

COVID-19: Germany Update — Management Duties During the Crisis

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The following article is the translation of an associated podcast, which is [available in German here](#).

The COVID-19 outbreak creates numerous challenges for managers and directors in companies. In the present situation, they must keep a focused view of the business, while leading the company prudently through the crisis and laying the foundation for a rapid recovery.

Management board members and managing directors are now tasked with having to make key decisions quickly and are under great pressure to succeed, while also dealing with potential bottlenecks from suppliers and slumps in demand for their own products. Additionally, management has to be able to respond to the fact that companies may no longer be able to fully utilize their workforce or may temporarily lose sick employees.

Once the pandemic is over, members of management will be measured by how they dealt with these challenges. In our experience, many decisions taken during a crisis are questioned soon after the crisis is over, with time for reflection and the advantage of knowing how the decisions turned out. Accordingly, supervisory boards, shareholders or other stakeholders may choose, or be required to, assert potential claims against management for these decisions.

This article, which is based on a German-language podcast on this topic, serves as a reminder to companies that the general legal framework for prudent and conscientious management also applies to decisions taken during a crisis, while also outlining the ways that members of management can protect themselves from potential claims. Also included are suggestions on how members of management can tackle some of the current challenges they face.

The Business Judgment Rule Applies

The general principles also apply in a crisis. Members of management must observe the legal requirements of all relevant jurisdictions, as well as the articles of association and their respective employment agreements they utilize. Separately, however, members of management can make decisions freely, provided they act in a prudent and conscientious manner.

The Business Judgment Rule applies, meaning members of the management boards or managing directors act dutifully when making entrepreneurial decisions, if they can reasonably assume they are acting in the best interests of their company and have the necessary information to do so.

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Many of the decisions to be made during this crisis have and will be these kinds of entrepreneurial decisions. As such, members of management can protect themselves by ensuring that they meet requirements of the Business Judgment Rule.

This is, of course, particularly challenging in the current situation as it is difficult to base all decisions on a complete set of information. Management may have to act quickly and cannot always exhaust all theoretically available sources of information, especially given that members of management — like many others — are flooded daily with new information regarding the COVID-19 pandemic.

However, the Business Judgment Rule allows actions to be taken on an incomplete set of information, requiring only that information be adequate. Undoubtedly, particularly urgent decisions must often be made based on limited information. Members of management therefore have to seek out the best possible basis of information and must not ignore any obvious aspects that can inform their decision-making process. However, the Business Judgment Rule does provide protection if members of management rely — to a certain extent — on their experience and gut feeling.

Management actions have to serve the best interests of the company from the relevant member of management's point of view. In times of crisis, the aim must be to strengthen the company's long-term earnings. Employees, investors, shareholders and creditors often all having different ideas about how this can best be achieved. Therefore, it is important for management to involve all of these stakeholders in the decisions made during the crisis, as doing so may prevent conflicts at a later stage.

Even in a Crisis, the Burden of Proof Rests With Management. Good Documentation is Key.

If a member of management invokes the Business Judgment Rule, he or she has to prove that the requirements of the rule were met at the time the decision was taken. This can be difficult if a decision made by a manager today is challenged 10 years in the future and the manager is held liable.

In the current circumstances, managers are often forced to make decisions in tight timeframes and under great pressure to succeed, with potential outcomes uncertain. Anyone who challenges these decisions in the future will know the outcome and have far more facts than are available today. However, they do not know today's decision-making situation. Neither do the judges, who will be competent to rule on the appropriateness of a decision if the parties decide to go to court.

Members of management are, therefore, well-advised to document their decisions today in a forward-looking manner that addresses potential concerns of a future court. This documentation should be easy to comprehend regarding the pandemic and should consequently confirm that the relevant member of management could indeed reasonably assume, from today's perspective, that the basis of information was adequate for the decision and that the decision served the best interests of the company.

This documentation recommendation places high demands on the form and contents of board resolutions, presentations, minutes and other documents of the decision-making bodies within the company. These documents serve as the company's memory and therefore must be self-explanatory and comprehensible, even for third parties with limited background knowledge.

High-Risk Decisions Deserve Additional Safeguards

Decisions that contain high-risk potential and that have to be taken under extraordinarily uncertain circumstances should be particularly safeguarded. Should something go wrong, directors and officers liability insurance coverage only provides protection up to certain limits, and only where no exclusions of coverage apply. Members of management are safer if they exclude liability from the beginning by, for example, seeking expert advice on critical issues. Accordingly, management may rely on expert advice if the adviser is professionally qualified, independent and has been provided with all information relevant to his or her advice. If management considers the respective advice to be plausible, it may rely on it and not be liable if the advice subsequently proves to be incorrect.

This can be particularly useful in legal issues. In many sectors of the economy — including regulated and unregulated industries — legal questions arise in connection with recently changed or enacted laws and regulations. Typically, a “prevailing opinion“ of legal commentators or “established case law“ by higher courts is unavailable, especially when the laws are issued by the EU. Also, interpretative guidance from the relevant authorities is often lacking. In these areas, management can eliminate the liability risks arising from a legal misjudgment by properly obtaining plausible legal advice.

Crisis Management Is a Board-wide Affair

In terms of organization, successful companies are usually excellently positioned to respond to a crisis. Those that are most successful typically are able to quickly and efficiently adapt existing processes and organizational structures in a crisis situation, setting up cross-functional crisis response teams with the required tasks, competencies and responsibilities, and arranging reporting lines accordingly.

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From management's point of view, it is important to set the right "level of escalation." In a crisis situation, some delegated tasks can become so important that they fall under the responsibility of one member of senior management or potentially under the collective responsibility of all members of management. German case law tends to suggest that the members of the management board of German stock corporations should monitor the activities of their fellow board members quite intensely. In recent years, major liability cases have often involved board members who were not closest to the facts in question, but only marginally involved in problematic dealings or defective decisions. It is, therefore, advisable to also closely monitor the associated departments of fellow management board members and to encourage a collective approach to making key decisions.

Government Initiatives Can Help Mitigate the Impacts of the COVID-19 Pandemic

The German government and parliament have launched an unprecedented set of measures to ease the burden on businesses and consumers, and to bridge liquidity bottlenecks. The packages include financial aid, such as state-subsidized loans, tax relief and equity measures. In addition, some legislative changes interfere with, or even alter, existing legal principles, including in contract and insolvency law.

These changes create completely new options for companies, and senior management should be familiar with the new measures in order to make the best possible use of them. Knowing what the measures entail not only allows for better economic decisions, but also permits management to act on the basis of adequate information and achieve the safe haven of the Business Judgment Rule.

For more on German and European COVID-19-related issues, please click below for recent Skadden client alerts:

["Germany Introduces 'Virtual' General Meetings for Public Companies"](#)

["COVID-19: Germany Update — Suspension of Obligation To File an Insolvency Application and Certain Effects"](#)

["COVID-19: Germany Update — How Will the Pandemic Affect Private M&A Deals in Europe?"](#)

["COVID-19: Germany Update — Corporate Liquidity Issues in the Time of the Coronavirus Crisis"](#)

["Financial Relief Under the CARES Act for US-Incorporated Subsidiaries of Foreign Companies"](#)

["COVID-19: How To Prepare for Potential Future Disputes"](#)