

The Duties and Possible Actions of Management Board Members of a German Stock Corporation in the event of Conflicts of Norms

The Study

In the course of globalization in recent decades, companies have become much more international. This applies not only to the expansion of the operative business beyond national borders, but also to the staffing of the boards. In particular, the management boards of globally operating stock corporations consist of members of various nationalities, and a DAX company operating solely in Germany is hardly conceivable. This trend is countered by increasing regulation at national level, which, apart from a large part of the European Union's internal market, is hardly coordinated. Against this background, the wide scope of duties board members of internationally operating stock corporations have to obey cause problems in certain cases. Those can be illustrated by means of two examples:

1. First, there is the case of a German stock corporation which is requested by an US authority to disclose certain information in the course of investigations and has therefore a legal obligation to do so under US law. However, compliance with this disclosure obligation is contrary to European data protection law, with the result that an infringement of either law is inevitable. However, the management board of the company has a duty towards the company to ensure compliance with all legal provisions addressing the company. Since the prevailing opinion in German law does not make a distinction between domestic and foreign provisions, it is unclear which violation of law is in accordance with the management board members' duties.
2. The second case concerns a US citizen who is a member of the management board of a German stock corporation. This company intends to enter into a profitable business transaction with Iran. However, a US embargo regulation prohibits any US citizen to participate in or support such transactions in any way. However, management board members are subject to an indispensable residual monitoring obligation. It is therefore questionable to what extent such foreign embargo provisions affect the duties owed to the company.

So far, the study of such conflicts of norms from the perspective of the respective norm addressee (that means beyond international public law) has received only little attention in German jurisprudence. The dissertation aims to close this gap. The methodological approach is primarily based on traditional legal doctrine, while a legal comparison with US corporate law is used as a source of inspiration with regard to the management board members' duty to act lawfully.

The Key Findings

At the beginning, the study defines the "international conflict of norms" for the purpose of the study and therefore specifies the scope of research: An international conflict of norms arises when two different norms with different contents from different jurisdictions apply to a particular case in an incompatible way, with the result that the norm addressee cannot comply with one norm without violating the other. International public law does not prohibit this in principle. An analysis of several international law mechanisms reveals that, in practice, such (unresolvable) conflicts particularly exist in foreign trade law and in case of a collision of US-American disclosure obligations with European data protection law. From the management board members' point of view, those conflicts can be divided into the categories of company-related conflicts (Example 1) and personal conflicts (Example 2), depending on the person addressed by the conflicting norms. This categorization determines the structure of the study.

Regarding company-related conflicts of norms, it can be concluded that the board members' duty to act lawfully is a decisive factor in answering the question regarding the board members' duties and possible actions: Without any duty to act lawfully, the dealing with company-related conflicts of norms equals a purely business-related decision. If, on the other hand, the duty to act lawfully relates exclusively to German law a reasonable decision from business perspective and the legally required conduct can diverge strongly. If the duty to act lawfully refers equally to both German and foreign law, there will be room for any decision within the limits of public policy. However, the study also shows that the doctrinal and conceptual basis of the generally accepted duty to act lawfully is more or less unclear. A look at US corporate law, which also has such duty to act lawfully, shows that this duty arises from the fact that directors are obliged to act in good faith which also means to act within the boundaries of the corporate charter. This limits the business activities to the boundaries of law. This explains where the duty to act lawfully arises from but at the same time its foundation in the principle of "good faith" shows that this legal obligation is highly dependent on the motivation for the concrete act. This concept can be transferred to German law: The management board is bound by the provisions of the articles of association. Here, all business activities that are within the general limits of private autonomy can be agreed on (c.f. Section 134, 138 para. 1 of the German Civil Code (*Bürgerliches Gesetzbuch*)). Accordingly, the management board may only take those actions which could, in theory, also be agreed on in the company's articles of association. Since Section 134 of the German Civil Code is applied very restrictively, it generally depends on Section 138 para 1 of the German Civil Code, where the motivational aspect is also considered. This means that the management board, in accordance with its duty of care, can violate the law, if it will not be deemed immoral after an overall assessment, including the motivation for the concrete violation. As a result, the study establishes a program for coping with company related conflicts of norms. While due to the relevance of a domestic morality standard the violation of foreign law in favor of compliance with a domestic provision will never be considered to be contrary to the duty to act lawfully, the application of specific assessment criteria shows that in certain cases (for instance example number 1) a violation of domestic law may also be permissible.

Regarding personal conflicts of norms, the study shows that in absence of specific corporate law solutions, the general law of obligations of the German Civil Code needs to be applied. Section 275 para. 3 of the German Civil Code grants exemptions from an obligation upon raising a plea if such obligation is unreasonable due to a personal obstacle. However, this cannot be done indefinitely, as the company's interest in a well-functioning management board has to be considered as well. The study explores the relevant criteria and limitations. If, in an individual case, recourse to Section 275 para. 3 of the German Civil Code is not an option, a genuine resignation by the conflicted board member from the management board may be considered as the last resort in order to escape the conflict. Furthermore, the possible legal consequences of the discharge from obligations are examined, in particular, with regard to the entitlement to continued payment of remuneration. As a rule, it is to be assumed that the claim to remuneration under the employment contract will continue to apply pursuant to Section 616 sentence 1 of the German Civil Code. Finally, the study establishes a program for coping with personal conflicts of norms.
