
Liability of the managing director

Working session 6

Thursday 28 August 2014

„Who is not afraid to be a company director?“

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1. Civil Liability - Germany

- Personell liability for all damages caused by the managing director
 - The standard of due care applicable to managing directors is rather generally described in sec. 43 of the German Law on Limited Liability Companies (GmbHG)
 - Typical legal obligations are for instance: the payment of social security contributions, due and proper accounting, the annual publication of financial statements and the obligation to file for insolvency
- Limitation of the civil liability by creating different departments?
- Application of the principles for the liability of employees to the managing director of a limited company?



1. Civil Liability - Italy

- Duties and responsibilities are broadly described by the Italian Civil Code Art. 2476 (*the Director shall manage the Company in compliance with the Law and Company's bylaws*) and Art. 2392 (*Directors shall perform their tasks with the necessary diligence as the nature of the appointment requires and their personal expertise allow*);
- The relevant test is the one described under Art. 1176 of the Italian Civil Code, meaning the general diligence due in performing professional duties;
- Responsibilities, and relevant civil liabilities, are generally linked to (i) the performance in the management, (ii) corporate governance and (iii) conduct upon dissolution of the Company;
- Claims pertaining Directors liability shall be brought in front of the Special Chambers on Corporate Law; specific remark on the burden of proof and field of investigation



1. Civil Liability - Switzerland

- Conditions: a) damage; b) unlawful breach of duty; c) natural and adequate causality between breach of duty and damage; d) fault;
“The members of the board of directors and all persons engaged in the business management or liquidation of the company are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties.” Art. 754 I SCO
- In case of delegation of powers, liability of directors limited if they can prove that they acted with all due diligence when selecting (cura in eligendo), instructing (cura in instruendo), and supervising (cura in custodiendo) the managing directors or executive officers to whom they delegated their duties;
“A person who, as authorised, delegates the performance of a task to another governing officer is liable for any losses caused by such officer unless he can prove that he acted with all due diligence when selecting, instructing and supervising him.” Art. 754 II SCO



2. Criminal Liability - Germany

- In Germany a limited liability company may not be prosecuted criminally, only the managing director of the company may be held liable for crimes
- Criminal liability for crimes committed by the company:
 - Withholding employee social insurance contribution
 - Environmental crimes
- Criminal liability for crimes committed by the managing director:
 - Misdeclaration in the registration of the company
 - Delay in filing for insolvency
 - Violation of the secrecy obligation
- Strategies to prevent criminal liability risks, criminal compliance
 - Establishing a monitoring system or a code of conduct
 - Internal investigations into criminal offences with the assistance of a COO
 - Sanctions for violations
- Example: Interviews concerning financial issues: CEOs of Porsche are accused of market manipulation (OLG Stuttgart, 18. August 2014)



2. Criminal Liability - Italy



- Proper criminal liability of the Director is limited to those managing listed companies;
- Remarks on Legislative Decree 231/2001 introducing criminal liability for Companies; significant aspects also under Labour Law perspective;

2. Criminal Liability - Switzerland



- As directors have a position of guarantor of the company's assets, they may be criminally liable for their own behavior (**Personal Criminal Liability**), e.g. Criminal Management; False Statements about Commercial Business; False Statements to the Commercial Register Authorities; Breach of Manufacturing or Trade Secrecy; Criminal Liability in Case of Bankruptcy; Mismanagement; Fraudulent bankruptcy and fraud against seizure; Reduction of assets to the prejudice of creditors; Bribery; etc.;
 - *“A special obligation, the violation of which establishes or increases criminal liability, and which is incumbent only on the legal entity, the company or the sole proprietorship, is attributed to a natural person, if that person acts: a. as a governing officer or as a member of a governing officer of a legal entity; b. as a company member; c. as an employee with independent decision-making authority in his field of activity within a legal entity, a company or a sole proprietorship; or d. without being a governing officer, member of a governing officer, company member or employee, as the de facto manager”. (Art. 29 Criminal Code)*
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3. Agreements to exclude or limit the director 's liability

- A preclusion of liability only for slight negligence can be agreed in the service contract. However, a liability for intention and gross negligence can not be excluded.
 - In addition to that, the parties may conclude in the service contract a limitation of the liability up to a maximum amount to limit the liability of the managing director or the limitation period of five years for claims against the director stated in sec. 43 para. 4 GmbHG can be reduced
 - D&O insurance – covering all financial damages caused by the director?
 - Example: Breuer (Former CEO of Deutsche Bank) ./.
Kirch Group: Bank's supervisory board decided to make a claim against Breuer (Spiegel, 4. August 2014)
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