4.1.), the lasting and sustainable fulfilment of the foundation object is ensured and the foundation object does not endanger the common good.

The foundation authorities must check the presence of these prerequisites and where applicable reject recognition. If the act of foundation does not fulfil the requirements of § 81 Paragraph 1 Sentence 3 BGB (see 4.1.) and if the founder dies before issue of the recognition, which is particularly the case in foundation transactions set up to administer a legacy, the foundation will be given articles by the competent state authorities or incomplete articles will be supplemented, with the founder's wish taken into account (§§ 83 Sentence 2, 81 Paragraph 1 Sentence 4 BGB).

As regards composition and an alteration of the bodies entitled to represent it the foundation laws of the individual federal states foresee an obligation to inform the foundation authorities accordingly as a rule. The foundation laws do not specify a special obligation to carry out inspections by the foundation authorities in this respect as a rule. Nonetheless the foundation laws regularly stipulate that the foundation authorities must supervise whether the foundation is being administered in accordance with the law and foundation articles. In this context the foundation authorities are entitled to suspend or even prohibit a member of the foundation organ from exercise of his function for important reasons, especially because of a violation of obligations or incapacity to engage in regular business. As a rule the foundation laws stipulate that if the required foundation organ is absent the foundation authorities can appoint the missing organ until the shortcoming is eliminated.

7.2. Associations

7.2.1. Profit-making associations

Profit-making associations acquire legal capacity exclusively through state issue by the competent authorities in the federal state in which the association has its seat (§ 22 BGB;

see the details of this above in 2.2., 4.2.1. and 5.2.1.) A special register is not specified for profit-making associations by law.

The competent state authorities check in detail whether the legal prerequisites for foundation of the association have been met and insofar as this is not the case, reject the granting of legal capacity. In this context they must specifically check whether the association cannot be expected to take on the legal form of a joint-stock company or cooperative or to waive legal capacity.

7.2.2. Registered association (e.V.)

Within the course of the entry procedure for a e.V. the lower district court/register of associations must check whether the material and formal legal prerequisites (see 4.2.2. and 5.2.2.) for entry have been fulfilled. If this is not the case, the lower district court must reject the notification of the entry while stating the reasons for this (§ 60 BGB).

The lower district court checks whether the association or its articles violates public association law (e.g. punitive laws, the constitutional order or thinking on international understanding among peoples). Insofar as the object of the association still requires special legal permission, the presentation of this permission must also be checked by the lower district court.

The association's executive board and the type of its representative competence are to be entered in the register of associations (§ 64 BGB); the same applies to any change in the persons or power of representation (§ 67 Paragraph 1 BGB). A special inspection of the suitability of the individual executive board members does not arise as a rule. If the association is without an executive board temporarily or if some of the members required for representation leave the multi-member executive board, the lower district court/register of associations can appoint a stopgap management committee officially (§§ 29, 67 Paragraph 2 BGB) and enter this in the register of associations.

7.3. Joint-stock companies

7.3.1. Public limited company (AG)

The lower district court/commercial register must check whether the company and has been established regularly and registered (see 4.3.1. and 5.3.1. on this topic). If this is not the case, it must reject the entry (§ 38 Paragraph 1 AktG). The latter also applies if the company object requires a state permit (see Figure III 3 on this subject in Part I for the details.) and this permit has not been supplied.

The court can also reject entry under § 38 Paragraph 2 AktG, if the formation auditors declare or it is obvious that the founders' formation report or the inspection report drawn up by the members of the executive or supervisory boards (see 4.3.1. on this topic) is incorrect, incomplete or does not fulfil the legal provisions;

The same applies if the court or the formation auditors adopt the view that the value of the contribution in kind 'is significantly below the minimum payment for the shares issued in return or a concealed subscription in kind is hidden behind an apparent stipulated cash contribution foundation in the articles.

The executive board of the AG and its representative competence (§ 39 Paragraph 1 AktG) plus each later amendment (§ 81 AktG) are to be notified to the commercial register and entered there. In this case a check is also made to establish whether reasons for prevention under § 76 Paragraph 3 AktG impede any appointment (e.g. absence of business capacity, condemnation due to an insolvency offence, judicially or authority imposed ban on exercising a profession or trade in the area of the company object).

If a required executive board member is absent, the court can appoint a stopgap executive board until the shortcoming is remedied (§ 85 AktG).

7.3.2. Partnership limited by shares Partnership limited by shares (KGaA)

The items listed above for the AG apply accordingly to the KGaA, once nothing else arises due to the absence of an executive board. However, insofar as a legal person, especially an AG or GmbH, is a personally liable partner, the competence to inspect held by the lower district court/commercial register covers the organs entitled to represent the body in accordance with the rules applicable to this legal person.

7.3.3. Private limited company (GmbH)

Similar rules to those for an AG apply to the GmbH.

The lower district court/commercial register must check whether the company has been established and registered regularly (see 4.3.3. and 5.3.3.). If this is not the case, the court must reject the entry (§ 9 c Paragraph 1 Sentence 1 GmbHG); the same applies if asset contributions are overvalued (§ 9 c Paragraph 1 Sentence 2 GmbHG) or a case of concealed contribution in kind exists or the state permit stipulated for the corporate object has not been contributed. The court must also check whether the memorandum & articles violate provisions which have been established exclusively or predominantly to protect company creditors or otherwise in the public interest (§ 9 c Paragraph 2 Nr. 2 GmbHG). For the remainder the court generally checks the completeness and effectiveness of the memorandum & articles, the permissibility of the selected company name, the stipulated capital contribution and otherwise correctness of the required statements and assurances.

The GmbH's executive directors and their representative competence (§ 10 Paragraph 1 GmbHG) as well as any later alteration (§ 39 GmbHG) must be submitted to the commercial register and entered there. As with an AG, the court checks whether impediments will prevent an appointment (§§ 8 Paragraph 2, 6 Paragraph 2 Sentence 3 and 4 GmbHG) (e.g. absence of business capacity, condemnation due to an insolvency offence, judicially or authority imposed ban on exercising a profession or trade in the area of the company object).

If a GmbH does not have or no longer has a management competent to act, the lower district court/commercial register can appoint a stopgap executive director until the shortcoming is remedied (§ 29 BGB is applied accordingly).

7.4. Registered cooperative (eG)

The lower district court/register of cooperatives must check whether the cooperative has been established and notified regularly (see 4.4. and 5.4.). If this is not the case, the court must reject the entry (§ 11 a Paragraph 1 GenG).

According to § 11 a Paragraph 2 GenG the court must also reject the entry, if there is fear of endangering the interests of the cooperative's members or creditors due to personal and commercial relations/economic circumstances, especially the asset situation.

The executive board and its right of representation as well as every later change in this respect are to be notified to the register of cooperatives and entered there (§§ 10 Paragraph 1, 28 GenG). Special legal inspection obligations are therefore not specified.

If an eG does not have or no longer has an executive board capable of acting, the lower district court/register of cooperatives will appoint a stopgap executive board with corresponding use of § 29 BGB until the shortcoming is remedied.

7.5. Mutual insurance association (VVaG)

The competent supervisory authorities, who award the VVaG its legal capacity with their permit for business operations (§ 15 VAG), check whether the association has been established regularly.

Insofar the association is entered in the commercial register as well (see 4.5. and 6.5. on this), the registry court must check whether the application for entry is in the proper form, complete and signed by the legitimised and required persons and whether the executive and supervisory board members have been appointed regularly. The registry court does not have to check the articles, as this is the task of the supervisory authorities.

In the case of later alterations in the composition of the executive board, in contrast to the initial notification of the VVaG whereby the corresponding inspection is carried by the supervisory authorities, the executive board members must ensure that no circumstances exist (e.g. lawful condemnation due to an insolvency offence, prohibition on exercising a profession or trade) which would prevent their appointment under §§ 34 Paragraph 1 VAG, 76 Paragraph 3 AktG in the notification to the commercial register.

Question 8:

Name the constitutive or declaratory legal effects of an entry in the corresponding register.

8.1. Foundation

A register for foundations is not stipulated in law. Insofar as directories of foundations are kept in individual states, entries there have a declaratory nature in any case. Legal capacity is only granted through the state recognition act (§ 80 Paragraph 1 BGB).

8.2. Associations

8.2.1. Profit-making association

The items listed for the foundation (8.1.) apply accordingly.

8.2.2. Registered association (e.V.)

Constitutive effect of entry in the register of associations:

- initial entry of the association after foundation (the association acquires its legal capacity with entry in the register of associations, § 21 BGB) including the incorporating articles,
- each later amendment of the articles

Declaratory effect of the entry in the register of associations:

- composition of the executive board as well as any later alteration of the members of the executive board.

Whereas entries concerning the personal composition of the executive board in the register of associations have a mere declaratory importance, third parties enjoy a certain bona fide sight protection vis-à-vis the entries (§ 68 BGB). Protection is granted to someone who undertakes a legal transaction or legal procedure with the 'executive board up to now' in good faith or in irreproachable ignorance of the content of the register. § 68 BGB has the following wording: 'If a legal transaction has been undertaken between the previous members of the executive board and a third party, the change in the executive board can only be enforced against the third party if it has been entered in the register of associations at the time of the legal transaction or if it is known to the third party. If the change is entered, the third party does not have to allow it to be enforced against him, if he does not aware of it and his ignorance is not based on negligence.'

8.3. Joint-stock companies

8.3.1. Public limited liability company/corporation (AG)

Constitutive of entry in the commercial register:

- Initial entry of the company after establishment (the company acquires its legal capacity with the entry of the AG in the commercial register and therefore comes into being as a legal person), § 41 Paragraph 1 Sentence 1 AktG;
- Each later amendment of articles including capital measures (capital increase/capital reduction) first become effective on entry in the Commercial Register (§ 181 Paragraph 3 AktG);
- Inter-company agreements in the sense of § 291 AktG, undertaken by an AG or KGaA which places the management of its company under (the authority of) a different company (management agreement) or which obliges it to transfer its profit to a different company (profit transfer agreement) first become effective when their existence is recorded in the commercial register of the dependant AG or KGaA (§ 294 Paragraph 2 AktG).

Declaratory effect of the entry in the commercial register:

- Composition of the executive board as well as modifications in the personal composition of the executive board members
- Any concrete representative competence held by individual executive board members that deviates from the law or articles.

However, according to § 15 Commercial Code (HGB) the content of the commercial register also enjoys public trust for items subject to an entry obligation although this only has a declaratory effect (e.g. changes in the executive board). As long as an alteration in the executive board is not entered, it cannot be asserted by the company against a third party, unless the change was known to the third party (§ 15 Paragraph 1 HGB). If the alteration has been entered and publicised, a third party must allow it to be asserted against itself; this does not apply to legal transactions which are undertaken within fifteen days of the announcement, insofar as the third party proves that it neither knew nor could have known the fact (§ 15 Paragraph 2 HGB).

8.3.2. Partnership limited by shares (KGaA)

The items listed for the AG apply correspondingly to commercial registry entries for the KGaA.

8.3.3. Private limited company (GmbH)

Constitutive effect of entry in the commercial register:

- Initial entry of the company following establishment (the company acquires its legal capacity with entry in the commercial register (§ 11 GmbHG));
- Each later amendment of the memorandum & articles including capital measures (capital increase/capital reduction) initially become effective with their entry in the commercial register (§ 54 Paragraph 3 GmbHG);
- Inter-company agreements (see 8.3.1. on the topic) first become effective when they are entered in the commercial register of the dependent GmbH.

Declaratory effect of entry in the Commercial Register:

- personal composition of the members of management as well as an alteration in the persons acting as executive directors
- any concrete powers of representation enjoyed by individual executive directors that deviate from the abstract memorandum & articles or legal representation regulations.

However, the legal certification principles of § 15 HGB already mentioned for the AG (8.3.1) also apply as regards the stipulated entry obligations that produce a mere declaratory effect.

8.4. Registered cooperative (eG)

The first entry in the registry of cooperatives also has a constitutive effect for the eG. According to § 13 GenG 'the cooperative does not have the rights enjoyed by a registered cooperative before its entry in the register of cooperatives'. It therefore also acquires legal capacity initially with its entry in the register. Later amendments of the articles only become effective with their entry in the registry of cooperatives as well (§ 16 Paragraph 6 GenG).

The entries on the personal composition and alteration of the executive board have only a declaratory effect in contrast. As a result, the statements under 8.3.1. on the public limited company apply correspondingly.

According to § 29 GenG the registry of cooperatives also enjoys public trust for entries with only declaratory effect, with the scope corresponding to § 15 HGB (see 8.3.1. on this subject).

8.5. Mutual insurance association (VVaG)

Although the VVaG, with the exception of 'smaller associations' in the sense of § 53 VAG, must be entered in the commercial register, this entry only has a declaratory meaning, as

legal capacity is exclusively granted through permission by the competent supervisory authorities (§ 15 VAG). The entry of the executive board members and later amendments in the composition of the executive board have merely a declaratory value.

8.6. Mergers, splits, changes of legal form in accordance with the Transformation law (UmwG)

All types of merger, split or changes of legal form provided for in the Transformation law, first become effective when they are entered in the registers for the legal persons involved. The corresponding registry entries thus have a constitutive effect.

Question 9:

**Which substantive and formal prerequisites apply in the case of amendment of articles?
Are notarial involvement and a register entry required?**

9.1. Foundation

An amendment of foundation articles (statutes) is only possible as a rule if this is provided for in the articles themselves and the underlying conditions established by founder have altered significantly (Federal Court of Justice ruling of 26.04.1976, III ZR 21/74, published in WM 1976, 714 and DB 1976, 1664). The will of the founder is to be taken into account here; if the founder is alive his/her approval is required.

Amendment of articles requires approval from the foundation authorities in any case (thus the Federal Court of Justice in the above-mentioned cited ruling and also in most state foundation rules). The permit is issued on application; the decision by the competent foundation organ responsible for amendment of articles should be enclosed with the application. Involvement by a notary is not required.

Independently of an amendment of the foundation articles through a decision by the competent foundation organ the foundation supervisory authorities can set another object or even remove it, if fulfilment of the foundation object becomes impossible or the foundation endangers the common weal (§ 87 BGB).

As a foundation register is not stipulated by law, no corresponding entry needs to be made. Insofar as individual federal states keep directories of foundations, a entry is thus possible, even if it only has a declaratory effect.

9.2. Associations

9.2.1. Profit-making association

Insofar as the articles do not specify a larger majority, amendment of the articles of a profit-making association requires a resolution adopted by the meeting of members reached by a majority of three quarters of the members who have appeared. The approval of all

members is required for a change of the association's object, where the agreement of the members who do not appear must be given in written form (§ 33 Paragraph 1 BGB). Involvement by a notary is not required.

Amendment of the articles requires the approval of the competent state authorities (§ 33 Paragraph 2 BGB) and becomes effective initially with the issue of this approval. A register entry is not required, as keeping a register is not legally stipulated for profit-making associations.

9.2.2. Registered association (e.V.)

The same material prerequisites as described under 9.2.1. for profit-making associations apply for the amendment of the articles of a registered association.

The following applies from the formal viewpoint: if the general meeting has passed a resolution on amending the articles, the association's executive board (in the number competent for representation) must notify the amendment for entry in the register of associations; the resolution containing the change must be enclosed as an original copy and duplicate, with the original copy being returned to the association after successful entry (§§ 71 Paragraph 1, 66 Paragraph 2 BGB). Registration of the amendment of the articles in the register of associations must be arranged in public certified form by the executive board, i.e. in principle in notarially certified form (§§ 77, 129 BGB); involvement by a notary is not required for the remainder, especially the decision-making by the general meeting of members.

Amendment of the articles becomes effective when it is entered in the register of associations (§ 71 Paragraph 1 Sentence 1 BGB); entry thus has a constitutive effect. The register of associations' inspection competence is equivalent to that during the foundation of the association (see 7.2.2., 4.2.2., 5.2.2.).

9.3. Joint-stock companies

All joint-stock companies share the common feature that an amendment of the articles, insofar as the articles themselves or the law does not stipulate a larger majority (also a lower majority in the AG in certain circumstances, § 179 Paragraph 2 Sentence 3 AktG) must be resolved by a meeting of shareholders with a majority of at least three quarters of the initial capital/authorised share capital represented during the decision-making process (§ 179 AktG, § 53 Paragraph 2 GmbHG). Agreement among all shareholders is required as a rule, if special rights (preferential rights) are being affected. Moreover, § 53 Paragraph 3 GmbHG specifies that an increase in payments due by shareholders under the memorandum & articles can only be decided with the agreement of all involved shareholders.

The resolution requires notarial recording or registration (§ 130 Paragraph 1 Sentence 1 AktG, § 53 Paragraph 2 GmbHG). Amendment of the AG/KGaA articles or amendment of a GmbH's memorandum & articles is initially effective when entered in the commercial register (§ 181 Paragraph 3 AktG, § 54 Paragraph 3 GmbHG). The register's inspection rights are in line with the principles applied at foundation (see 7.3.1., 7.3.2., 7.3.3. on the subject).

The following applies from the formal viewpoint:

9.3.1. Joint-stock company

The amendment of the articles is to be notified by the executive board for entry in the commercial register (§ 181 Paragraph 1 Sentence 1 AktG). If a capital increase or capital reduction is involved, the registration must also be signed by the chairman of the supervisory board (§§ 195 Paragraph 1, 223 AktG). The registrations must be certified publicly and thus in principle by a notary (§ 12 HGB).

The following are to be enclosed with the registration:

- the notarial deed concerning the amendment of the articles as a certified duplicate;
- a complete new version of the articles, which takes account of the decided amendment of the articles and which must be equipped with certification by a notary that the amended provisions agree with the resolution on amending the articles and the non-amended provisions with the full wording of the articles last submitted to the commercial register (§ 181 Paragraph 1 Sentence 2 AktG);
- in the case of capital increases the following must also be added under § 188 Paragraph 3 AktG: duplicates of the subscription certificate, a directory of subscribers signed by the executive board, in the case of contribution in kind the contracts on their establishment and implementation as well as a calculation of the costs accrued by the company through the issue of new shares; for the remainder the provisions relating to affirmations and enclosed proof applicable during founding the AG also apply for the registration of the capital increase (see 4.3.1. and 5.3.1.);
- in the case of a regular capital reduction the proof that the capital reduction has been announced three times in the public pages stipulated for company announcements one year before registration (§ 58 Paragraph 1 GmbHG).

9.3.3. Private limited company (GmbH)

Amendment of the articles of association is to be undertaken by the executive directors in their number entitled to representation while capital increases and reductions are to be notified in the commercial register by all executive directors (§ 78 GmbHG) (§§ 54, 57, 57 i GmbHG). The registrations must be certified publicly, i.e. in principle by a notary (§ 12 HGB).

Just like with the AG, the following are to be included with the notification:

- the notarial deed on the amendment of the articles of association as a certified duplicate;

- a complete, new version of the articles of association, which takes account of the amendments decided on and which must be equipped with certification from a notary, stating that the amended provisions of the memorandum agree with the resolution on the amendment and the unchanged provisions with the last full wording of the articles submitted to the commercial register (§ 54 Paragraph 1 GmbHG);
- According to § 57 Paragraph 3 GmbHG the following are also to be enclosed on capital increases: publicly certified (thus notarial in principle) or notarially certified subscription statements by the acquirers of the new share capital (§ 55 Paragraph 1 GmbHG), a list of acquirers of the new share capital signed by the applicants as well as a complete new list of shareholders with a statement of their original capital shares as well as in the case of contribution in kind increases, the contracts covering their assessment and implementation; for the remainder, the provisions used for the foundation of the GmbH also apply to affirmations and enclosable proofs to be given in the registration of the capital increase (see 5.3.3. on this topic).

9.4. Registered cooperative (e.G.)

In principle a cooperative's articles are amended through a majority of three quarters of the votes cast in the general meeting, insofar as the articles do not provide for other majorities (§ 16 Paragraph 2 and 4 GenG). In any case, § 16 Paragraph 2 GenG stipulates that fundamental amendments of the statutes (e.g. amendment of the corporate object, increases or extensions of members' obligations, etc.) described there in detail cannot be decided with fewer than three quarters of the votes cast. If an obligation on the members to use or supply cooperative equipment or payments is established, the resolution requires a majority of at least nine tenths of the votes cast (§ 16 Paragraph 3 GenG). A notary's involvement is not required for the amendment of the articles. The amendment of the articles becomes effective initially with its entry in the register of cooperatives (constitutive effect of the entry, § 16 Paragraph 6 GenG).

The cooperative's executive board must notify the amendment of the articles for entry in the register of cooperatives. The involvement of a notary is not required here either. Two copies of the amendment resolution are to be enclosed with the notification (§ 16 Paragraph 5 GenG). For the remainder, the provisions applied under § 16 Paragraph 5 GenG for the notification and entry procedure on founding the cooperative apply accordingly (see 5.4. and 7.4.).

9.5. Mutual insurance association (VVaG)

Amendments of the articles are made through a resolution by the highest representation (§ 39 Paragraph 1 VAG) in notarial registered form (§§ 36 Paragraph 1 VAG, 130 Paragraph 1 Sentence 1 AktG). The resolution requires a majority of three quarters of the votes cast; insofar as it does not concern the closing down or new incorporation of an insurance sector, the articles can also stipulate a smaller majority (§ 39 Paragraph 4 VAG). Each amendment of articles must be approved by the supervisory authorities, insofar as this does not exclusively concern a capital increase (§§ 5 Paragraph 3 Nr. 1, 13 Paragraph 1 VAG). The

amendment of the articles is to be notified by the executive board in the number entitled to undertake representation in publicly certified form for entry in the commercial register (§§ 40 Paragraph 1 VAG, 12 HGB). The supervisory authority notice approving amendment of the articles as well as a notarially certified full new wording of the articles are to be enclosed with this (§ 40 Paragraph 1 VAG). In this instance, the court registry only checks whether the amendment of articles has been arranged regularly; material inspection competence is solely to the supervisory authorities. The amendment of the articles only becomes effective on entry in the commercial register, and therefore not yet on approval by the supervisory authorities (§ 40 Paragraph 3 VAG).

For 'smaller associations' in the sense of § 53 VAG the same applies accordingly with the exception of notification and entry of the amendment of articles for recording in the commercial register. Amendment of articles becomes effective here on approval by the supervisory authorities.

Question 10:

Which rules apply to the administration and representation of legal persons under private law (management board, executive board, a single executive director)?

10.1. Foundation

German foundation law (§§ 86, 26 Paragraph 1 BGB) only stipulates the executive board comprising one or more persons as a compulsory organ, whereas the foundation articles in practice usually also provide for the establishment of advisory councils, boards of trustees or similar committees.

The executive board represents the foundation both judicially and extra-judicially. The representative competence assigned to several executive board members, e.g. individual or all-member representation, can be regulated in the articles. The scope of the power of representation can also be restricted in terms of effect on third parties via the articles (§§ 86 Paragraph 1, 26 Paragraph 2 BGB). If the articles do not make any stipulation, a foundation with a multiple-member executive board is represented actively by the entire executive board (although some hold the view that representation by the majority of members is sufficient in an executive board comprising more than two members, c.f. §§ 28, 32 BGB); as regards passive representation, especially for acceptance of statements of will, each individual executive board member is individually competent if doubt exists (§§ 86, 28 Paragraph 2 BGB).

10.2. Associations

The following rules apply to management and representation for all associations, i.e. both profit-making associations and registered associations:

The association must have an executive board as the management and representative organ which represents the association judicially and extra-judicially (§ 26 BGB). The number of executive board members entitled to represent the association is determined by the articles; the executive board can comprise one or more members (§ 26 Paragraph 1 Sentence 2 BGB). The articles can also determine the type of representation (individual or multiple representation). If the articles do not state anything about the type of representation competence for a multi-member executive board, all-member representation applies to a two-person-executive board and in an executive board with more than two members representation is by the majority of the executive board members according to prevailing opinion (cf. §§ 26 Paragraph 1, 32 BGB). For passive representation, thus especially for the acceptance of declarations of will, individual representation competence also applies under § 28 Paragraph 2 BGB, including where a multi-member executive board exists. The scope of the representation power of the executive board can be restricted by the articles including with effect vis-à-vis third parties (§ 26 Paragraph 2 BGB). The articles can specify that 'special representatives' are to be appointed for certain transactions; the representative power of such a representative stretches in a case of doubt to all legal transactions which the business sphere assigned to him usually covers (§ 30 BGB). However, the appointment of such special representatives, which also must be entered in the association register is quite unusual in practice. The executive board members must be entered in the register of associations in a registered (non-commercial) association (e.V.) (§§ 59, 67 BGB).

10.3. Joint-stock companies

10.3.1. Public limited company/corporation (AG)

The public limited company's management body is the executive board, which can be made up of one or more people (§ 76 Paragraph 2 Sentence 1 AktG). In companies with an original nominal capital of more than three million euros the executive board must comprise at least two people, unless the articles explicitly provide for a one-person board (§ 76 Paragraph 2 Sentence 2 AktG). In companies subject to the employee participation process, the at least two-person executive board must include a labour relations manager (see §§ 33 MitbestG, 13 MontanmitbestG, 13 MitbestErgG), whose working area is the company's staff and social affairs.

According to § 76 Paragraph 1 AktG the executive board must manage the company under its own responsibility. This power of leadership cannot be transferred and can at most be shifted to a third party through an inter-company agreement (management contract). The AG's executive board is not bound by the shareholders' instructions. The executive board represents the AG judicially and extra-judicially. Unless the articles stipulate otherwise, in the case of a multi-member executive board only all of the executive board members together are entitled to engage in representation (§ 78 Paragraph 2 Sentence 1 AktG); however each executive board member is entitled to represent the company passively (§ 78 Paragraph 2 Sentence 2 AktG). If multiple representation occurs, the articles can also stipulate that, in addition to representation by several executive board members, joint representation by an executive board member together with a holder of power of attorney is also possible (§ 78 Paragraph 3 Sentence 1 AktG). The articles can also empower the supervisory board to regulate the type of representation in a multi-person executive board

(§ 76 Paragraph 2 Sentence 2 AktG). According to § 78 Paragraph 4 AktG only executive board members entitled to engage in all-member representation can empower one of them to engage in certain business transactions or certain types of business. The articles can also release the executive board generally or specifically from the restrictions of § 181 BGB, whereby no one as a representative of a third party can undertake a legal transaction in his own name or as a representative of a further third party; the articles can also empower the supervisory board to release the executive board from this 'self-contracting' prohibition in individual instances. If such a release is not just awarded in individual instances, it must be entered in the commercial register. If the executive board does not or no longer exists, the lower district court can appoint a stopgap executive board until the shortcoming is eliminated (§ 85 AktG).

The executive board members are appointed by the supervisory board for a duration of a maximum of five years (reappointment is permitted) (§ 84 Paragraph 1 AktG). If an important reason arises, especially a major breach of obligation, the supervisory board can revoke the appointment (§ 86 Paragraph 3 AktG). The supervisory board's essential task is to supervise management (§ 111 Paragraph 1 AktG). Management measures cannot be transferred to the supervisory board; however the articles or the supervisory board itself can stipulate that in the internal relationship certain company business may only be undertaken with approval from the supervisory board (§ 111 Paragraph 3 AktG). The supervisory board does not have representational competence, with the exception of representing the company vis-à-vis the executive board members (§ 112 AktG).

10.3.2. Partnership limited by shares/silent partnership (KGaA)

The personally liable partner (full partner) is the legal management and representation organ in the KGaA (§ 278 Paragraph 2 AktG, §§ 161 Paragraph 2, 114 ff., 125 ff. HGB). If there are several full partners each of them is enjoys individual entitlement to represent the KGaA in the absence of statutory provisions stating otherwise (§§ 161 Paragraph 2, 125 HGB); in this case the articles can also stipulate that a full partner together with a holder of power of attorney are entitled to represent the KGaA as well as several full partners jointly (§§ 161 Paragraph 2, 125 Paragraph 3 HGB). In the presence of several full partners the articles can also exclude individuals among them from representing the company (§§ 161 Paragraph 2, 125 Paragraph 1 HGB). As in the case of an AG, several full partners who are only jointly entitled to represent the KGaA can empower individuals among themselves to undertake certain business transactions or certain types of business in a KGaA as well (§§ 161 Paragraph 2, 125 Paragraph 2 Sentence 2 HGB). For the remainder, the full partners essentially hold the rights and obligations of the executive board in a public limited company (§ 283 AktG). The same applies to the supervisory board with the exception of the right to appoint and release the executive board.

However, the obligation to appoint a labour relations manager is absent in a corporate KGaA subject to the participative process (see §§ 31 Paragraph 1 Sentence 2, 33 Paragraph 1 Sentence 2 MitbestG).

10.3.3. Private limited company (GmbH)

The executive director is or executive directors are the sole legal management and representation organ of the GmbH (§§ 35 ff. GmbHG). The GmbH can have one or more executive directors. If only one executive director has been appointed, this person represents the company alone. If several executive directors are appointed and the articles do not make any deviating rule, the executive directors are only entitled to represent the GmbH actively together (§ 35 Paragraph 2 Sentence 2 GmbHG); however, the articles can stipulate a deviating competence for representation. In practice it very frequently occurs that a regulation in the articles states that where several executive directors exist two executive directors together or one executive director plus a holder of power of attorney are entitled to represent the GmbH; the possibility of individual representative competence can also be provided for. The memorandum can also allow the general meeting of shareholders to determine the type of representative competence. A declaration only needs to be made to a single executive director (§ 35 Paragraph 2 Sentence 3 GmbHG) for passive representation of the GmbH during the acceptance of declarations of will.

Just as with the AG, the memorandum can release the executive directors from the prohibition on multiple representation or self contracting under § 181 BGB (see 10.3.1.) or empower the general meeting of shareholders to declare a release in individual cases. If such a release is not granted for a single case, it must be entered in the commercial register. Moreover if the corresponding applicability of § 78 Paragraph 4 AktG is also approved by jurisprudence, whereby several executive directors entitled to represent the GmbH jointly can empower one of themselves to represent it individually in given instances or for specific types of transactions.

Representation of the GmbH vis-à-vis its executive directors is the responsibility of the shareholders (§ 46 Nr. 8 GmbHG).

The GmbH law sets the number of executive directors in accordance with the company's free will. If no executive director exists, the lower district court can appoint a temporary executive director until the shortcoming is eliminated (§ 29 BGB similarly). In the case of GmbHs, which are subject to corporate employee participation under the co-determination law (GmbHs with more than 2,000 employees), there is an obligation to appoint a labour relations manager as an equally entitled member of management, as is the case with the AG and eG.

Insofar as the articles do not provide for action by a different organ (e.g. an (optional) supervisory board) or a right of dispatch does not exist for individual shareholders, the executive directors are appointed and dismissed by the general meeting of shareholders (§ 46 Nr. 5 GmbHG). A limitation on the duration of office is not legally stipulated (in contrast to with the AG). Revocation is possible at all times in principle (§ 38 Paragraph 1 GmbHG), insofar as the articles do not stipulate otherwise.

In contrast to the executive board of an AG the executive directors of a GmbH are bound by the shareholders' competence to instruct. According to § 37 Paragraph 1 GmbHG the executive directors are 'obliged vis-à-vis the company to meet the restrictions imposed by

the articles or if these do not stipulate otherwise by the shareholders' resolutions on the scope of their competence to represent the company'. However § 37 Paragraph 2 GmbHG makes it clear that such restrictions only apply to the executive directors in the internal relationship, which means that acts of representation undertaken by the executive directors in contravention to these restrictions are valid in external relationships; a transaction that contravenes the obligation thus binds the GmbH in the external relationship with third parties.

10.4. Registered cooperative (e.G.)

The legal management and representative body for the e.G. is the executive board; it represents the cooperative judicially and extra-judicially (§ 24 Paragraph 1 GenG).

The executive board comprises two members (§ 24 Paragraph 2 Sentence 1 GenG); the statutes can stipulate a higher number of members (§ 24 Paragraph 2 Sentence 2 GenG). If several executive board members are appointed, the eG is represented jointly by all executive board members, although the articles can establish deviating representative competence, especially individual representative competence (§ 25 Paragraph 1 Sentence 1 and 2 GenG).

As with the AG and GmbH, the articles can also stipulate that an executive board can represent the eG with a holder of power of attorney (§ 25 Paragraph 2 Sentence 1 GenG). Executive board members authorised to represent the body jointly can empower individuals from among themselves to undertake certain transactions or certain types of transactions (§ 25 Paragraph 3 GenG). Individual or all executive board members in cooperatives can also be released from the prohibition on multiple representation or self contracting under § 181 BGB (see 10.3.1. and 10.3.3. on the subject) by virtue of the articles or empowerment from the appointment organ stipulated in the articles.

Handover to an executive board member suffices (§ 25 Paragraph 1 Sentence 3 GenG) if a declaration of will needs to be transmitted to the eG (passive representation).

Unless the statutes specify otherwise (§ 24 Paragraph 2 Sentence 2 GenG), the appointment body for the executive board is the general meeting (§ 24 Paragraph 2 Sentence 1 GenG), or in cooperatives with more than 1,500 members, whose statute provides for a meeting of representatives, the meeting of representatives (§ 43 a Paragraph 1 GenG). If the executive board is not filled regularly, the lower district court can appoint a stopgap executive board until the lack is remedied (analogous to § 29 BGB).

The executive board must manage the cooperative under its own responsibility (§ 27 Paragraph 1 Sentence 1 GenG). It must observe the restrictions imposed on it by the articles where applicable (§ 27 Paragraph 1 Sentence 2 GenG); nonetheless this restriction has no effect vis-à-vis third parties, i.e. in external relations (§ 27 Paragraph 2 GenG). The supervisory board must supervise the executive board extensively (§ 38 Paragraph 1 GenG). However, it does not have representation competence – with the exception of representation of the eG relative to the executive board members (§ 39 GenG).

10.5. Mutual insurance association (VVG)

The executive board of a VVG must comprise at least two people (§ 34 Paragraph 1 Sentence 1 VAG). According to § 34 Paragraph 1 Sentence 2 VAG the provisions of the Law on share companies law thus apply to it essentially (§§ 76 Paragraph 1 and 3, 77 to 91, 93, 94 AktG); compare 10.3.1. The executive board accordingly manages the VVG under its own responsibility. The executive board is appointed by the supervisory board.

The supervisory board, whose essential task (as with the AG) is the appointment, convening and monitoring of the executive board, comprises at least three people or a higher number divisible by three (§ 35 Paragraph 1 VAG). The provisions applying to the supervisory board of an AG also apply to it correspondingly under § 35 VAG (cf. 10.3.1.).

In the case of an executive board of a 'smaller association' in the sense of § 53 VAG the association law provisions of the Civil Code apply in contrast (§§ 26 ff. BGB) (cf. 10.2.). A supervisory board is not stipulated by law for 'smaller associations'.

Question 11:

What competences and restrictions are borne by the administrators during the exercise of their office and what are these competences and restrictions based on?

11.1. Foundation

According to §§ 86, 26 BGB the foundation is represented exclusively and extensively by the executive board, where the scope of the power of representation including vis-à-vis third parties can be restricted by the statutes.

According to §§ 86, 27 Paragraph 3, 664 to 670 BGB a foundation's executive board must carry out the foundation's transactions with the care borne by a commissioner. In this instance, the founder's will as well as any stipulations in the articles must be taken into account. In the absence of other regulation in the articles the executive board can seek reimbursement of its expenditure incurred (§ 670 BGB).

11.2. Associations

The executive board is the legal representative organ of the association both for the profit-making association and the registered association (§ 26 Paragraph 1 BGB).

The executive board represents the association judicially and extra-judicially (§ 26 Paragraph 2, Sentence 1 BGB). Its power of representation is extensive, but can be restricted by the articles, including with effect against third parties (§ 26 Paragraph 2 Sentence 2 BGB).

The executive board must exercise the association's business with the care borne by a commissioner (§§ 27 Paragraph 3, 664 ff. BGB). Its acts and omissions must be measured against the care that a conscientious and competent person would exercise; it must take responsibility for these relative to the association (§ 276 BGB).

11.3. Joint-stock companies

11.3.1. Public limited company (AG)

The members of executive board is the sole management and representative organ of the AG (§§ 76, 78 AktG). It must 'manage' the company's business 'under its own responsibility' (§ 76 Paragraph 1 AktG). This power of leadership is non-transferrable and can at most shifted to a third party through a inter company agreement (management agreement). In contrast to the executive directors of a GmbH, the members of the executive board of the AG is not subject to instructions from the capital owners. The government justification on the new version of § 76 AktG in 1965 generally assumes that the members of the executive board must take account of the company shareholders' and employees' interests as well as the common good. The executive board's tasks listed in the law also include convening the general meeting (§ 121 Paragraph 2 AktG), the preparation and execution of general meeting resolutions (§ 83 AktG), maintenance of the required ledgers (§ 91 Paragraph 1 AktG) as well as drawing up the annual accounts and the management report (§ 264 HGB).

According to § 90 AktG the executive board must regularly report to the supervisory board on the intended business policy and other fundamental questions of corporate planning (especially the finance, investment and staff planning), the company's profitability (especially the profitability of the shareholders' equity), the state of business (especially the company's turnover and position) as well as transactions which could major significance for the company's profitability or liquidity. According to § 91 Paragraph 2 AktG the executive board must adopt suitable measures, especially a supervisory system, so that developments which could endanger the continued existence of the company can be recognised early.

The executive board can establish rules of procedure for itself insofar as the supervisory board has not already issued these (§ 77 Paragraph 2 AktG).

Only the executive board represents the company externally (§ 78 Paragraph 1 AktG). This representation competence cannot be restricted (§ 82 Paragraph 1 AktG). Insofar as the articles do not stipulate otherwise, the law provides for overall representation by all executive board members (§ 78 Paragraph 2 Sentence 1 AktG); also see 10.3.1. In practice, articles of public limited companies mostly appear to deviate; a regulation is often found whereby the AG with several executive board members is represented by two executive board members or by an executive board member together with a holder of power of attorney.

According to § 93 Paragraph 1 AktG the executive board members must exercise the 'care due from a prudent and conscientious manager' manager during their duties. They must maintain confidentiality concerning confidential company information and secrets (§ 93

Paragraph 1 Sentence 2 AktG). Executive board members who breach their obligation are bound to compensate the company (§ 93 Paragraph 2 and 3 AktG). According to § 88 AktG the executive board members are subject to a legal prohibition on competition; without permission from the supervisory board they are not allowed to either carry on a trade or to do business in the company's sector for their own or third party account or to be the management of a different trading company.

11.3.2. Partnership limited by shares/silent partnership (KGaA)

According to §§ 278 Paragraph 2 AktG, 161 Paragraph 2, 114 ff. HGB the personally liable partner (full partner) is the sole management and representation organ of the KGaA; the limited partners are excluded from management (§§ 278 Paragraph 2 AktG, 164 HGB). If there are several personally liable partners present and the articles do not specify any other regulation, every personally liable partner is entitled to represent the KGaA individually (§§ 278 Paragraph 2 AktG, 125 Paragraph 1 HGB). The reader is referred to 10.3.2. for further details on representation competence. Power of representation can be withdrawn from a personally liable partner following an application by the remaining partners shareholders via a judicial ruling, if an important reason, especially a serious violation of obligations or inability to represent the company regularly exists (§§ 161 Paragraph 2, 127 HGB).

The personally liable partner is subject to a prohibition on competition, just like an AG's executive board (§ 284 AktG; for the details see 11.3.1.).

For the remainder, § 283 AktG also declares that essential Law on share companies executive board obligations are meaningfully applicable to the personally liable partners in a KGaA; this applies particularly also for obligations concerning care and responsibility vis-à-vis the company, drawing up annual accounts and reporting obligations to the supervisory board. Please refer to 11.3.1. for further details.

11.3.3. Private limited liability company (GmbH)

The executive directors of a GmbH are the compulsory specified necessary corporate management and representation organ (§§ 35, 36 GmbHG). If several executive directors have been appointed and the articles of association do not stipulate any deviating regulation the company is represented by all the executive directors acting jointly (§ 35 Paragraph 2 Sentence 2 GmbHG); however, the articles often provide for a different regulation, with two executive directors or an executive director with a holder of power of attorney acting jointly. The executive director does not also have to be a shareholder in the GmbH at the same time.

The GmbH's executive director is bound vis-à-vis the company to maintain the restrictions which are placed on him during his management and representation by the memorandum/articles or the resolutions by the shareholders (§ 37 Paragraph 1 GmbHG); thus he is also bound by instructions in the representation area. Nonetheless, such restrictions have no effect in the external relationship with third parties (§ 37 Paragraph 2 GmbHG); organ power of representation is also unrestrictable outwardly.

In addition to representing the company and binding by instructions, the special legally regulated obligations and tasks borne by the executive director include the company accounts (§ 41 GmbHG), drawing up the annual accounts (§ 264 HGB), convening the general meeting of shareholders (§ 49 GmbHG) as well as the obligation to give each shareholder information about the company's affairs on request as well as to grant inspection of the company's books and records (§ 51 a GmbHG). According to § 40 GmbHG the executive directors are also obliged to notify any change in the composition and level of participation of the shareholders by sending a complete new list of shareholders to the commercial register. According to § 17 GmbHG divisions of the business shares also require approval by the management to be valid.

According to § 43 Paragraph 1 GmbHG the managers must provide 'the care due from a prudent businessman' when exercising their office; if this obligation is not fulfilled they are liable to the company for the damage caused (§ 43 Paragraph 2 GmbHG).

11.4. Registered cooperative (eG)

The cooperative law (GenG) stipulates the executive board as the compulsory management and representative organ (§§ 9, 24 Paragraph 1 GenG). If several executive board members are appointed, all executive board members represent the eG jointly, unless the statutes stipulate otherwise (§ 25 Paragraph 1 GenG). In practice, deviating provisions from this regulation are often found, as is the case with the AG and GmbH (also see 10.4.). In contrast to the AG and GmbH the executive board members of an eG must also be members of the cooperative (§ 9 Paragraph 2 GenG). According to the legal stipulations of § 27 Paragraph 1 GenG the executive board must manage the cooperative 'under its own responsibility'. In this case it must follow the restrictions imposed by the articles (§ 27 Paragraph 1 Sentence 2 GenG); these restrictions have no legal effect vis-à-vis third parties (§ 27 Paragraph 2 GenG); as with the AG and GmbH the executive board's power of representation with external effect cannot be restricted.

In addition to representing the eG the specially regulated obligations and tasks borne by the executive board including maintaining a list of members (§ 30 GenG), regular accounting including drawing up the annual accounts and position statement (§ 33 GenG), the obligation to draw up a report for the supervisory board on request (§ 38 Paragraph 1 GenG), as well as the convening the general meeting or meeting of representatives (§ 44 Paragraph 1 GenG).

According to § 34 Paragraph 1 GenG executive board members must 'employ the care due from a prudent, conscientious manager of a cooperative' as well as to maintain confidentiality concerning confidential information and secrets when doing their duties. In the event of violation the perpetrators are bound to pay compensation to the cooperative (§ 34 Paragraph 2 GenG).

11.5. Mutual insurance association (VVaG)

The executive board is the sole management and representative body of the VVaG.

Decisive provisions apply according to the executive board of a public limited company in terms of its rights, obligations and competences (§ 34 VAG); see 11.3.1. on this topic.

In contrast, the decisive provisions of the Civil Code for the executive board of an association essentially apply accordingly to the executive board of a 'smaller VVaG' (see 11.2.).

Question 12:

How is the appointment of the administrator or representative of legal persons proven?

Insofar as legal persons are to be entered in a public register, proof of the composition of the representative body and the type of representative competence is arranged via a certified extract from the corresponding register or through notarial certification based on an inspection of the register.

The following legally decisive items among others are found in the register of associations, maintained by the lower district court responsible for the seat of the association: the association's legal capacity, its name and its seat, the date of the establishment of the association as well as the names and type of representative competence of the executive board members.

For joint-stock companies (AG, KGaA and GmbH) these items are found in the commercial register, maintained by the lower district court competent for the company's seat (centralisation of the commercial register has been underway since 01.01.2002 which means that it is only maintained by lower district courts in whose territory a state court has its seat, and for all companies which have their seat in this state district, § 125 FGG); the company object is also found in the commercial register.

In the case of the registered cooperative (eG) these facts appear in the register of cooperatives, which is maintained by the lower district court responsible for the cooperative's seat.

Everyone is entitled to consult the register of associations (§ 79 Paragraph 1 Sentence 1 BGB). The issue of simple or certified extracts from the register of associations can be requested by everyone (§ 79 Paragraph 1 Sentence 2 BGB). Proof of a legal interest is not required in any case. Similarly everyone can request certification of the executive board composition from the lower district court (§ 69 BGB).

An inspection of the commercial register as well as the right to request a simple or certified extract from the commercial register is also available to everyone without requiring proof of a special interest (§ 9 Paragraph 1 and 2 HGB). The same applies to the right to request proof on the representation relationships of a trading company from the lower district court (§ 9 Paragraph 3 Sentence 2 HGB). If the commercial register has already been electronically automated, the simple or certified print of the automated file from the lower district court acts instead of the a simple or certified extract from the commercial register (§ 9 Paragraph 2 Sentence 4 HGB).

As regards inspecting the register of cooperatives and the right to request a simple or certified copy or (in the case of an electronic register) a simple or official extract, the principles prescribed for the commercial register apply correspondingly (§§ 156 Paragraph 1 GenG, 9 HGB).

However, notarial certification of the legal relations of a legal person (or another trading company) entered in a public register is assigned major practical importance in Germany. According to § 21 Paragraph 1 Sentence 1 Federal Regulation on Notaries (BNotO) the notary is competent to:

1. Certify a representation entitlement as well as
2. Exhibit certification of the existence or seat of a legal person or trading company, a change in the company name, a transformation or other significant legal circumstances, if these circumstances arise from an entry in the commercial register or a similar register. According to § 21 Paragraph 1 Sentence 2 BnotO a corresponding notarial certification has 'the same power of proof as testimony from the registry court'. According to § 29 Paragraph 2 BNotO the notary can only issue the certification, if he is certain about the events being certified through inspection of the register or a certified register extract. The notary must state the date of the inspection of the register or the date of issue of the inspected certified register extract in the certification (§ 21 Paragraph 2 Sentence 2 BNotO).

As there is no (uniform federal) register of foundations and the directories of foundations kept in some federal states are not registers in the legal sense and thus do not enjoy any public protection of bona fides, proof of the representation relationships in the foundation can neither be provided by an official register extract or a notarial certification. However, in practice the state authorities responsible for foundation supervision issue an official representation certificate on application, if the applicant demonstrates a justified interest; some states have also provided for this legislatively in the state foundation laws.

Proof of representation for a commercial or foreign association can only be certified by the state authorities responsible for recognising commercial or foreign associations. Legal regulations don't exist on the matter. The same applies to a 'smaller' mutual insurance association (VVaG), which does not have to be entered in the Commercial Register (see 4.5. and 6.5.).

Part III

In regard to foreign legal persons, especially also foreign trading companies, existence and power of representation are often difficult to prove. The question often arises: does the company exist? Who must act so that a legally meaningful declaration by the legal person becomes effective? Given increasing internationalisation and globalisation (including in legal transactions) it would be a considerable relief for international legal transactions if there were general notarial competence to draw up certificates of existence and representation that are standardised to the greatest extent possible for domestic legal persons under private law (especially domestic trading companies), at least for use abroad.

German law explicitly provides for such notarial certification in § 21 Paragraph 1 Federal Regulation on Notaries (BNotO). The law assigns such national certification the same power of proof as a certificate from the court registry.

In German legal practice expert opinions by foreign notaries enjoy wide recognition although there is no legal regulation of this, regardless of whether they are based on an entry in a foreign register, or in the absence of a register, on other sources of recognition (simply see Schippel/Reithmann BNotO, § 21 Margin figure 11 and Reithmann DNotZ 1995, 360/367). Such certification from a foreign notary would also provide the client with more transparency and understandability than that often provided by a foreign registry extract. The added value of the notarial activity in international legal transactions is evident and considerable.

Certification of a foreign notary on the existence and representation of a foreign legal person under private law should contain at least the following essential items to be usable in Germany:

1. Confirmation of the legal existence of the legal person;
2. Company name;
3. Seat;
4. Legal form;
5. Name, date of birth and domicile of the legal representative(s)/holder(s) of power of attorney;
6. Type of representation entitlement of the legal/authorised representative (e.g. individual representation or overall representation entitlement);
7. Where applicable, a statement whether the person(s) with a registration entitlement is/are entitled to undertake 'transactions with themselves' (self contracting), which e.g. is important where the person acting for the foreign legal person wishes to appoint himself as the executive director of a German subsidiary of this foreign legal person or the foreign legal person sets up a domestic subsidiary where the person acting for the foreign legal person would also act as a joint shareholder;
8. Where applicable, whether restrictions of power of representation exist (subject of these, scale, etc.);
9. A statement of which date and how the foreign notary acquired certainty about the events or legal relationships confirmed by him (e.g. through inspection of a public register, e.g. the commercial or companies register, from a certified official register extract or by downloading the register data from some official electronic register etc.);
10. In the case of certification due to inspection in a register:
 - the location in which the register is situated,
 - the register number under which the legal person is listed.

The foreign notary's certificate must be equipped with the date of drawing up as well as the notary's official seal and signature. Moreover, specifications about the legalisation of the deed (an apostille where applicable) need to be taken into account.

The notary's certification could be handed over in a general form but, for example, also during the process of registering a power of attorney issued by the legal person in concrete form, and thus offer legal security surrounding the issue of proving the legal person's existence and manner of representation (see the formulation proposals on this issue in various languages in *Notarius International*, Edition 1-2/2002, Page 96 ff.).

An abstract certificate of existence and representation for a German private limited company (GmbH) could look as follows, for example:

Certificate of existence and representation

On the basis of an inspection of (*Date*) in Commercial Register C-city lower district court under HR B 1234 I, the notary Dr. A. B. with my official seat in C-city certify the following:

- XY-GmbH is an existing legal person with legal capacity under German law.
- The company's corporate name is XY-GmbH.
- The company's seat is C-city.
- Legal form: Private limited company.
- Legal representatives (in each case with an indication of the first name, surname, date of birth, address and statement of the function, e.g. executive director, holder of power of attorney, etc.):
 - Ms DE
 - Mr FG
 - Mr HJ
- The company is represented on a legally binding basis by two executive directors jointly (*or*: by each executive director acting alone).
- Restrictions on power of representation: (e.g. no transactions or only transactions with a value of up to €or no sale or burdening of real estate assets).
- The legal representatives are entitled to represent the company in business transactions with themselves in their own name and as the representative of a third party.
- XY-GmbH is registered in the commercial register of the C-city lower district court under number No. B 1234.

C-city, on.....

(Dr A. B., Notary)

Notary's official seal

The relevant required legalisation process should be maintained when using this certification abroad, where applicable by affixing the apostille.

A sub-committee of the *Commission des Affaires de l'Union Européenne* (CAUE) already undertook valuable preliminary work for the drawing up and formulation of notarial representation certification on use abroad in 1996 within the framework of the UINL. The results of the research, partly with formulation proposals in various languages, were published in a closing report titled '*Certificat d'Identité et de Capacité des Sociétés Immatriculées au Registre du Commerce*' in 1996 by the Dutch *Fondation pour la Promotion de la Science Notariale*, Amsterdam, jointly with the *German Notarial Institute*, Würzburg/Germany.

Even greater added value from the notarial activity could arise if involvement by the notary was generally assigned decisive importance in the context of founding a legal person, especially a joint-stock company. Various requirements compete within the framework of foundation, depending on the viewpoint and interest involved. On the one hand, the procedure should be as simple, quick and inexpensive as possible. On the other, an object is created through the foundation of the legal person which as a rule is based on an alliance between several people and thus establishes legal relationships which usually have significant importance. This argues in favour of advising the founders, examining their will and creating a legal context which takes account of the various different interests of the founders but also of protection of legal transactions and especially creditors and thus ultimately produces the desired legal safety, safeguarding of legality and legislative compliance.

German law provides for compulsory notarial registration of the act of formation in the most important legal persons under commercial law - the private limited company (GmbH) and the public limited company (AG). The notary can fulfil the listed requirements without further ado in his public function. The costs for the overall notarial guidance only comprise a percentage of the fees for corresponding legal advice under German law, while the speed at which the legal person is created due to the usually required constructive judicial registration often appears slow and the process time consuming. Here *de lege ferenda* could be created a modification ensuring that constitutive effect could already be assigned to the notarial deed of establishment, thus providing assistance and leading to significant added value to notarial activity – establishing a legal person could then take merely a few hours to accomplish.