

The two-tier system in Germany and Italy

6. The responsibility of the supervisory board and the manager

a) The responsibility of the supervisory board

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It is an elementary interest of the company that the supervisory board is obliged to monitor and inspect the director's board. Their obligationable rights have to be completed in an acceptably manner their due diligence and the duty to monitor the board of directors. The spirit and purpose of the personal liability of the members of the supervisory board are the following: The officers' liability (§§ 93, 116 AktG) is part of the Corporate Governance and fulfils the functions of adjustment for the loss and prosecution and also to the supervisory boards performance in general as a preemptive effect. To escape a possible liability, the members are called upon a correct action towards the company.

The supervisory boards' private law liability splits into internal and external liability.

The supervisory board's task is to supervise the management board's actions. If they breach their duties, there will be a liability of the supervisory board's members.

Core function of the supervisory board is the supervision of the executive board. Because of a time in which there are economic crisis's, every possible additional debtor is searched by the creditor(s). And if a member does not fulfil its duties, the member is or can be liable to indemnify.

Each member of the supervisory board has to insist on a functional work of this institution.

During their administration, every member has to preserve the care of a prudent and assiduous surveillant and members who harm their duty / -ies have to pay for this misbehaviour, according to § 116 in connection with § 93 I, II AktG. Also gripped by this norms are not only supervisory boards in corporations, but also those of associations limited by shares and limited liability companies.

Point 3.8 of the German Corporate Governance Codex (DCGC) does not constitute a self-contained accountability. But it is also due that the German courts will follow the

recommendations given by the DCGC in isolated cases.

Every member of the supervisory board is liable for damages if his decision is caused by the influence of an outsider to act in a way which causes a loss to the company. Both have to pay for this. This does not work in a co-determined limited liability corporation, but this does not change the fact that each member of the supervisory board has to act in a way which fits in the company's interests. The regulation of the liability obtain for every single member, whatever he is an employee representatives or even a member which appointment had been incorrect. Furthermore, the validity incorporates board decisions.

The only possible liability is the one of a single member of the supervisory board, but the board as a whole does never vouch.

The foundation of claim in these cases are §§ 116, 93 of the German Stock Corporations Act (Aktengesetz, AktG).

With the KonTraG began a phase of change in the liability and the security for the members of the board. The Federal Court of Justice gave a judgement which guided to this situation in which the supervisory boards are today.

There are a lot of risks for members of an institution of a company in case of a misconduct, not only by the private law but also by the criminal law. In the case of a violation (or neglect) of a failure to comply with one's duties, this can lead to unpleasant consequences, especially if the failure had been wilful or if their acting had been illegal.

Central rules of law in the case of a liability by supervisory board members are §§ 116 s. 1, 93 AktG. These norms bind them to implement their position with the diligence of a prudent and conscientious outside director. A culpable violation of this duty leads to a liability for the caused damages. Furthermore, a few other rules of law deal with liability by supervisory board members: §§ 117 I, II 1 AktG; §§ 310 I, 318 II AktG; §§ 399, 400, 404, 405 AktG, §§ 331, 334 HGB.

The reference in § 52 I GmbHG guides to the norms of the AktG and for that reason, the non-executive directors of the supervisory board of a limited liability company are in the same way liable for damages as the supervisory board of a corporation. By a generally accepted analogy, advisory boards are treated equally like optional supervisory boards of limited liability companies.

Consequences of this progress are, that from now on, the supervisory boards' duties are wide-ranging enlarged. Recently, besides the historical monitoring function, it also has – in the name of the corporation – to lodge a claim for compensation against the management in case of a suitable / corresponding misconduct. In cases like these, there is no discretion given to the supervisory board, so it has to act, otherwise it will be subjected to an own liability risk.

Core function and core obligation of the supervisory board is to monitor and to control the directors boards' work, for example the decisions and so on, § 111 I AktG. This duty includes the control of all kinds of the business management: economic profitability, expediency, legality and conformity with regulations. Not included is the business management which is exclusively assigned to the board of directors.

Object of the surveillance is the management, especially the management guidance in consideration to the measures taken.

The directors board has to fulfil its job in a lawful way. This implicates not only the rules of the German Stock Corporations Act, but also the articles of their association and of course also the compliance with other important statutes which touch the interests of a company, e.g. competition law (UWG, GWB), environmental law, tax law, antitrust law and others.

The supervisory board can also have the duty to make a report in a situation, in which the internal instruments cannot achieve a constitutional status and furthermore when every citizen would have a disclosure duty or if this would be the only way to deter harm from the company.

Considering the amount of the surveillance, it is enough to prove the regularly given reports from the board of directors and in the normal case, the supervisory board can have confidence in the accuracy and completeness of the current situation. But in the case of objection towards the contents of the bulletin, e.g. by hazardous business dealings. For instance, if a company has just started up, a more critical view on the reports is necessary and expected. In difficult (especially difficult economical) times for the company, it is also required to hold meetings a lot more often to use the right of information in times when hazardous dealings shall be

transacted. Another duty in the monitoring theme is to prove the company to be in enough funds and that the board of directors take appropriate actions in sufficient circumference. § 114 IV AktG offers another possibility to the supervisory board to exert influence on: A few decisions which touch a particular manner of business dealings have to be acquiesce by the supervisory board, otherwise there cannot be a deal and this proviso affirm has to be limited on a special type of deals.

The duty to monitor the board of directors is not only limited on the past, much important is also to invigilate the future in the sense of strategic planning and general questions and decisions about the corporate policy in the near future.

As a conclusion from that, one could say that the supervisory board has a lot of duties and therefore a huge responsibility.

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§ 116 s. 2 AktG obligated them also to be always secretive about their work for the supervisory board acquire information and the counsels.

It is also to classify as a breach of duty if a member uses its insider-information to procure vantages for him- or herself or an affiliated and the same applies for a member of a supervisory board who is also a member in the board of another corporation and which attune for a business dealing that exceed the possibilities of this company but benefits the other one.

Core area of the supervisory board's responsibility is the internal liability.

Every single member has to be responsible for its faults which caused a loss for the enterprise. Claims for damages of the internal and external liability expire in five years, §§ 116 VI, 117 VI, 93 AktG, in the case of §§ 823 I, II, 826, they lapse in three years.

Participation of the general meeting, see § 93 I AktG, prescribes that a duty of replacement towards the corporation cannot occur, if the results which ends up in a loss for the company resulted from an adjudication of the general meeting.

A liability towards the shareholders of the company can base on § 117 I 2, II AktG and also on §§ 310 I, 323 I, 309 IV, 318 II AktG concerning the liability in terms of a combine.

A liability towards third parties, thus furnisher or clients e.g. is typically only possible on tortious rules, an obligee can only take action against a member of the supervisory board, if he distrains an entitlement which the company has against the member, but this is circumstantial and the member has the same objections as towards the company.

The claims against the members of the supervisory board have to be asserted by the board of directors as the leading organ of the company, § 78 AktG. § 147 II 1 AktG also offers the possibility to alienate this right to a proxy.

Because of the development that members of the supervisory board are in very few more cases liable than before the reform of the AktG through the KonTraG and also because of the judgement by the Federal Court of Justice, a new insurance evolved, specialising in insurance of managers and members of supervisory boards.

The origin of the D & O – Policies lays in the USA, but in reality, the first insurance for this theme was created by Lloyd's of London.

In Germany, the insurance for managers was originally unessential, this was judicially not required because shareholders do not have far-reaching rights to sue. For them it is only possible to enforce a claim of interior liability, if they can affiliate 10 % of the nominal capital (§ 147 AktG) or if they combine the majority of a limited liability company. The instrument to assert a claim have not changed in general but the mindset regarding a commencement of action has because of the changes in the market, the economical crisis, the breakdowns of a startling number of companies and the judgement of the highest courts.