

Additional duties for executive board members and managing directors in times of the Corona pandemic

Dr. Christian Becker
Dr. Christian Glauer

The so-called Corona crisis (SARS-CoV 2/Covid-19 pandemic) has changed economic life in Germany and all over the world in one fell swoop. Supply chains have been interrupted, employees are working largely from their home offices and some companies and production facilities are closing down completely. This entails considerable challenges for executive board members and managing directors. Even and especially in this state of emergency, executive board members and managing directors have to fulfil their legal obligations. In the following, some measures and proposals for action are mentioned (without any claim to completeness), which executive board members and managing directors should consider now.

1. Legal starting position

Pursuant to Section 93 I 1 of the German Stock Corporation Act (*AktG*), members of the executive board must exercise the due care and diligence of a prudent and conscientious manager in the management of the company. A distinction is made between (i) entrepreneurial decisions made by the executive board member, in which the executive board member has a discretionary decision-making power under the so-called Business Judgement Rule, and (ii) the fulfilment of other legal duties, in the fulfilment of which the executive board members have no decision-making leeway. These other duties, such as the preparation of the annual financial statements, the immediate disclosure of inside information and the monitoring of the financial situation against the background of the duties to file for insolvency, must be fulfilled by the members of the executive board in any case.

When taking business decisions, such as decisions on the acquisition or sale of a business, investments in research projects or expansion into or withdrawal from a sales region, each member of the executive board must act on the basis of appropriate information (see Spindler, in: Münchener Kommentar zum

Aktiengesetz, 5th edition 2019, Section 93 marginal no. 55 et seqq.). In doing so, they must weigh the reasons, opportunities and risks for and against the corresponding measures for the company and make a reasonable decision for the benefit of the company from an ex-ante perspective. If the members of the executive board adhere to these rules, they are not liable even if a decision later turns out to be wrong and the company suffers damage as a result.

In order to enable the members of the executive board to exonerate themselves in any subsequent liability proceedings, it is advisable, particularly when making decisions that will likely prove critical, to document these decisions with all the information and recitals on which the decision is based.

The aforementioned principles apply equally to managing directors of a limited liability company (*GmbH*) (see § 43 GmbHG).

2. Verification of the financial stability of the company by adjusting the corporate planning

In the current special situation and against the background of the changed economic conditions, it is the first and foremost duty to immediately review and adjust the existing corporate planning correspondingly. Since no one can predict the course of the Corona pandemic and the resulting effects on the economy as a whole as well as on the company, any adjustment of plans will be subject to considerable uncertainty. Against this background, so-called best- and worst-case scenarios must also be prepared. In doing so, members of the executive board can base their planning on (i) the estimates of the Robert Koch Institute for the course of the Corona pandemic and (ii) the estimates of recognised economic research institutes such as the IFO Institute for the overall economic effects. In this context, highest priority is given to planning the company's liquidity and ensuring its solvency. In connection with the preparation of adjusted corporate planning, particular attention must be paid

to the fulfilment of the following duties of the executive board / managing directors:

- Capital market-oriented companies are required to withdraw a current guidance in case of a significant deviation of the adjusted plan from a previously published guidance in an ad-hoc announcement. As long as the adjusted plan is not yet reliable, the company should postpone disclosure in accordance with Art. 17 IV MAR by a resolution of the executive board if its requirements are met.
- In addition, the executive board may have to review existing duties to file for insolvency due to illiquidity and/or over indebtedness. This is also in particular because a current bill provides for the suspension of the obligation to file for insolvency until 30 September 2020 - with the possibility of a further extension until 31 March 2021 - for companies that find themselves in difficulties due to the consequences of the Corona pandemic. Such bill regarding the suspension of the obligation to file for insolvency because of the spread of infections with SARS-CoV 2 (COVID-19 pandemic) was unanimously adopted by the German Federal Parliament (*Bundestag*) on 25 March 2020 and is expected to be ratified by the Federal Council of Germany (*Bundesrat*) on 27 March 2020.

Even if the adjusted corporate planning can only be drawn up on "uncertain ground" today, the members of the executive board must draw it up immediately and adjust it continuously. It is acceptable that these plans will not have the detail level of previous plans and that the planning assumptions will involve considerable uncertainty. The preparation of such a plan cannot be dispensed with by pointing out that such a plan makes no sense at all as the uncertainties are currently far too great. This would constitute a breach of duty and could entail considerable liability on the part of the executive board / managing director.

3. Taking all available measures to limit the damage

In the current special situation, the members of the executive board must take all measures to avoid as

far as possible the disadvantages arising for the company from the Corona pandemic. These include in particular:

- the initiation of all cost reduction measures, including the immediate application for short-time work and the development of a medium-term personnel plan,
- taking all measures to generate liquidity; these include intensified receivables management, optimization of working capital, talks with banks with the aim of maintaining credit lines, talks with shareholders/partners regarding the provision of additional funds and the application for state aid from the federal and state governments,
- reviewing the main existing contracts with customers, suppliers, landlords and other contractual partners with regard to possible contract amendments and termination options and taking the necessary measures, and
- securing the supply chains to the extent possible.

4. Obtaining expert advice

In the event of lack of their own expertise, the members of the executive board must seek expert advice (Fleischer, in: Spindler/Stilz, Aktiengesetz, 4th edition 2019, § 93 marginal no. 209). If the members of the executive board make use of the expert advice of third parties for support in the current exceptional situation, they must comply with certain legal requirements in order to avoid liability at a later date. According to the decision of the German Federal Court of Justice (BGH, judgement of 20 September 2011 - II ZR 234/09, NZG 2011, 1271 "Ision"), a member of the executive board can only rely on external expert advice if (i) the expert has the necessary expertise, (ii) the complete facts of the case are brought to his attention and (iii) the executive board member considers the expert advice to be reasonable on the basis of a plausibility check. In addition, care must be taken to ensure that the expert acts independently and free of self-interest for legally required compliance reasons and has not previously been preoccupied with the facts of the case.

5. Conclusion

The executive board members and managing directors of companies have to overcome considerable challenges in the current special situation of the Corona pandemic. In doing so, they are faced with increased duties which they have to fulfil. The manag-

ers are well-advised to document their decisions and the measures taken in detail, even in these hectic times. Otherwise they expose themselves to considerable liability risks.

Note

This overview is for general information only and cannot replace concrete legal advice in individual cases. If you have any questions please contact your usual contact person at GÖRG or the authors Dr. Christian Becker at +49 89 3090667 40 or cbecker@goerg.de or Dr. Christian Glauer at +49 89 3090667 40 or cglauer@goerg.de. Information about the authors can be found on our homepage www.goerg.de.

Our Offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN

Kantstraße 164, 10623 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE

Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

FRANKFURT AM MAIN

Ulmenstraße 30, 60325 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG

Alter Wall 20 – 22, 20457 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH

Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90