

AIJA PRAAG 2014 – JOINED SESSION LABOUR AND CORPORATE

Who is not afraid of being a company director ?

The position of a director/managing director of a company has changed substantially during the past couple of years. Legislative changes, close monitoring by shareholders and the international economic and financial crisis have contributed to an increased attention towards management of companies. The expectations towards directors and managing directors have become much higher. Last but not least, also the media have developed a particular interest in company management, in particular, the remuneration of top management.

1. The legal position/status of a director and/or managing director in the different jurisdictions ?

In the Anglo-American legal system, a so-called Board of Directors usually manages companies. It is the governing and, at the same time, the controlling body. The shareholders appoint the members of the board, usually in the general shareholders meeting. The Board of Directors consists of executive (managing) and non-executive (supervising and controlling) members. In a nutshell, this is single body structure.

German corporate law is different and provides for a two body solution. For example, the German stock corporation (*Aktiengesellschaft* or *AG*) consists of a Management or Executive Board (*Vorstand*) and an independent Supervisory Board (*Aufsichtsrat*). The Supervisory Board consists of members appointed by the shareholders as well as the employees (one third or even half of the members). The Supervisory Board appoints and recalls the Executive Officers. The Executive Officers report to the Supervisory Board. Therefore, the members of the Supervisory Board are often compared with the non-executive directors in the Anglo-American legal system. The Executive Officers are comparable to the executive members in the Board of Directors.

The Chairman of the Management/ Executive Board of a German stock corporation is often called the Chief Executive Officers (*Vorstandsvorsitzender*). Another Officer is, *for example*, the Chief Financial Officer (*Finanzvorstand*).

The term Managing Director usually describes the main representative of a German limited liability corporation (*Gesellschaft mit begrenzter Haftung* or *GmbH*). The Managing Directors usually reports directly to the shareholders assembly, sometimes there are voluntary Supervisory Boards.

a. Status of the Executive Officers and the Managing Directors

For both types of company managers one needs to separate two different legal relationships:

- The contractual agreement level – agreed between the Parties
- The functional/ body level – governed by the respective laws

Both levels are independent from another and need to be separated carefully. This means: a Managing Director can be appointed as Managing Director even without any contractual relationship just by a shareholder's resolution. And a recalled Managing Director might still have a valid contractual agreement with the company that needs to be terminated separately.

The contractual agreement is often called Service Agreement (*Dienstvertrag*). It contains the usual provisions regarding responsibilities, salary, bonuses, vacation, company car, covenants and a variety of other, individual clauses (e.g. D&O insurance). The service agreement of a Managing Directors is usually fixed-term. The service agreement is often accompanied by certain management guidelines describing the responsibilities if there is more than Officer or Managing Director and also the reporting duties towards the shareholders or the Supervisory Board.

aa. The Managing Director

The Managing Director(s) have the responsibility to support and achieve the respective company's purpose and to execute all required actions. Managing Directors must take all organizational, commercial and staffing actions that are necessary to fulfill the tasks of the company. The Managing Director represents the Company and acts of its behalf. This also applies to litigation. The Managing Director is named in a Public Commercial Register (*Handelsregister*). Depending on how the shareholders structured the representation, each Managing Director may represent the company alone or only together with another Managing Director. To third parties, the Managing Director's powers cannot be limited at all. However, he needs to follow the decisions of the shareholders' meeting and the shareholders may limit his powers. Such provisions are often included in the articles or bylaws of the company. If the Managing Director disregards such limits, he can be held liable while the company is still bound in relation to the third party (*Example: The Managing Director signs a contract for 1 Million Euros even though he is only allowed to sign contracts up to 250.000 Euros. The contract is still*

valid, while the Managing Director can be held liable for the 750.000 Euros). Detailed rules for the role of the Managing Director are included in the German limited liability company law (*GmbH-Gesetz*). The Managing Director is appointed and recalled by the shareholders' meeting. A recall does not require special reasons (however, this can be required if expressly provided in the bylaws).

It is still not clear whether a Managing Director is working as self-employed person or as an employee. While the Federal German Civil Court (*Bundesgerichtshof*) and the prevailing opinion in the legal literature see the Managing Director as a self-employed person, the Federal Employment Court (*Bundesarbeitsgericht*) constantly holds that Managing Directors can also be regarded as employees if certain requirements are met. Usually, the question is answered by assessing the grade of personal dependence on the company. A decisive criterion is the level of autonomy towards the shareholders' meeting and the scope of freedom to operate the company. Commonly, Managing Directors have significant powers to manage the company more or less without constant interventions from the shareholders. Only if the Managing Directors needs to report on a very regular (day-to-day) basis to the shareholders, requires consent even for smaller dealings or if the Managing Director requires approval for hires or terminations, one could argue the Managing Director is not self-employed, but an employee.

Sometimes, it happens than a prior employee is appointed as Managing Director and that the Parties forget about the earlier employment contract. The employment relationship can survive even after the appointment as Managing Director as inactive. The Federal Employment Court holds that an earlier employment contract is implicitly terminated if there is a written service agreement. If there is only an oral service agreement, the employment contract is usually regarded only as inactive and is reactivated once the Managing Director is recalled from his function. This is a huge risk for the company as this an lead to the application of the Protection Against Dismissal Act and the company would need reasons for a termination of the employment contract which are usually not identical to the reasons for the recall of the Managing Directors function. Normally, a Managing Director is not entitled to Protection Against Dismissal and can therefore be terminated without reasons as long as the (statutory or contractual) notice period is observed. Only in case of a immediate termination without notice, the company needs an important reason. The question self-employed/employee is also relevant for litigation. A self-employed Managing Director needs to file legal action at the Civil Courts carrying the full financial risk in case of a loss. An employee Managing Director may file his legal actions at the employment courts where both parties bear their

legal expenses separately. Moreover, the civil courts require a significant retainer for the court's fees. However, most cases related to Managing Directors are argued at the civil courts.

bb. The Executive Officers in the Management Board

The Executive Officers in the Management Boards of a German stock corporation also have the responsibility to manage the company free from instructions. They are supervised by the Supervisory Board, but are operating the company in the day-to-day business independently. They need to respect any guidelines, e.g. incorporated in the bylaws. Pursuant to German case law the Management Board has far reaching freedoms and discretionary powers. Once the Management Board or a single Officer exceeds the borders of accepted actions, he can be held liable for misconduct or even embezzlement. The Management Board is responsible, *inter alia*, for operating the company, report to the Supervisory Board, closing the yearly accounts, convene the general shareholders' assembly.

While Managing Directors can theoretically be regarded as employees under certain circumstances, Officers are only rarely classified as employees. Therefore, Officers are working as self-employed persons under a service agreement. As mentioned before, this contractual relationships needs to be separated from the functional level as representative of the company. The shareholders' meeting appoints and recalls Officers. Officers may only be appointed for a maximum period of five years, but may be renewed afterwards for another term. A recall requires important reasons, especially a severe breach of duties, inability of a proper management or loss of confidence by the shareholders' general assembly. Therefore, the Executive Officers of a Stock Corporation enjoy far more independence than Managing Directors of a Company with limited liability.

Again, the service agreement of an Officer requires separate termination. As such agreements are often fixed-term without the right to prior termination, the company is often bound to the agreement until the end of the term or needs important reasons. The important reasons for a recall may be, but are not necessarily important reasons for the termination of the service agreement. Often, the company needs to pay the remuneration until the end of the term.

cc. The Members of the Supervisory Board

The Supervisory Board is appointed by the shareholders' general assembly. Only stock corporations are required to have a Supervisory

Board; limited liability companies are only obliged to form a Supervisory Board if they have more than 500 employees pursuant to the One-Third Employee Participation Act (*Drittelbeteiligungsgesetz*).

The Supervisory Board is a separate body of the company and supervises and controls the Management Board. The Board appoints and recall the Officers. The Board may request approval for certain actions of the Management Board and has far reaching supervising and reporting duties (especially related to annual accounting). Moreover, the Supervisory Board represents the Company towards the Management Board. Depending on the company's size, the Supervisory Board consists (1) of 50 % shareholders' representatives and 50 % employee representatives (if the company has more than 2000 employees) or (2) of 1/3 employee representatives and 2/3 shareholders' representatives (if the company has between 500 and 2000 employees) or only of shareholders' representatives (in company with less than 500 employees). This means that larger companies are strongly dependent on the employee representatives.

The Members usually get a remuneration set by the shareholders' general assembly. The amounts differ significantly usually depending on the company's size. It often consists of a fixed-based salary and additional variable components, e.g. one-time payments for each Supervisory Board meeting.

2. What is the impact of corporate governance legislation or soft-law (such as corporate governance codes) for the position of a director / managing director ?

Good corporate governance is a hot topic since the 1990s in Germany. However, German corporate law still provides significant freedom for companies on how they structure their bylaws and day-to-day business. Only in 2000, German government introduced the so-called 'Corporate Government Codex'. This Codex is reviews on an annual basis by an independent Commission. Therefore, the rules of the Corporate Government Codex is soft-law and a self-regulation of the German economy. However, the Codex is reference in the German Stock Corporation Act and therefore, indirectly hard-law. Pursuant to sec. 116 German Stock Corporation Act the Supervisory Board and the Management Board of a Stock Corporation need to publish on a annual basis if the company complies with all recommendation of the Codex (so-called Declaration of Conformity). Moreover, the is German case law that the violation of the Corporate Government Codex may lead to invalidity of (for example) Supervisory Board resolutions.

The Codex constantly renews its recommendations. There are recommendations on Supervisory Boards as well as Management Boards. Inter alia, the Codes contains provisions regarding (examples):

- Cooperation between Management Board and Supervisory Board (sec. 3 of the Codex): Constant reporting, on D&O insurance (recommending 10 % own-risk deductibles for raising the personal risk of Officers up to 1,5 fixed annual income)
- The Management Board (sec 4 of the Codex): Recommendations on the remuneration, especially related to bonus-agreement (long-term bonuses preferred), severance-caps (golden-parachute limits).
- The Supervisory Board (sec. 5 of the Codex): Especially on the structure and the members of the Board (diversity, autonomy, waiting periods for former Officers before becoming Supervisors)

In general, the Codex is only applicable to Stock Corporations. However, most Courts also use the Codex as reference if it comes to contractual breaches or misconduct of Managing Directors.

3. Liability of a company director / managing director?

All representatives of companies are subject to liability. As Managing Directors and Officers are the representatives in the day-to-day business, they are facing the most significant liabilities when it comes to the requirement of sound and prudent management.

The Managing Directors and Officers is usually on liable towards the company when it comes to violations of proper management rules. Normally, these Executives have certain freedom when it comes to risk taking. Officers of German Stock Corporations can be liable if they violate the so-called 'Business Judgment Rule' significantly. Pursuant to this rules, the Management Board may take certain risks as long as it serves the company's purpose and may be beneficiary. Therefore, the Management needs to disrespect noticeable risks. However, in case the company sues for damages, the Company needs to prove a possible breach of duty, any damage occurred and a chain of causality between the Officer's actions and the damage. The Officer needs to prove that he/ she complies with his duties to due diligence. Moreover, Officers may also be held liable (personally) in case of wrong ad-hoc reports.

If Executives exceed the limits of proper management, they may also face criminal charges such as embezzlement. All Executives have far-reaching fiduciary duties. This also applies to insolvency situations. Management needs

to ensure proper and early insolvency filings in order to avoid personal liability. They also need to ensure compliance with certain employee workplace protection laws and may be held liable for violation of such laws. Moreover, they are liable for the deduction of taxes and social security contributions (by tort law).

The high-level Executives can also be held liable for their actions by third-parties. A really extremely interesting and important case is the one of the former Deutsche Bank CEO Rolf E. Breuer. During an 2002 interview for Bloomberg TV, Breuer made some comments on the capability of the Kirch-Group (one of the largest German Media Companies: ProSieben, Sat.1, Sky Germany) to raise money on the financial market. The Kirch Group sued Breuer for damages in the amount of 3,5 Billion Euro as his comment allegedly led to the insolvency of the company a few weeks after the interview. The Kirch Group also sued the Deutsche Bank as Breuer was the CEO at the time of the comment. The case has been settled in February 2014 (after 12 years of hard litigation) for 925 Million Euro. This is still a landmark case for CEO liability.

4. Are there any recent changes in remuneration legislation / policies for company directors / managing directors ?

- See below under 8.

5. Has it occurred in your jurisdiction that management decisions were revised after being challenged by stakeholders (e.g. consumers)?

We don't have a concrete case in mind, but management decisions will definitely have been subject to revisions after being challenged by stakeholders. There are sometimes interventions from employees, unions, work councils leading to a change of strategy. The same applies if customers jointly file complaint directly with the management or also with customers associations or customer protection authorities.

6. Has your jurisdiction issued specific legislation on female presence in the board of directors ?

The German jurisdiction has not yet issued specific legislation on female presence in the board of directors, while this issue was discussed several times in politics in the last few years.

However, the government formed last year, have reached the following compromise on this issue:

- a. Companies with 2000 or more employees, which are listed on the German stock exchange, shall have in 2016 a minimum of 30% of women on their supervisory boards. If this minimum percentage won't be reached, the seats on the supervisory board remain vacant.
- b. The composition of the management board of directors shall remain in place as before, so that a fixed quote regarding the appointment of women for the management board won't be established for now by the German jurisdiction. Though, companies with more than 2000 or more employees, which are listed on the German stock exchange, shall publish in 2015 a binding target to increase the proportion of women in the supervisory boards, the management board of directors or in a high-level management team.

Since today, a concrete progress was not made concerning the adoption of laws on concerning this topic. In the near future, a legislative proposal is expected to implement the suggested changes.

7. Is there in your jurisdiction an obligation to have a minimum of independent and/or non-executive directors in the board ?

In accordance with section 77 para. 1 of the German Corporation Act (*Aktiengesetz*) all members of the management board of directors are in general authorized to manage and represent jointly. Therefore a management measures requires the unanimous consent of all members of the management (*Einstimmigkeitsprinzip*). If only one member of the management board objects a planned management measure, the management measure must be suspended. In this regard, it makes no difference whether the company is listed or not since section 77 para. 1 of the German Corporation act applies to all stock corporations.

Therefore, in the German jurisdiction does not exist a legal obligation to have a minimum of independent and/or non-executive directors in the board.

However, this legal obligation can be departed from, if the articles or the bylaws stipulate other provisions, for example it is possible that individual management board members are responsible for particular functions (e.g. production, distribution).

All management responsibilities are by the way non-transferable to third parties (e.g. employees), so that the members of the management board are not able to transfer their management responsibilities. Hence, the management of the company will be exclusively exercised by the members of the management board.

8. Are there in your jurisdiction certain obligations that are different for private and for publicly owned companies and which are not yet covered by the above topics?

a. Composition of Board of Directors

In accordance with section 76 para. 2 of the German Corporation Act (*Aktiengesetz*) the board of directors of a stock corporation may consist of one or more persons, in case the share capital exceeding three million Euros, the board of the directors must comprise at least two persons, unless the Articles of Association stipulate that the Executive Board consists of one person only. The same applies for a private owned company, e.g. a limited liability company shall have at least one managing director in accordance with sec. 6 para. 1 of the German private limited liability company Act (*GmbHG*).

b. Compensation for Directors

Concerning the compensations for directors there are differences between a private and a publicly owned company:

For private owned companies there are no restrictions for compensations for the managing directors of the company.

For a stock corporation, the following applies concerning the compensation for the directors:

Since August 5, 2009, the German Act on the Appropriateness of Management Board Compensation (*Gesetz zur Angemessenheit der Vorstandsvergütung*, "VorstAG") came into force. The VorstAG introduces clarifications to the criteria that are relevant to determine the appropriateness of board compensation of publicly owned company respectively of a stock corporation, in particular:

- The compensation must not only be appropriate in view of the respective board member's tasks, but also with respect to the individual board member's performance;

- The compensation shall not exceed "customary" (übliche) levels, unless there is a good reason for such excess.

From the legislative material, one can expect that the customary level will need to be determined by taking into account compensation levels in the same industry, country and in companies/groups of a similar size and complexity. Furthermore, the general salary structure in the company/group managed by the management board is an additional criterion for assessing what level of compensation is customary.

c. Obligation to have certain stakeholders represented in the Board

There are no obligations in the German jurisdiction to have certain stakeholders in the board of directors in a stock corporation. In accordance with sec. 76 para. 3 of the German Corporation Act (*Aktiengesetz*) every natural person with full legal capacity may be a member of the management board. The same applies for a private owned company, e.g. a limited liability company.

9. Position of directors/ managing directors in the event of disposal and/or merger of the company?

In the event of a disposal or a merger of a company, it is not typical to have a special wording on the position of the management in transfer agreements, but in some cases the parties agree that any liabilities towards the managing directors (including pension liabilities) are not transferred to the purchaser of the company. Further, it is not uncommon, that the parties agree, that the managing director have to resign as of the date the takeover becomes effective. In this regard, the purchaser usually holds the managing director free and harmless of all claims of the company.

Further provisions concerning the position of the managing director in the event of a disposal or a merger of a company are mostly uncommon, because the purchaser of a company normally will not replace the position of a managing director in the event of a disposal or a merger.

10. Are there in your jurisdiction minimum requirements to become a company director?

The managing director represents the GmbH in its external relations. He will appoint by the shareholders and are subject to the shareholders-instructions.

In accordance with sec. 6 para. 2 of the German limited liability company law (*GmbHG*) only a natural person with full legal capacity may be a managing

director of a limited liability company. Even foreigners may be appointed managing directors of a GmbH. If the company is managed from Germany, such persons must have the required residence and work permits. If a foreigner is to manage the company from abroad, that person may be appointed managing director if he is able to enter Germany at any time without the need for a visa.

Further there are no laws or provisions in force in Germany, that a director of a company shall have a certain education or similar to become a company director.

In their capacity as the representative body of the GmbH, managing directors must comply with numerous legal duties to take due care as well as duties of care developed by the legislation. If the managing directors are guilty of breaching their duties, they are personally liable. The standard of due care applicable to managing directors is rather generally described in sec. 43 GmbHG as follows: In matters relating to the company, managing directors must work with the due care of a prudent and professional businessperson. Typical legal obligations are, for instance, the payment of social security contributions, due and proper accounting, the annual publication of financial statements in the electronic Federal Gazette and the obligation to file for insolvency.

For the purposes of the application for the GmbH-s registration in the Commercial Register, the managing directors must assure the notary public in writing that no circumstances exist which might impede their appointment. Incorrect statements are punishable under law. Impediments are, for example, the prohibition of further trade activity or a legally effective conviction for an insolvency offence. The GmbH Reform has extended the list of reasons for impediment as defined in sec. 6 GmbHG; it now also includes a legally effective sentence to at least one year of imprisonment for fraud, embezzlement and withholding or misappropriating remuneration. Based on a temporary provision, these reasons for impediment do not apply to managing directors who were appointed prior to the date when the Reform took effect.

If the shareholders appoint a person as managing director in a grossly negligent manner although there are reasons for an impediment, they will bear the liability risk for damages for which the managing director is responsible.

11. Does a company director has specific obligations with regard to:

a. Non-compete obligations

The managing director is subject to a prohibition on competition during his term of office even without explicit non-compete provisions in his manager contract due to its fiduciary duty to the company.

After the termination of his work as managing director, there is no longer a non-compete obligation for the managing director of the company, if a post-contractual non-compete clause was not agreed between the managing director and the company. However, for the most managing director contracts, you will find such a post-contractual non-compete clause for a limited time period (regularly two years) to avoid, that a managing director will compete in any way with the former company.

But also without a post-contractual non-compete clause, the managing director is not allowed to enter into a unfair competition with the former company, e.g. the former managing director is not allowed to poach the employees of the company or to offer goods or services that are replicas of the former company in accordance with sec. 4 no. 9 and no. 10 of the German law against unfair competition (*UWG*). Therefore a company is protected by the *UWG* in case the managing director is creating illegal and unfair competition after his work as managing director in the former company and a post-contractual non-compete clause was not agreed with the former managing director of the company.

b. Corporate Opportunities

The company director is, due to its fiduciary duty to the company, obliged to reveal "corporate opportunities" towards the company, in order to use a corporate opportunity for his own personal interest. Therefore, a managing director is obliged to exploit a business opportunity in favor of the company. In this regard, it doesn't matter the managing director heard about a corporate opportunity in his free time or not.

In the event of violation of this duty, the managing director is in breach of his obligation. In such case, the company is entitled to claim for damages caused by the managing director. Furthermore, the company may be entitled to terminate the management contract with immediate effect.