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Revocation of an appointment to the management board based on a withdrawal of confidence

German Federal Court of Justice strengthens shareholders' rights

The Federal Court of Justice (BGH) judged previously disputed legal questions regarding the dismissal of a management board member based on a withdrawal of confidence by the annual general meeting in favor of the shareholders. The withdrawal of confidence does not have to be explained. A corresponding resolution of the general meeting is valid, even if the grounds for the withdrawal of confidence prove inaccurate.

October 2017, Dr. Alexander Wolf

Background:

The management board of a stock corporation (AG) is more independent than the managing director of a limited liability company (GmbH). It is not bound by instructions and it cannot be dismissed without serious cause.

The Stock Corporation Act (AktG) requires an important reason for the revocation of an appointment to the management board by the supervisory board (Aufsichtsrat). This is generally the case if further institutional activity until the end of the term is unacceptable. The legislator wants to avoid the dependency of the members of the management board in regards to the autonomous functioning of management.

The Stock Corporation Act provides the following important reasons that may justify the dismissal of members of the management board:

- Gross breach of duty (for example criminal acts),
- Incapacity for proper management (for example lack of skills in exceptional

circumstances, such as in the case of restructuring)
- Withdrawal of confidence by the annual general meeting.

The **withdrawal of confidence by the annual general meeting** is an important reason **per se** and requires no further explanation. However, it is inadmissible in a case of obviously arbitrary reasons. The prevailing legal opinion in Germany holds that the withdrawal of confidence requires a resolution of the annual general meeting, which must precede the revocation.

Decision of the BGH:

On Nov. 15, 2016, the Federal Court of Justice issued the following **guidelines** for the revocation of an appointment to the Board of Management in the case of a withdrawal of confidence:

1. The decision of the annual general meeting of a stock corporation to withdraw confidence in a member of the management board is not obviously arbitrary, even if the reasons for the withdrawal of confidence prove incorrect.
2. The annual general meeting, that revokes confidence on a member of the management board, need not be justified.
3. A hearing for the management board member is not required for the revocation of the appointment.

The BGH clearly states that such a revocation depends **only** on a resolution of the annual general meeting and **not on the behavior of the management board member that justifies the withdrawal of confidence**. The withdrawal of confidence by the annual general meeting requires “neither an offense nor a fault on the member’s part or an important reason”.

It is sufficient that the annual general meeting believes that a member of the management board is no longer acceptable because of certain transactions or occurrences. The loss of confidence based thereon “cannot be denied to be an important reason even if the board member was **not to be subjectively blamed or even was right**.”

The exception contained in the Stock Corporation Act (obviously arbitrary withdrawal of confidence) is narrowly interpretet by the Federal Supreme Court:

“Only an , unfounded or, for the purposes pursued, immoral, unfaithful, or otherwise unlawful withdrawal of confidence is **obviously arbitrary**.”

In particular, the BGH explains: Even if a failure of the member of the management board did not exist, the withdrawal of confidence would not be arbitrary if the annual general meeting could assume a wrongdoing.

Matters are made worse for the management board member by the fact that the member has to demonstrate and prove that the reasons were obviously arbitrary. The BGH left it open as to whether the member of the management board is able to benefit from a simplified burden of proof in individual cases.

Conclusion and recommended actions:

The Federal Court of Justice has **strengthened the rights of the general meeting and created legal clarity**. In particular, a withdrawal of confidence is excluded only if its arbitrariness is **obvious**. A lack of justification for the withdrawal of confidence is not deemed arbitrary.

Nor can the member of the management board appeal due to a failure to gain a hearing before the supervisory board.

The supervisory board shall, **on its own authority**, decide on the revocation after the withdrawal of confidence by the general meeting. In doing so, the supervisory board must also examine whether there are obviously arbitrary reasons for the withdrawal of confidence.

In individual cases (especially for small companies), it may be necessary to examine whether the company is obliged to disclose existing reasons for the withdrawal of confidence or subsequently justify the withdrawal of confidence.

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