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Наблюдательный совет немецкого акционерного общества – права и обязанности

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Аннотация

В данной статье рассматривается одна из форм корпораций – акционерное общество (*Aktiengesellschaft*), а именно один из ее трех органов управления – Наблюдательный совет, первостепенной обязанностью которого является наблюдение за управлением корпорации.

Ключевые слова

Наблюдательный совет, акционерное общество, органы управления, менеджмент, наблюдение.

Introduction

German business law provides for three forms of corporations (as opposed to partnerships): the stock corporation (in German *Aktiengesellschaft*, abbr. *AG*), the public limited partnership by shares (*Kommanditgesellschaft auf Aktien*, abbr. *KGaA*) and the limited liability

company (*Gesellschaft mit beschränkter Haftung*, abbr. *GmbH*).¹ In this article the *Aktiengesellschaft*, and precisely one of its three corporate bodies – the supervisory board – will be examined.

1 Robbers G. An Introduction to German Law. – Baden-Baden: Nomos, 2006. – P. 314; Schmidt K., *Gesellschaftsrecht*. – Köln: Carl Heymanns, 2002. – P. 755.

The reasons to concentrate on the powerful corporate body are not far to seek: the supervisory board is mainly responsible for the supervision of the directors' work and was created to control decisions which might be harmful to the company. As several decisions of the highest German Court (*BGH*)² demonstrate, the *Aktiengesetz* (abbr. *AktG*)³ gave the supervisory board a wide discretion which was often abused, as members of the supervisory board were close to the board of directors' members and for that reason the supervision was not as intensive, as actually intended by the legislative.⁴ This diminished the wealth of the company and led to an abuse of the shareholders' rights. Therefore a range of amendments to the *Aktiengesetz* has been introduced. The *BGH* made the supervisory board more powerful as well – all this to meet the increasing demands of global economic changes and to avoid any abuse of power by the management. The main rights and responsibilities of the *Aufsichtsrat* will be introduced in this article.

2 Bundesgerichtshof.

3 Translation of the *Aktiengesetz* can be found in Wirth G., Arnold M., Morshäuser R., Greene M. *Corporate Law in Germany*. – München: Beck/Vahlen, 2010. – P. 231.

4 See ARAG, Garmenbeck. *BGHZ*. – No. 135, 244; *BGHZ*. – No. 114, 127.

The German (listed) Stock Corporation – an overview

The *AG* can be established for any object allowed by law. It has a legal personality and is generally used to conduct business. Its registered share capital is divided into shares and the usually anonymous shareholders have no personal liability beyond the cost of their shares – only the company's assets are available to the creditors to satisfy their claims against the company.⁵ Its advantage is its easy access to capital markets and therefore its greater scope for raising funds to finance business activities.⁶

The stock corporation has three mandatory corporate bodies: the general meeting (*Hauptversammlung*), whose powers and functions are mainly defined in §§ 118-147 *Aktiengesetz*, the supervisory board (*Aufsichtsrat*), whose powers can be found mainly in §§ 95-116 *AktG* and the management board (*Vorstand*), §§ 76-94 *AktG*.⁷ The memorandum of association, which is mandatory to any

5 Wirth G., Arnold M., Morshäuser R., Greene M. *Corporate Law in Germany*. – München: Beck/Vahlen, 2010. – P. 71.

6 Karel Van Hulle, Gesell H. *European Corporate Law*. – Baden-Baden: Nomos, 2006. – P. 163.

7 Robbers G. *An Introduction to German Law*. – Baden-Baden: Nomos, 2006. – P. 315.

stock corporation,⁸ cannot alter the powers allocated to each of these organs by statute.⁹

The general meeting is the assembly of all shareholders.¹⁰ Certain corporate decisions provided by law (election of the members of the supervisory boards, appropriation of accumulated earnings, appointment of the annual auditors,¹¹ amendments to the memorandum of association, changes in the capital basis, total transfer of assets, and dissolutions etc.) or by the memorandum of association have to be taken by the general meeting.¹²

The company's management and representative organ is the board of directors.¹³ The company's direction is the sole responsibility of the board, it

also represents the company in and out of court §§ 76, 78 *AktG*.¹⁴ It is theoretically not bound to follow the directions of the supervisory board or the general meeting.¹⁵ The powers of the board to represent the company with regard to third parties are unlimited and there is no possibility to limit them through special provisions of the memorandum. However this does not concern the internal powers of the board which indeed might be limited by the declared purpose of the company, the memorandum of association, by certain resolutions of the general meeting and also by decision made by the supervisory board.

The most important limitation has to be regarded in the necessity for certain decisions or transactions to be taken only with the consent of the supervisory board, the examination object of this legal essay.¹⁶ However the paramount competence of this corporate body is the supervision to all activities of the board of directors including their legality and

8 See § 23 *AktG*.

9 Robbers G. *An Introduction to German Law*. – Baden-Baden: Nomos, 2006. – P. 315.

10 Ebke W.F., Finkin M.W. *Introduction to German Law*. – Netherlands: Kluwer Law International, 1996. – P. 147.

11 Lutter M., Krieger G. *Rechte und Pflichten des Aufsichtsrats*. – Köln: Dr. Otto Schmidt, 2009. – Para. 171.

12 For unwritten competences cp. BGH, 26.04.2004 – II ZR 154/02 and II ZR 155/02.

13 Robbers G. *An Introduction to German Law*. – Baden-Baden: Nomos, 2006. – P. 315; Karel Van Hulle, Gesell H. *European Corporate Law*. – Baden-Baden: Nomos, 2006. – P. 164.

14 Ebke W.F., Finkin M.W. *Introduction to German Law*. – Netherlands: Kluwer Law International, 1996. – P. 149.

15 Robbers G. *An Introduction to German Law*. – Baden-Baden: Nomos, 2006. – P. 315.

16 Reimann M., Zekoll J. *Introduction to the German Law*. – Netherlands: Kluwer Law International, 2005. – P. 155.

commercial soundness, as well as to advise the executive board.

Rights and Responsibilities of the Supervisory Board – an overview

Appointment and Termination of Management Board Members

The supervisory board appoints and terminates the members of the management, which is seen as one of the cornerstones of the two-tier system, § 84 para. 1 sentence 1 *AktG*.¹⁷ These rights are considered as the most effective to actively influence policy decisions in public corporations.¹⁸ This power cannot be delegated to other bodies of the company or shareholders.

17 Lutter M., Krieger G. Rechte und Pflichten des Aufsichtsrats. – Köln: Dr. Otto Schmidt, 2009. – Para. 1, 331; Spindler, G. Münchener Kommentar zum Aktiengesetz. – München: Beck/Vahlen, 2008. – § 84 AktG. – Para. 8; Cahn, A., Donald, D. Comparative Company Law. – Cambridge: Cambridge University Press, 2010. – P. 302.

18 Immenga, U. Zuständigkeiten des mitbestimmten Aufsichtsrats? // ZGR. – 1977. – Nu. 16. – S. 251; Baums, T. Corporate Governance in Germany: The Role of the Banks // The American Journal of Comparative Law. – 1992. – No. 2(40). – P. 514; Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. German Corporate Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 84.

In practice usually the chair of the management board and the chair of the supervisory board have huge influence on the selection of the new board member, while the other supervisory board members only approve the appointment of the person proposed to them.¹⁹ The influence of the supervisory board members over the management is enhanced by the fact that it is also the supervisory board that appoints the chair of the management board, § 84 para. 2 *AktG*.²⁰

Determination of the remuneration of Management Board Members

According to § 87 para. 1 *AktG* the supervisory board determines the total remuneration sum which will be paid

19 Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. German Corporate Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 81.

20 Lutter M., Krieger G. Rechte und Pflichten des Aufsichtsrats. – Köln: Dr. Otto Schmidt, 2009. – § 111. – Para. 456; Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. German Corporate Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 88; Hüffer U. Aktiengesetz. – München: Beck/Vahlen, 2012. – § 87. – P. 20; Schmidt K., Gesellschaftsrecht. – Köln: Carl Heymanns, 2002. – P. 807.

to the management.²¹ Due to this section the supervisory board must ensure that the remuneration is reasonable and proportionate with regard to the functions of each of the members of the management board and also reasonable and proportionate with regard to the general financial position of the *AG*.²² These requirements are aimed at protecting the corporation, the shareholders, the stakeholders and creditors against excessive and ruinous remuneration promised to the board members.²³ Paragraph 2 deals with reduction in the total remuneration where a company's financial situation has deteriorated significantly. In this case the supervisory board shall reduce the remuneration to a reasonable level. According to para. 3, if the company becomes insolvent, management board members, whose contracts have been terminated, may only demand compensation for loss-

es suffered, as a result of the termination of the contract, for a period of two years following that termination.²⁴

Supervision and consulting

The supervisory board's paramount duty is to supervise the management of the corporation.²⁵ The supervision is a joint responsibility of the complete supervisory board and neither can be exercised by individual members, nor delegated to other corporate bodies or persons, § 111 para. 5 *AktG*.²⁶ The supervisory responsibilities are confined to the duties of the management board.²⁷ Other groups, like employees appointed by the management do not have to be controlled by the supervisory board.²⁸ When a cor-

21 For the development of § 87 *AktG* see Spindler, G. *Münchener Kommentar zum Aktiengesetz*. – München: Beck/Vahlen, 2008. – § 87 *AktG*. – Para. 6.

22 Spindler, G. *Münchener Kommentar zum Aktiengesetz*. – München: Beck/Vahlen, 2008. – § 87 *AktG*. – Para. 20; Hüffer U. *Aktiengesetz*. – München: Beck/Vahlen, 2012. – § 87. – Para. 2.

23 Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. *German Corporate Governance in International and European Context*. – Wiesbaden: Springer, 2007. – P. 83.

24 Hüffer U. *Aktiengesetz*. – München: Beck/Vahlen, 2012. – § 87. – Para. 13.

25 ARAG, Garmenbeck. *BGHZ*. – No. 135, 244; *BGHZ*. – No. 114, 127; Ebke W.F., Finkin M.W. *Introduction to German Law*. – Netherlands: Kluwer Law International, 1996. – P.148; Habersack, M. *Münchener Kommentar zum Aktiengesetz*. – München: Beck/Vahlen, 2008. – § 111 *AktG*. – Para. 12.

26 Hüffer U. *Aktiengesetz*. – München: Beck/Vahlen, 2012. – § 111. – Para. 9.

27 Lutter M., Krieger G. *Rechte und Pflichten des Aufsichtsrats*. – Köln: Dr. Otto Schmidt, 2009. – Para. 61.

28 Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. *German Corporate Governance in International and European*

poration goes through a period of crisis, the intensity of the supervisory board's control becomes much higher, not only in controlling the activities of the management board, but also in the regularity of control.²⁹

The scope of the duty to supervise the management of the corporation inter alia, comprises the following duties: to compare the financial statements over a period of time; to act pro-actively by scrutinizing the way in which the management board directs the business of the corporation; to allow for consultation with regard to the management board's policy decisions; to ensure that the management board acts lawfully, orderly, according to acceptable business practices and appropriately as far as the business of the corporation is concerned; to scrutinize the information which it obtains from the management board; and act promptly whenever they think that the management board does not act appropriately.³⁰

Context. – Wiesbaden: Springer, 2007. – P. 87.

29 Lutter M., Krieger G. Rechte und Pflichten des Aufsichtsrats. – Köln: Dr. Otto Schmidt, 2009. – Para. 87-91. Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. German Corporate Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 92.

30 Lutter M., Krieger G. Rechte und Pflichten des Aufsichtsrats. – Köln: Dr. Otto Schmidt, 2009. – § 111. – Para. 4.

It forms an important part of the supervisory board's duties, besides the supervision to which it connects, to provide the management board with advice (*Beratung*).³¹ It is, however, important to note that in practice this duty is not seen as one which is forced upon the management board. Quite to the contrary, vital business issues are often referred to the supervisory board by the management board, even under circumstances where the management board has exclusive management power.³²

Right to be informed

To assist the management, the supervisory board has to be informed fully and correctly about the latest developments in the company.³³ In order to ensure that the supervisory board obtains

31 Lutter M., Krieger G. Rechte und Pflichten des Aufsichtsrats. – Köln: Dr. Otto Schmidt, 2009. – P. 96; Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. German Corporate Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 96.

32 Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. German Corporate Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 96.

33 Lutter M., Krieger G. Rechte und Pflichten des Aufsichtsrats. – Köln: Dr. Otto Schmidt, 2009. – Para. 191.

the right information, the management board must report to it periodically on specific matters prescribed by § 90 *AktG*.³⁴ The management has to inform about the intended business policy of the corporation and fundamental matters regarding the planning of the corporation, in particular regarding financial investment and human resource planning; the profitability of the company and in particular the return on shareholders' equity; the progress of business and in particular their turnover and the financial state of the corporation; transactions that are of vital importance for the corporation's profitability and liquidity. All these specific matters on which the management board must report to the supervisory board also have specific provisions prescribing specific periods of time within which the reporting must take place.³⁵

Furthermore, the supervisory board, or even an individual member of the supervisory board, may at any time request a report on the affairs of the company, § 90 para 3 sentence 2 *AktG*.³⁶

34 Hüffer U. *Aktiengesetz*. – München: Beck/Vahlen, 2012. – § 90. – Para. 9.

35 Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. *German Corporate Governance in International and European Context*. – Wiesbaden: Springer, 2007. – P. 94.

36 Hüffer U. *Aktiengesetz*. – München: Beck/Vahlen, 2012. – § 90. – Para. 11.

Approval of Supervisory Board Required for Certain Matters

The supervisory board itself (§ 111 para 4, sentence 2), the article of incorporation or the *AktG* may require the management board to obtain the approval of the supervisory board for specific matters.³⁷

The German legislator defined only some instances where the management must obtain the approval by law, as in the case of advance payment of balance sheet profit (§ 59 *AktG*), granting of credit to members of the management board (§ 89 *AktG*), contracts with supervisory board members (§ 114 *AktG*), granting of credits to supervisory board members (§ 115 *AktG*) and the increase of the registered share capital (§ 202 *AktG*).

However, the right for the supervisory board to create types of transactions, which make an approval necessary, is much more important in the German law.

According to § 111 para 4 sentence 2 *AktG*, the supervisory board has to draw up a catalogue of management

37 Lutter M., Krieger G. *Rechte und Pflichten des Aufsichtsrats*. – Köln: Dr. Otto Schmidt, 2009. – Para. 103; Habersack, M. *Münchener Kommentar zum Aktiengesetz*. – München: Beck/Vahlen, 2008. – § 111 *AktG*. – Para. 100; Hüffer U. *Aktiengesetz*. – München: Beck/Vahlen, 2012. – § 11. – Para. 16.

decisions which require the approval of the supervisory board in order to ensure effective supervisory.³⁸ This makes the supervisory board a strong partner in the company's management. For instance, the supervisory board can create an *ad hoc* approval³⁹ for a measurement planned by the management board, the supervisory board dismisses.⁴⁰ In a following step the supervisory board disapproves this measurement. The management board thereupon has to find a different way to reach the target or refrain from the planned measurement.

However, if the supervisory board disapproves by unanimous agreement, a final option is available to the management board: it can insist that the matter be referred to the general meeting.⁴¹ The general meeting can overrule the supervisory board's decision on the particular matter and the management board will then be bound by the general meeting's voting decision.⁴²

38 Karel Van Hulle, Gesell H. *European Corporate Law*. – Baden-Baden: Nomos, 2006. – P. 165.

39 This is a current disclosure (of significant events).

40 BGHZ. – No. 124, 111, 127.

41 Hüffer U. *Aktiengesetz*. – München: Beck/Vahlen, 2012. – § 111. – Para. 20.

42 Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. *German Corporate Governance in International and European*

Duty to report to the General Meeting

According to § 171 para. 2 sentence 1 *AktG* the supervisory board has a statutory duty to report its views regarding the financial statements to the general meeting;⁴³ in the report the supervisory board should also state in what manner and to what extent it has supervised the management of the company during the fiscal year. At the end of its annual report the supervisory board must also state that it has no objections against the financial statements presented by the management board and that it approves of them.

In listed companies, the supervisory board is statutorily obliged to report on the following matters: the number of meetings it held; the existing or newly formed sub-committees; the number of sub-committees and how often they met. This report has to be done on an annual basis to the general meeting.⁴⁴

Context. – Wiesbaden: Springer, 2007. – P. 89.

43 Lutter M., Krieger G. *Rechte und Pflichten des Aufsichtsrats*. – Köln: Dr. Otto Schmidt, 2009. – Para. 562; Kopff, N. *Münchener Kommentar zum Aktiengesetz*. – München: Beck/Vahlen, 2003. – § 171 AktG. – Para. 8; Hüffer U. *Aktiengesetz*. – München: Beck/Vahlen, 2012. – § 171. – Para. 2.

44 Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. *German Corporate*

Action against Members of the Management Board

The supervisory board is obliged to institute action against members of the management board who are in breach of their duties and cause damages to the corporation.⁴⁵ In deciding to proceed with such an action, the supervisory board has to analyze the possible action carefully, taking into consideration aspects like procedural risks and whether there is a real possibility of claiming back the damages suffered by the corporation.⁴⁶ In fact the supervisory board will only be excused for not proceeding with such actions if there are compelling reasons, based on the best interest of the corporation. That may include factors like the public's opinion of the corporation, the negative effect such actions could have

Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 99.

45 Lutter M., Krieger G. Rechte und Pflichten des Aufsichtsrats. – Köln: Dr. Otto Schmidt, 2009. – Para. 432; Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. German Corporate Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 100; Spindler, G. Münchener Kommentar zum Aktiengesetz. – München: Beck/Vahlen, 2008. – § 93 AktG. – Para. 10.

46 Lutter M., Krieger G. Rechte und Pflichten des Aufsichtsrats. – Köln: Dr. Otto Schmidt, 2009. – Para. 422.

on the productivity of members of the management board and general labor relations in the corporation.⁴⁷

Conclusion

Business operations and transactions are becoming more complex, so are the responsibilities committed to the supervisory board. Historically grown German stock corporations employ a unique system of a dualistic board. To meet the increasing demands of a global economic environment, the German legislature is constantly improving the effectiveness of the corporate bodies and especially the supervisory board – its rights and responsibilities are still in the focus of this development.

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47 Plessis J.J.d., Großfeld B., Luttermann C., Saenger I., Sandrock O. German Corporate Governance in International and European Context. – Wiesbaden: Springer, 2007. – P. 100.

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The Supervisory Board of German Stock Corporations – Rights and Responsibilities

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Abstract

The article titled "The Supervisory Board of German Stock Corporations – Rights and Responsibilities" by Dr. A. R. Fabisch examines the main rights of the supervisory board, as one of the three mandatory corporate bodies of a German stock corporation (Aktiengesellschaft). The author outlines the system of liability in the German listed stock corporation, the benefits this form of corporation offers and the three mandatory legal bodies, i.e. the board of directors, the supervisory board and the general meeting. In the following the article emphasizes the rights and responsibilities of the supervisory board, which are (1) according to § 84 AktG the right to appoint and to terminate the management board members, a power that cannot be delegated to other bodies of the corporation, (2) the right to determine the remuneration of the board members, § 87 AktG – this provision has been amended in 2009 due to inflated salaries of the recent past, which are named to be concurrently causative for the economic crisis of the last years, (3) the legal power to supervise and consult the board members, § 111 AktG, a responsibility which can further be split into the main duties to compare the financial statements, to take part in policy decisions and to codetermine the corporation's development, (4) the right to be informed, as the basis of supervision as well as decision-making, (5) the approval which has to be given by the supervisory board, for instance in the case of advance payments of balance sheet profits and the increase of the registered share capital, (6) the statutory duty to report its views regarding the financial statements to the general meeting and (7) the obligation to institute actions against members of the management board who are in breach of their duties.

Keywords

Supervisory board, stock corporation, corporate body, management board, supervision.