



The general meeting of the monistic SE

Administrative board or managing directors: Who is responsible for what at the general meeting of a European Company (SE)? An overview.

The management of German stock corporations (AG) or dualistic SEs is divided between the management board and the supervisory board. In an SE with a monistic management system on the other hand, the respective competencies of the administrative board and the managing directors are not always clear.

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Monistic or dualistic?

The choice between a monistic and a dualistic management system sets an important course for the legal structure of an SE. While the dualistic management system provides for the division of management into two independent bodies (management board and supervisory board), the monistic management system concentrates the company's entire management in one body, the administrative board. The monistic SE's "board" system (or "one-tier" system) is based on organizational forms found primarily in the USA, England and, as an option model, in France and Italy. German legal practice occasionally encounters difficulties with the monistic system of implementing management and supervision within a single body.

In particular, the responsibilities of the administrative board and the managing directors appointed by the administrative board are subject to differentiation issues. It should be noted, on one hand, that the administrative board is not purely a supervisory body, as it performs both management and supervisory functions. On the other hand, the managing directors (including the CEO) are not to be equated with the management board of a German stock corporation (in contrast to the AG they must follow the instructions of the administrative board). This blend of management and supervision in

the monistic SE is intended by the legislator, and goes so far that members of the administrative board can also be appointed as managing directors. In practice, however, the responsibilities of the administrative board and managing directors, unless expressly provided for by law, are not always easy to determine.

Prior to the annual general meeting

Financial statement

The preparation of the annual financial statements and the proposal for the appropriation of profits are the responsibility of the managing directors. The administrative board – in this case comparable to the role of a supervisory board – is responsible for the approval and audit of the annual financial statements, and for issuing the audit assignment to an auditor.

Reporting

The report to the annual general meeting on the annual financial statement audit and, if necessary, the report on the audit of the dependent company – report to be prepared by the managing directors (sec. 312 of the German Stock Corporation Act (Aktiengesetz; AktG)) – are the responsibility of the administrative board.

Convocation of general meetings

Whereas in an SE with a dualistic management system, the supervisory board is entitled to convene general meetings in addition to the management board (art. 54 para. 2 SE Regulation), in a monistic SE, the administrative board is solely responsible. This also applies to convocations in connection with the notification of the loss of half of the share capital or with the request to convene by a minority holding 5 percent of the share capital. The managing directors do not have the right to convene the annual general meeting. The administrative board is also solely responsible for preparing and implementing decisions of general meetings.

Proposals to the agenda

In an SE with a monistic management system, the administrative board has to make a resolution proposal for each item on the agenda, which is to be published together with the agenda in the invitation to a general meeting.

Explanatory report as per sec. 176 para. 1 AktG

Additional statements in the management report pursuant to sec. 289a para. 1 and sec. 315a of the German Commercial Code (German Handelsgesetzbuch; HGB) are intended to provide potential bidders with as comprehensive a picture as possible of the company, its structure and any takeover obstacles.

The management board of listed stock corporations must make an explanatory report on these statements available to the annual general meeting (sec. 176 para. 1 AktG). In the general meeting practice of the monistic SE, the reporting responsibilities are not handled uniformly. In some cases they are taken over by managing directors, in others the report is prepared by the administrative board.

Conducting the annual general meeting

Direction

Neither the European SE Regulation nor the German Stock Corporation Act (AktG) determines who chairs the general meeting of the SE. The articles of association of stock corporations often appoint the chairman of the supervisory board to chair the meeting. This is not an issue for the dualistic SE.

The situation is different for a monistic SE with an administrative board. It is discussed controversially in this case whether it is permissible for reasons of neutrality for a member of the administrative board to assume the chairmanship of the annual general meeting. It is recognised that the management board of a German stock corporation (AG) may not chair the general meeting, and it is derived from this idea that the chairmanship of a member of the administrative board is to be rejected in principle. Other opinions allow the chairmanship of the general meeting to be delegated to a non-managing member of the administrative board.

Explanatory statements

The administrative board must present and explain its report at the annual general meeting (sec. 176 para. 1 sent. 2 AktG).

The managing directors have the duty to comment on the annual financial statements.

Obligation to provide information

In the case of a dualistic SE, the obligation to provide information in general meetings is incumbent on the administrative board. This is no different from a German stock corporation (AG).

This question is again more difficult to answer for the SE with a monistic management system. There is a renewed tendency to use the company form and to entrust this task to the managing directors; after all, they run the business of the SE and draw up the annual accounts. Nevertheless, the administrative board alone is responsible here as the management body of the SE. Managing directors who are not also members of the administrative board are not the beneficiaries of the right to information. Questions from shareholders should therefore be answered by managing directors who are also members of the administrative board.

Recommendations

The responsibilities in the monistic SE cannot be derived from the dualistic system with its management board and supervisory board. Rather, the monistic SE's "board" system follows its own logic. The administrative board is the central management body, which in principle has all management and supervisory powers, while the managing directors only hold the responsibilities that were expressly conferred on them. In case of doubt, a careful examination of the responsibilities is recommended. If possible, general meetings should be chaired by a neutral chairman.

Our services

We advise our clients on the establishment of European Companies (SE) and the transformation into this legal form. We support existing SEs in all matters of corporate law, especially in the preparation and execution of annual general meetings, in capital raising and in IPOs as well as in the fulfilment of follow-up obligations on the capital market.

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