

The German Supervisory Board: A Practical Introduction for US Public Company Directors

2021

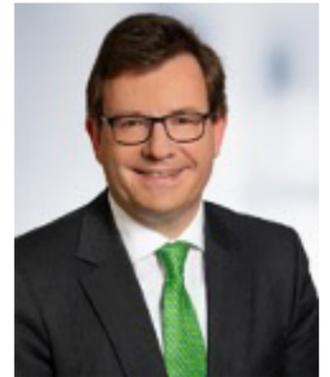


Contents

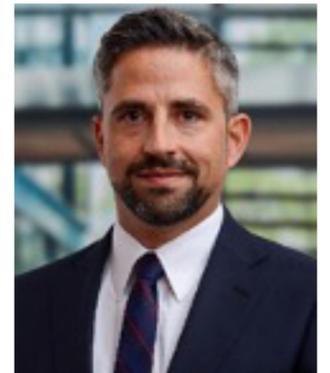
| | |
|--|----|
| Foreword | 03 |
| Executive Summary | 04 |
| The German Supervisory Board: Characteristics and Context | 05 |
| The German Supervisory Board in Action: Regular Order, M&A, Crisis | 14 |
| Conclusion | 15 |
| Endnotes | 17 |

Foreword

As the world's economy globalizes, there is often an expectation that business practices will harmonize along with it. This is an expectation that we will see a kind of convergence of corporate governance forms and practices, where boards the world over resemble each other, perhaps with a large majority of independent directors, an audit committee, a separate chair and CEO, and so on. A lot of this reflects a certain familiarity with the Anglo-Saxon board model among institutional investors in London and New York. The reality, however, is quite different. Despite real advances in globalization in other areas, differences in what boards look like and how they work in practice persist across countries. This publication brings to light the differences between the predominant Anglo Saxon, one-tier corporate governance model on the one hand, and the still influential Germanic two-tier-model on the other. The authors, Yvonne Schlaeppli and Michael Marquardt, both experienced corporate directors who have served on European company boards, highlight the main characteristics of the German supervisory board model and how it demands accountability from its members, despite looking rather different than the combined board model.



Claus Buhleier
Partner, Center for Corporate
Governance Deloitte Germany
cbuhleier@deloitte.de



Kai Bruehl
Director, Risk Advisory Deloitte
Germany kbruehl@deloitte.de

Executive Summary

This two-part article is a primer for US public company directors on the German two-tier corporate governance model of German publicly traded companies which are incorporated as Aktiengesellschaften (or “AGs”).¹ Having an understanding of the German Supervisory Board is important for US public company directors whose companies are doing business with a German corporation controlled by a Supervisory Board, or who are considering becoming a Supervisory Board member of a German corporation.

The first part of this article sets out the most significant aspects of the German AG’s Supervisory Board (Aufsichtsrat) and Management Board (also sometimes translated into English as the Executive Board or Board of Management) (Vorstand). The origins and current characteristics of the German dual-tier board are described with comparisons to the unitary corporate board common in the US.²

In the second part of this article, light is cast on the characteristics of the German AG’s Supervisory Board—e.g., during a M&A transaction, a crisis and regular order—again by way of contrast to the familiar workings of the US public company board at the same junctures. These illustrate how significant characteristics of the Supervisory Board, including its composition and scope of authority, impact its work and function.

The distance of the German Supervisory Board from the Management Board is greater than the US public company board from the CEO and his or her executive team or “C-Suite.” US public company directors are familiar with and strive to live by the “Nose In/Fingers Out” dictum; to stay with the metaphor, German Supervisory Board members may be a good nose length further away from the CEO and the rest of the Management Board. However, in US business circles and the US business press the distinctive aspects of the German Supervisory Board is frequently glossed over or ignored.³

In sum, although at first blush the powers and authorities set out by the respective corporate laws seem to be similar (at its most basic, the Supervisory Board supervising or controlling management in the form of the Management Board), German laws, practice and custom, as well as the presence of employee representatives on larger German Supervisory Boards, dictate significant differences in the German Supervisory Board’s working and function when compared with the US corporate board. There are advantages and disadvantages to both systems of corporate governance. An adequate understanding of the basic distinctions is a necessity for a US public company director engaged with a German publicly traded, multinational AG.

The German Supervisory Board: Characteristics and Context

The Dual Board Structure Today

German corporate law and its corporate governance code mandate a two-tier board structure (Supervisory Board and Management Board) for the AG. There are other German legal entities which have a two-tier board, as well as the rarely used European stock corporation (Societas Europaea “SE”), which permits having either a two-tier or a unitary board.⁴ In this article, however, for simplicity’s sake, we refer only to the AG when we address the German two-tier board structure.

To place the two-tier board structure in a broader international context, quite a number of countries other than Germany mandate a two-tier board structure for their publicly listed companies or permit adoption of a two-tier board.⁵ There are substantial differences among the various national two-tier board systems. However, additionally to splitting management and oversight (a goal shared with unitary board structures), a common goal of two-tier boards is to bring representation of the various stakeholders in the company (other than its shareholders) into the company’s corporate governance. Those stakeholders include shareholders, employees, labor unions, business partners, creditors and the public at large, and potentially state ownership.⁶

By contrast, the unitary board of US companies gives primacy to corporate governance by and for the shareholders. This form of corporate governance has evolved to effectively allow the board to monitor the company on behalf of a widely dispersed shareholder base.⁷

Historical Evolution

The roots of Germany’s two-tier corporate governance model date back to the middle of the 19th century, starting with the first Stock Corporation Act (AktG) in 1843.

The two-tier system for boards of companies listed on a stock exchange was initially instituted in Germany in 1861 after first having been introduced in the Netherlands in the 17th century. It required a Board of Management to run the daily affairs of the corporation and another, separate Board of Supervisors to hold management accountable and to protect the interests of shareholders.

Employee representation on the Supervisory Board also has its origins in the middle of the 19th century. In 1849, the Frankfurt Parliament passed a law that attempted to set the boundaries of corporate power by instituting so called “works councils” to better represent the interests of average workers in the management decision making process.⁸ Reforms instituted after World War I aimed at protecting the rights of authors, inventors, and artists also led to ordinary employees nominating their first directors to Supervisory Boards and thus gaining a more equal footing with employers.⁹ Co-determination received its first legal definition in Germany’s Works Council Law (Betriebsrätegesetz) in 1920.

In 1976, Germany’s federal parliament (Bundestag) passed the Co-Determination Act, the “Mitbestimmungsgesetz” (MitbestG). Although separate from the country’s Company Act for Public Companies (Aktiengesetz), it specifies that at most companies with more than 2,000 employees, one half of the Supervisory Board members are to be elected by the employees. For most companies with 500 to 2,000 workers, one third of the Supervisory Board members must be elected by employees. This applies to all German corporations, whether publicly listed and privately held.

In practice today German Supervisory Boards of AG’s with more than 2,000 employees must have 12, 16 or 20 members, none of whom are members of the company’s executive management or Management Board, but some of whom may well be employees serving in lower level management. In the event of a tied vote between shareholders’ representatives and employees’ representatives, the vote of the Chair of the Supervisory Board (who is elected by the shareholders) counts twice.



The Role and Characteristics of the German Supervisory Board of an AG

The German word for Supervisory Board, Aufsichtsrat, makes it abundantly clear that the central mission of this body is to serve as a “check” on management. In German, the Supervisory Board is often referred to as a “Kontrollgremium” or controlling organ, further emphasizing its responsibility to “control” the Management Board of the corporation.

The Supervisory Board is entirely separate from the company’s executive team (the Management Board); that is, no member of the management, including the CEO, is a member of the Supervisory Board. As is the case in the US for a corporate Board, the Supervisory Board is intended to be the recipient and reviewer of reports from company management or Management Board. The Supervisory Board is empowered to actively investigate or charge others to do so on its behalf. The Management Board also reports to the Chairman of the Supervisory Board on other significant or material developments.¹⁰

The Role of the Supervisory Board

The Management Board independently manages the AG and is responsible for the day-to-day business of the company. The Supervisory Board appoints and can remove members of the Management Board. Although the Supervisory Board supervises and advises the Management Board, it cannot make any executive decisions or give formal orders to the Management Board. Consistent with the Supervisory Board’s strict oversight role, the AG is represented both internally and externally (that is, towards third parties) exclusively by the Management Board.

The Supervisory Board may only act on behalf of the AG if prior approval and authority is granted by the Management Board.

In supervising and advising the Management Board, among other things, the AG’s Supervisory Board is responsible to:

- Appoint and dismiss Management Board members
- Approve selected Management Board decisions (for example,
- Material M&A, budgets and opening or closing of branches)
- Monitor and evaluate the Management Board’s performance
- Determine the Management Board’s compensation and employment contracts
- Monitor compliance in all respects (including legal, regulatory and corporate governance)
- Engage the company’s auditor and inspect the annual financial statements and other financial reporting
- Request reports from the Management Board regarding the company
- Oversee that the interests of shareholders and other stakeholders are respected, and call a shareholders’ meeting, if required
- Represent the company with respect to all legal actions taken against the Management Board¹¹



It is important to recognize the distinctive legal obligation of each member of a German Supervisory Board to be focused on the interests of the “corporate enterprise” only, whether that Supervisory Board member is elected by shareholders or the employees.¹²

The Characteristics of the Supervisory Board

The Management Board independently manages the AG and is responsible for the day-to-day business of the company. The Supervisory Board appoints and can remove members of the Management Board. Although the Supervisory Board supervises and advises the Management Board, it cannot make any executive decisions or give formal orders to the Management Board. Consistent with the Supervisory Board’s strict oversight role, the AG is represented both internally and externally (that is, towards third parties) exclusively by the Management Board. The Supervisory Board may only act on behalf of the AG if prior approval and authority is granted by the Management Board. In supervising and advising the Management Board, among other things, the AG’s Supervisory Board is responsible to:

- Appointment & Removal
- Size/Number of Members
- Independence
- Terms & Term Limits
- Board Committees
- Number of Meetings
- Mandatory Workers’ Representatives
- Representatives of Shareholders
- Liability & Remuneration
- Diversity

The powers and procedures of any particular German AG’s Supervisory Board are further delineated in its Articles of Association and Bylaws (Satzung, Geschäftsordnung and/or Statuten), the Rules of Procedure of the Supervisory Board or Management Board and the Charters of its Committees.

Appointment & Removal

The shareholder representatives on the Supervisory Board are elected by the shareholders’ meeting. Before their term expires, members can be removed by shareholders’ resolution with a 75% majority, unless the Articles of Association require a different majority. The employee representatives on the Supervisory Board are elected and removed according to the Co-Determination Act.¹³

Size/Number of Members

The Supervisory Board of an AG must have at least three members and can have as many as 21 members, depending on the AG’s nominal capital, its Articles of Association and whether the AG is subject to co-determination (in which case the number of Supervisory Board members should be divisible by 3). Under the Co-Determination Act applicable to companies with more than 2,000 employees in Germany, the Supervisory Board will have the same number of shareholder representatives as it does employee representatives and will have 12, 16 or 20 members, depending on the numbers of employees.¹⁴

On the other hand, SE’s have the option, if they choose a dual board structure, to have a smaller Supervisory Board. A number of German SE’s have made that choice.¹⁵

By contrast, few publicly traded companies with unitary boards choose to have boards as large in number as the typical German AG Supervisory Board. In the US, in 2017 BlackRock Inc. and General Electric Co. were the only companies in the S&P 500® with 18 board members.¹⁶ General Electric shrunk its board to 12 members at its April 2018 shareholders meeting.

Independence

On its face and from a formal perspective, the German Supervisory Board is clearly independent of the company and the Management Board and there is no need for the securities regulator or stock exchange rules, for example, to stipulate independence for Supervisory Board members (as the US SEC and NYSE and NASDAQ do in the US, for example). A member of the Management Board of a German publicly-listed company may not join the Supervisory Board of the same company for two years after stepping down from the Management Board.¹⁷ But the meaning of Supervisory Board director independence is the subject of ongoing discussion in Germany. "This is mainly due to the fact that not only unions but also founders (and their families) are uncomfortable with their treatment under commonly accepted definitions."¹⁸ Certain commentators note that Supervisory Board members may not in practice have the independence to control conflicts and self-dealing, whether that is due to their links to banks, labor unions or to the concentrated shareholdings which may dominate and be linked to both the Supervisory Board and Management Board.¹⁹

Terms & Term Limits

The maximum term for members of the Supervisory Board, like that of members of the Management Board, is five years, taking into account the date of the shareholders' meeting. Appointment to an additional term is permitted.²⁰

Board Committees

The Supervisory Board is free to establish committees. The German corporate governance code (Deutscher Corporate Governance Kodex or "DCGK") recommends that committees be established in order to improve the Supervisory Board functioning. Sizeable companies usually have, at minimum, a Nomination Committee and an Audit Committee. The role of the Audit Committee is, as one might anticipate, to exercise oversight over the company's accounting procedures, effectiveness of its internal controls, its risk management and audit systems and the audit of its financial statements. Each committee which the Supervisory Board establishes must keep the entire Supervisory Board informed of its actions. If the Supervisory Board as a whole delegates a particular responsibility to a committee, the Supervisory Board members who are not members of that committee must supervise the members of that committee.²¹ Due to the increased complexity of business risk and regulation in many industries, quite a number of larger AG's Supervisory Board's have and are establishing additional committees in order to dig deeper into aspects of corporate governance. In recent years, committees focused on risk management and compliance are among the more commonly established committees.

Number of Meetings

The typical German Supervisory Board meets at least four times a year.²² The Supervisory Board may meet more often and many do. As one would expect of the senior executive team, the Management Board meets much more often.

Mandatory Workers' Representatives & Representatives of Shareholders

See the discussion of co-determination at Section 1.2 above.

Liability & Remuneration²³

The liability of a member of the Management Board towards the company is generally unrestricted and unlimited. Supervisory Board members are held to the same high liability standards as Management Board members. The Supervisory Board and Management Board are obligated to take the necessary action to enforce the legal liability of former members of the other board.

Diversity

Per Deloitte's 6th edition of its Women in the Boardroom publication, German gender quota legislation passed in 2015 requires roughly 105 listed companies with full employee representation on their Supervisory Boards to have women hold at least 30 percent of non-executive board seats. Companies that fail to do so must appoint women to fill vacant board seats or leave them empty.²⁴ In 2019 the average share of women on Supervisory Boards in a sample of 185 listed companies exceeded 30 percent for the first time.²⁵

About 3,500 companies are listed or have employee representation on their supervisory boards and are subject to

the Law on Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector. They will have to determine their own binding quotas for Management and Supervisory Board seats and for members of top management. These regulations will also be reflected in the gender requirements for state-owned entities. Listed companies subject to the legislation must report on compliance in the corporate governance statement of the management report. Under certain conditions, companies also need to report target figures and company-specific time limits related to the implementation of measures to achieve equal representation.

The 2015 quota legislation contains a 50 percent target for women on the Supervisory Boards of state-owned enterprises from 2018 onward.

It is worth taking a closer look at a few of the extremely large German AG's which are consistently the subject of public interest in all major commercial centers and which are also featured routinely in the US business press. We look specifically at how their Supervisory Boards have organized themselves and handle their work. The authors make no comment and express no opinion on these Supervisory Boards' decision making or their effectiveness as instruments of corporate governance.



Examples of German AG Supervisory Boards

Daimler 

Number of Members
The Daimler AG Supervisory Board currently has 20 members, divided equally between 10 representatives of the shareholders and 10 representatives of the employees.

The Committees and Number of Meetings
The Daimler Supervisory Board has established three formal committees in accordance with the Daimler Supervisory Board's rules of procedure: Presidential, Audit, and Mediation, and has also established a fourth committee in accordance with the GCGK, Nominations.

On its website, Daimler clearly sets out the role of each Committee as follows:

"The **Presidential Committee** is responsible for deciding the service contracts and other contractual matters in relation to the Board of Management and the Supervisory Board. The Presidential Committee advises and decides on issues relating to corporate governance and issues recommendations on such issues to the extent Supervisory Board approval is required. Moreover, it assists and counsels the Supervisory Board's Chairman and Vice Chairman."²⁶ It has 4 members, 2 of whom are employee representatives, and met five (8) times in 2018.

The **Audit Committee** has the responsibility one would expect to review and examine the financial statements of the company, to instruct the auditors and determine points to emphasize during the audit and to make recommendations to the full Supervisory Board on financial measure, use of net income and the like. It has 4 members, 2 of whom are employee representatives, and met six (6) times in 2018.

The **Mediation Committee** is established pursuant to the Co-Determination Act, but did not meet in 2018.

In compliance with the German Corporate Governance Code the Supervisory Board has also established a Nomination Committee.

The committee's task is to propose candidates representing the shareholders for election to the Supervisory Board." The Nomination Committee is composed exclusively of 3 Supervisory Board members representing the shareholders. It meets as required.²⁷ The Nomination Committee met two (2) times in 2018.

Deutsche Bank 

Number of Members
In its Supervisory Board Report within the Deutsche Bank 2018 Annual Report, the 20 member Supervisory Board reported that it and its nine committees met 54 times during 2018 (vs. 59 times in 2017), with nine meetings of the entire Supervisory Board (versus ten in 2017). Two areas of particular focus were strategy and dealing with the Bank's legacy issues.

The Committees and Number of Meetings
The Supervisory Board set up two additional board committees, one to focus on strategy and one to focus on technology, data and innovation.

Currently the Deutsche Bank Supervisory Board has nine standing committees:

- Chairman's Committee (4 members, 2 of whom are employee representatives), which met 9 times in 2018;
- Risk Committee (7 members, 3 of whom are employee representatives) which met 6 times in 2018;
- Audit Committee (9 members, 4 of whom are employee representatives), which met 7 times in 2018;
- Nomination Committee (5 members, 2 of whom are employee representatives, which met 6 times in 2018;
- Compensation Control Committee (4 members, 2 of whom are employee representatives), which held 5 meetings in 2018;
- Integrity Committee (6 members, 3 of whom are employee representatives), which met 6 times in 2018;
- Strategy Committee (8 members, 3 of whom are employees representatives), which met 3 times in 2018;
- Technology, Data and Innovation Committee (6 members, 3 of whom are employee representatives), which met 3 times in 2018;
- Mediation Committee Committee (4 members, 2 of whom are employee representatives), established pursuant to provisions of Germany's Co-Determination Act, which did not meet in 2018.

Among other things, in 2017 the Chairman's Committee "worked intensively on preparing recommendations for decisions of the Supervisory Board on pursuing claims for damages or taking other measures against ten former Management Board members and one incumbent Management Board member" as well as monitoring various legal proceedings and concluding certain settlements.²⁸

The Integrity Committee was focused on resolving legacy issues (such as wrapping up the internal forensic investigations carried out with the assistance of independent external advisors) and in reviewing the Management Board progress on material litigation cases and regulatory, as well as governance, and reviewing reports from the Management Board on reputational risks.

Volkswagen AG



Number of Members

The Volkswagen Supervisory Board is comprised of 20 members, of which 10 are representatives of VW's workforce, and are organized in five committees. The members of the Supervisory Board have remained fairly stable during the diesel emissions scandal.²⁹

The Committees

The Volkswagen Supervisory Board's five committees are:

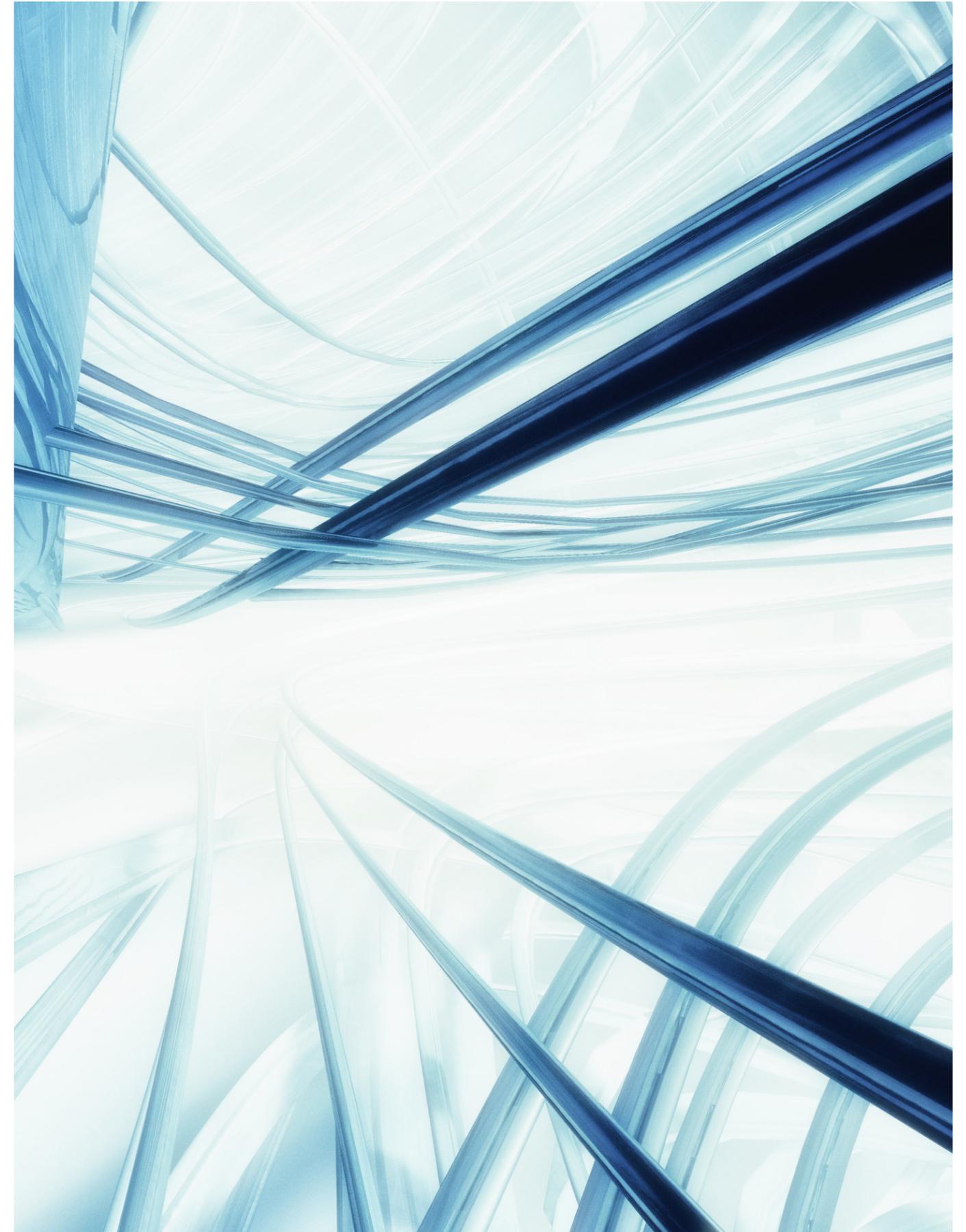
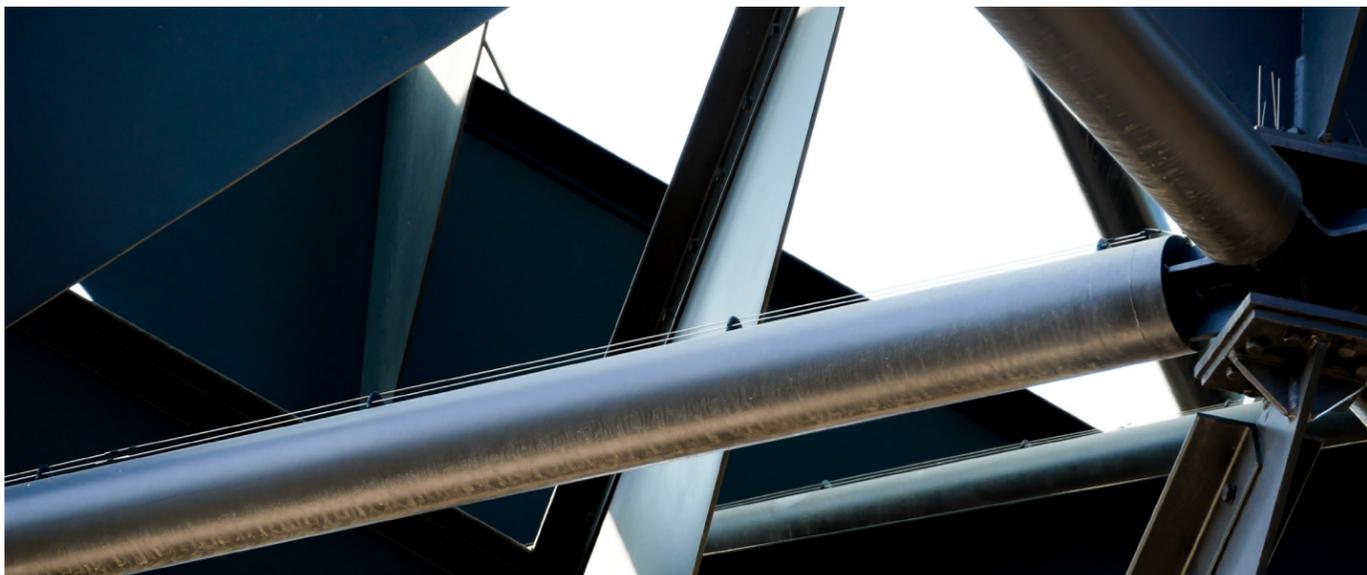
1. Executive Committee,
2. Mediation Committee,
3. Audit Committee,
4. Nominating Committee, and
5. Special Committee on Diesel Engines (established in October 2015 in the wake of the diesel emissions scandal).

Number of Meetings

The Board held 12 meetings in 2017 with an average attendance percentage of 84.6%.³⁰ The Executive Committee held 17 meetings during the fiscal year and the Special Committee on Diesel Engines met 11 times during the year. The Audit Committee met 5 times during 2017, whereas the Mediation and Nominating Committees did not meet during that year.

It is worth noting that these Supervisory Boards of large multi-billion dollar corporations with operations all over the world tend to face ever increasing workloads, workloads which would have been considered extraordinary fifteen years ago, and that they manage this markedly increased workload with a comparatively small number of board committees. Many US corporations with 9-member boards of directors have four or five standing committees while many German corporations with 20-member Supervisory Boards only have three or four standing committees, including often a version of an "Executive" Committee (also called a Presidential or Chairman's Committee) where the genuinely strategic decisions are prepared and "socialized" for the full Supervisory Board. Further, Compensation Committees and Governance Committees are not as common as they are in the US and Risk/Compliance Committees are not widely used outside the financial services sector.

Given that the group dynamics of a 20-member board are quite different from a 9-member unitary board (a fairly average board size in the US), one might expect more leveraging of committees on the German AG Supervisory Board to deal with the resultant workload and to enable each Supervisory Board member to contribute their own talent and experience. In light of the challenges faced by many of these corporations in increasingly complex regulatory environments, questions about employing a more effective use of board committees may fairly be asked.



The German Supervisory Board in Action: Regular Order, M&A, Crisis

Regular Order

The watchful role of the Supervisory Board as to the conduct of the German AG is similar to the responsibility of the US Board of Directors and continues to evolve in response to the perceived need for increased oversight and monitoring of executive leadership teams.

Strategic Planning Process

Traditionally, German Supervisory Boards have seen their oversight role as more “backwards” or “looking-back” monitoring as opposed to “forward-looking” and strategic. However, since the early 1990’s, in the wake of a German Federal High Court decision, the future-oriented, strategic role of the Supervisory Board is now also emphasized as “the second main task” in addition to holding management accountable, including hiring and firing the CEO.³¹

Annual Budgeting Process

Similar to the process in a unitary board governance model, it is the Management Board’s legal responsibility to develop an annual budget as well as usually a 4 to 5 year plan that is in line with corporate goals and then to defend that budget proposal in front of the Supervisory Board.

Roles of Committees

Supervisory Board Committees exist to support the entire Board’s duties and responsibilities. A good example of this is the Audit Committee. Since not every single member of a Supervisory Board can or should be a financial or accounting expert, it is strongly recommended that an Audit Committee—largely made up of such experts—spends the requisite time to “dig deep” into a corporation’s balance sheet and profit and loss statements.

Mergers & Acquisitions

The relationship between the Management Board and Supervisory Board in an acquisition context can be relatively fluid among the larger companies although an AG’s Supervisory Board tends not to be deeply involved in planning implementation of the acquisition. Like US boards, the German AG’s Supervisory Board needs to monitor management’s strategic rationale or fit and how the potential outlay of capital will make the company, post-acquisition, stronger, more resilient, more competitive and the like, as well as the forecast and path for post-merger integration. Very much like a well run US board, the well run German AG Supervisory Board checks that the development and execution of the business strategy, including that of an acquisition campaign, fits the long term, approved goals of the company. The Supervisory Board is informed by the CEO and the Management Board regularly and can choose to establish a special M&A subcommittee.

The two-tier board structure can help in the acquisition process if the respective roles are well defined and both boards communicate well and readily with one another. A Supervisory Board may be required to approve acquisitions (for example, by refraining from the exercise of its veto power) in a number of ways—for publicly listed companies, by the German takeover statute (Übernahmegesetz), the Bylaws of the company or the rules of procedure adopted by a particular Supervisory Board. But the many members of most sizeable AG’s Supervisory Board’s, the fact that many Supervisory Board members (especially the employee representatives) are not experienced in deal flow, and the absence of executives on the Supervisory Board, can all inhibit and

restrain informed debates of acquisition.³²

By and large, the employee representatives on the Supervisory Boards know that their preserving the confidentiality of information they receive, including with respect to proposed M&A, and preserving the trust of their fellow Supervisory Board members, is not only a key responsibility of theirs to the company as Supervisory Board members, but is also necessary for them to be valued as contributors by their fellow Supervisory Board members.

Crisis

A real test for any Board, whether a German Supervisory Board or a regular US Board of Directors, comes when an unexpected crisis descends on a corporation. While any organization’s response to an unexpected event often comes down to the personalities and leadership styles of the individuals and groups involved, there are clear points of difference in the way a Supervisory Board tends to grapple with a crisis. Since it is the Management Board’s responsibility to be “on point” during a crisis, the Supervisory Board’s role is primarily in advising the Management Board and serving as a check on management’s performance.³³ It generally does not see itself in the role of actively communicating on behalf of the company and it does not view itself as having to formulate the company’s response to the crisis, but rather to monitor management’s response. Although a US Board of Directors sees itself as more “in the foxhole” with the executive team, the German Supervisory Board acts as if it is one step removed.

Conclusion

In sum, although the powers and authorities set out by the respective corporate laws seem to be similar (at its most basic, the AG’s Supervisory Board supervises or controls management in the form of the Management Board), German laws, practice and custom, as well as the presence of employee representatives on larger German public Supervisory Boards, dictate significant differences in the German Supervisory Board’s working and function versus the US publicly listed corporate board. However, those differences play out in the context of similar corporate governance objectives. Having an understanding of the German Supervisory Board, is important for US public company directors whose companies are doing business with a German AG which is controlled by a Supervisory Board, or who are considering becoming a German Supervisory Board member.

Authors



Yvonne E. Schlaeppi is an independent public company director of global life sciences and industrial companies and a dual US and Swiss national. She currently serves on the board of AstroNova, Inc., an industrial company applying data visualization technologies to various products, based in Rhode Island, USA (NASDAQ: ALOT), and on an advisory board at Brigham and Women’s Hospital, Boston, MA, US. From 2016-2019 Schlaeppi served on the board of Stallergenes Greer plc, a global biopharmaceutical company headquartered in London, UK (then listed on Euronext Paris) and is a former General Counsel of global groups based in the US and Europe, admitted to the bars of New York and Massachusetts, and a National Association of Corporate Directors (NACD) Board Leadership Fellow (2017—present).



Michael T. Marquardt is a corporate director and global business advisor who has served as CEO of four companies over the past 25 years. He has lived and worked in Europe, Asia and the United States. Since 2009 Marquardt has provided strategic guidance and advice to corporate and government clients as CEO of Global Kompass Strategies, Inc. He has served on boards of directors in the United States, Europe, and Asia. Marquardt currently chairs the board of PT AAI Indonesia (based in Jakarta) and serves as an independent director on the boards of Commonwealth Trust Company (based in Delaware) and the American Cancer Society (based in Atlanta). Marquardt has been a National Association of Corporate Directors (NACD) Board Leadership Fellow since 2014 and holds the CERT Certificate in Cybersecurity Oversight.

Contributors



Dan Konigsburg leads Deloitte's Global Boardroom Program, a global network that promotes dialogue in the critical area of corporate governance across 66 countries. The Program coordinates thought leadership on governance issues developed by Deloitte member firms to advance thinking on corporate governance issues around the world. Dan serves as Chairman of the OECD's Business Advisory (BIAC) Committee on Corporate Governance in Paris, is a member of the Board of Governors of the International Corporate Governance Network (ICGN), and serves as a director on the board of the US Council for International Business (USCIB).



Dr. Kai Brühl is a director in Deloitte's Risk Advisory practice. His field of expertise lies with Strategic Risk, Org Design as well as Governance, Risk and Compliance topics (e.g. 3 LoD, Risk Governance, Corporate Governance) across different industries. He especially focuses on designing and implementing risk governance structures and processes, compliance and control systems, and managing large transformation projects. Kai has also published several articles on Corporate Governance and Risk Management. Before joining Deloitte in 2017 Kai worked several years at McKinsey and other Big4 consulting firms.

Kai has a master degree in business administration (Diplom-Kaufmann) and holds a Ph.D (Dr. rer. pol.), from Philipps-University Marburg, Germany.



Dr. Buhleier of Deloitte Germany is an audit partner for listed companies and specialized in leading cross-border IFRS group audits with a strong audit experience in the life sciences and health care industry, chemical industry as well as manufacturing. He has 25 years of experience with Deloitte, thereof 2 years in the US with Deloitte, partner since 2007.

He is the partner in the Deloitte Center for Corporate Governance in Germany, works regularly with management board and supervisory board members and does training for supervisory board. Among others he is co-chairman of the working party "Corporate Governance Reporting" at Schmalenbach-Gesellschaft, member of the "Corporate Governance" working groups at Institut der Wirtschaftsprüfer (IDW), co-editor of Deloitte's Audit Committee Guide ("Der Prüfungsausschuss des Aufsichtsrates: Praxisleitfaden für Finanzexperten und Aufsichtsräte") and co-editor of "BOARD—Zeitschrift für Aufsichtsräte in Deutschland". With Accountancy Europe, he is the German representative of the "Audit Committees Task Force".

He has a master degree in business administration from Mannheim University, Germany (Diplom-Kaufmann) and holds a Ph.D from Vienna University of Economics and Business (Dr.rer.soc.oec.), Austria.

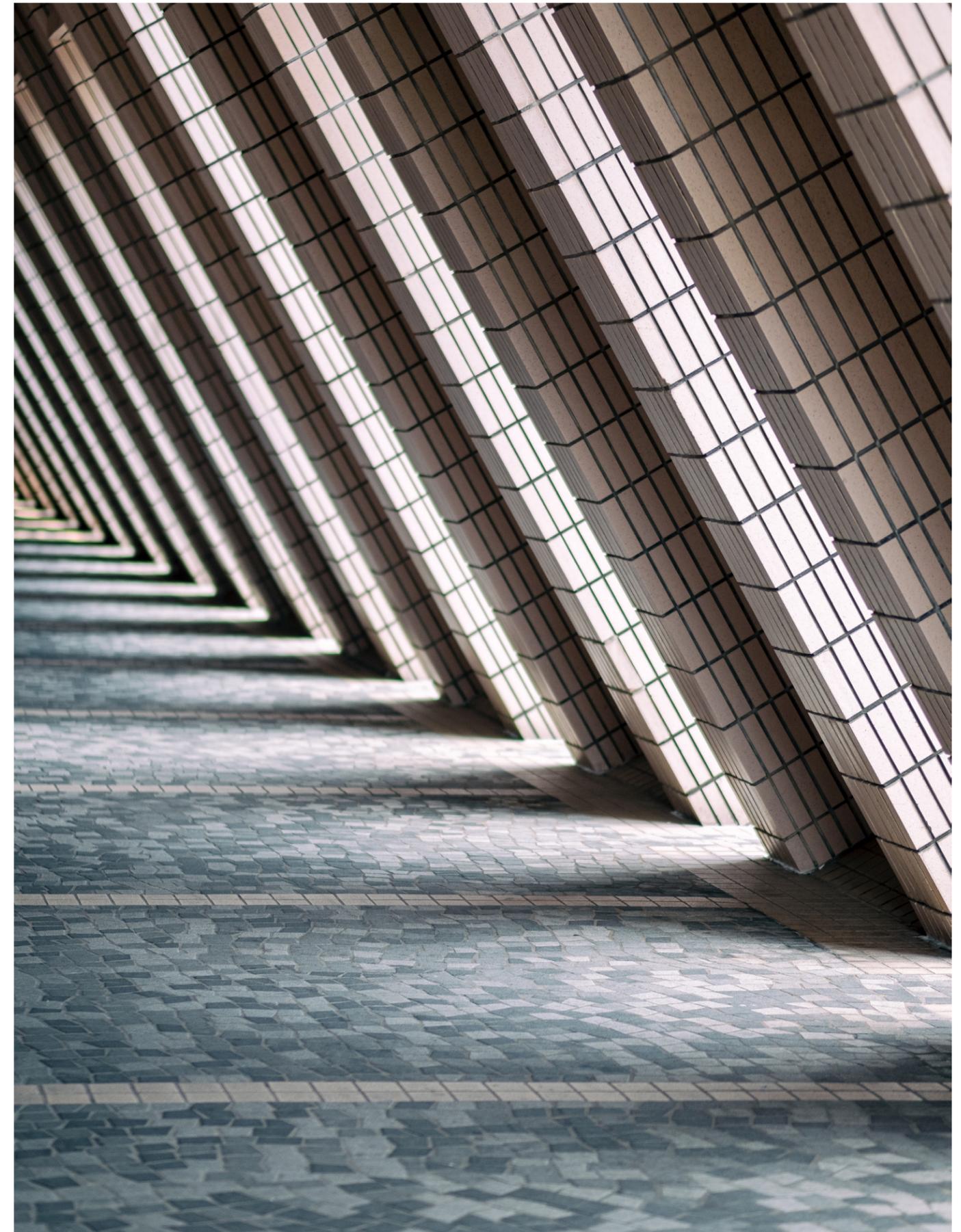
Endnotes

1. The AG is the abbreviation of "Aktiengesellschaft," the German public limited company whose shares are listed and traded on a public stock exchange and whose shareholders' liability is limited to their investment. Investopedia, "AG Aktiengesellschaft Definition," accessed April 30, 2020, <https://www.investopedia.com/terms/a/ag-aktiengesellschaft.asp>. The dual tier board structure also applies to the German KGaA (master limited partnership), as well as certain other German legal entities. The KGaA ("Kommanditgesellschaft auf Aktien") is the German 'partnership limited by shares,' which is the rough equivalent to a master limited partnership. Some large German family companies, which have some stock listed on an exchange, are KGaAs. Frank Wooldridge, "The German Kommanditgesellschaft auf Aktien (limited partnership with shares)," *Amicus Curiae*, Autumn 2010, pp. 25-28 [<https://journals.sas.ac.uk/amicus/article/view/1229/1112>]
2. A number, but not all of the authors' observations regarding US corporate boards also apply to the boards of companies in the UK (England, Wales, Scotland and Northern Ireland), which are subject to the UK Companies Act 2006.
3. In reporting on VW AG's CEO Matthias Mueller being replaced by Herbert Diess, The Wall Street Journal on April 12, 2018 reports simply that the VW board ousted Mr. Mueller. William Boston, "Volkswagen Ousts CEO Matthias Mueller, Promotes Herbert Diess to Top Role," *The Wall Street Journal*, April 12, 2018 [<https://www.wsj.com/articles/volkswagen-set-to-elevate-new-ceo-roll-out-broad-restructuring-1523538272>]. Although in an earlier article on the same subject, the WSJ noted it was the Supervisory Board which would be taking this prospective move. "Volkswagen AG's supervisory board is expected to vote on Friday to replace Chief Executive Matthias Müller with VW brand chief Herbert Diess, according to people familiar with the situation, a surprising shake-up after the German automaker endured a crisis that cost it billions of dollars." [Emphasis added] William Boston, "Volkswagen's Müller Is Set to Be Replaced as Auto Giant's CEO," *The Wall Street Journal*, April 10, 2018 [<https://www.wsj.com/articles/volkswagen-weighs-changes-to-top-management-including-ceo-post-1523364754>].
4. In addition to German corporate law and the German governance code, German companies also have the option of availing themselves of the EU corporate form, Societas Europaea. An SE can adopt either a two-tier or one-tier board. A number of the Euro STOXX 50 market index (the largest listed European companies) are SEs. A good number of those SEs are well known German corporates, most of which have adopted two-tier boards. Official Journal of the European Communities, *Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE)*, 2001. Of the major German stock listed companies which are SE's, only Puma SE, the footwear and apparel company, actually uses the one-tier board model.
5. Among the EU and EFTA member states, for example, Austria, France, Germany, Italy, the Netherlands and Poland require or allow two-tier boards, whereas Belgium, Finland, Ireland, Norway, Spain, Turkey, and UK require a one-tier board. Belgium allows a mixed structure. Deloitte, EMEA 360 Boardroom Survey Country Profiles, 2016, [<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Finance/gx-deloitte-uk-emea-360-boardroom-survey-country-profiles.pdf>]. Swiss corporate law foresees a one-tier board, but gives considerable latitude in the board structure adopted. Many Swiss companies delegate day-to-day management to the CEO or senior management in effect giving rise to a two-tier board structure. Patrick Schleiffer and Andreas von Planta, Lenz & Staehelin, Chapter 22: Switzerland, *The International Comparative Legal Guide to: Corporate Governance 2010*, Global Legal Group Ltd, 2010, p. 121. There are substantial differences among systems which use two-tier boards, as for example, between Germany and Japan.
6. By way of example, the foreword to the proposed amendments of November 6, 2018 to the German Corporate Governance Code notes that "The Code highlights the obligation of Management Boards and Supervisory Boards—in line with the principles of the social market economy—to take into account the interests of the shareholders, the enterprise's employees and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests)." Regierungskommission, *Deutscher Corporate Governance Kodex, Consultation 2018/19, 181106 Draft amended GCGC*, p. 2, <https://dceg.de/en/consultations/current-consultations.html>.
7. David Block and Anne-Marie Gerstner, "One-Tier vs. Two-Tier Board Structure: A Comparison Between the United States and Germany," *Comparative Corporate Governance and Financial Regulation. Paper 1* (2016): p. 17, http://scholarship.law.upenn.edu/fisch_2016/1.
8. Gustav Schmoller, *Jahrbuch für Gesetzgebung, Verwaltung, und Volkswirtschaft im Deutschen Reich*, Volume 32 (Leipzig, Verlag von Duncker & Humblot, 1908), p. 61.
9. Ewan McGaughey, "The Codetermination Bargains: The History of German Corporate and Labour Law," *Columbia Journal of European Law*, Vol. 23, No. 1 (2016): pp. 5-7.
10. The Supervisory Board may, in order to supervise the management of the company in accordance with Section 111 of the German Stock Corporation Act (§ 111 AktG), inspect and examine the books and records of the company or may also commission individual members or, with respect to specific assignments, special experts, to carry out such inspection and examination. A partial English translation of Section 90 of the German Stock Corporation Act (§ 90 AktG) reads: "(1) The Management Board shall report to the Supervisory Board on:
 - A. Intended business policy and other fundamental matters regarding the future conduct of the company's business (especially concerning budgeting, investments and personnel);
 - B. The profitability of the company, in particular the return on equity;
 - C. The state of business, in particular revenues and the condition of the company; and
 - D. Transactions which may have a material impact upon the profitability of liquidity of the company.

In addition, reports to the Chairman of the Supervisory Board shall be made on the occurrence of other significant developments; such significant developments shall also include circumstances concerning the business of an affiliated enterprise which become known to the Management Board and which may have a material impact upon the condition of the company."

Daimler AG, "Committees of the Supervisory Board," accessed April 30, 2020, <https://www.daimler.com/company/corporate-governance/supervisory-board/committees.html>.

11. Prof. Dr. Christoph H. Seibt and Dr. Sabrina Kulenkamp, Freshfields Bruckhaus Deringer LLP, *Corporate Governance and Directors' Duties in Germany: Overview (law stated as at 1 Dec 2017)*, Thompson Reuters Practical Law Country Q&A, 2018, p. 11.
12. "The GCGC goes even one step further and declares that it "clarifies the obligation of the Management Board and the Supervisory Board to ensure the continued existence of the enterprise and its sustainable creation of value in conformity with the principles of the social market economy (interest of the enterprise).""
 Marc Steffen Rapp and Christian Strenger, "Corporate Governance in Germany: Recent Developments and Challenges," *Journal of Applied Corporate Finance*, vol. 27, no.4 (Fall 2015): p. 11, <https://ssrn.com/abstract=2739601>.
13. Seibt and Kulenkamp, *Corporate Governance and Directors' Duties in Germany*, p. 8.
14. Seibt and Kulenkamp, *Corporate Governance and Directors' Duties in Germany*, p. 6.
15. One example of a German SE opting for a smaller Supervisory Board is BASF, which reduced its Supervisory Board to 12 members upon converting to the SE form.
 See also, Jürgen Odenius, *Germany's Corporate Governance Reforms: Has the System Become Flexible Enough?*, IMF Working Papers, July 1, 2008, p. 11, <https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Germanys-Corporate-Governance-Reforms-Has-the-System-Become-Flexible-Enough-22139>.
16. According to a proxy statement analysis by Spencer Stuart, the average S&P 500® board in 2017 had 10.8 members. Sarah Krouse and Joann S. Lublin, "BlackRock Names Executives From Microsoft, Other Firms to Its Board," *The Wall Street Journal*, March 15, 2018, <https://www.wsj.com/articles/blackrock-names-executives-from-microsoft-other-firms-to-its-board-1521146700?mod=searchresults&page=1&pos=5>.
17. Unless the member of the Management Board is voted in by more than 25% of the shareholders. See AktG § 100 (2)(4).
18. Rapp and Strenger, "Corporate Governance in Germany," p. 12.
19. Odenius, *Germany's Corporate Governance Reforms: Has the System Become Flexible Enough?*, IMF Working Papers, p. 12.
20. Seibt and Kulenkamp, *Corporate Governance and Directors' Duties in Germany*, p. 8.
21. Seibt and Kulenkamp, *Corporate Governance and Directors' Duties in Germany*, p. 13.
22. The German corporation law requires a minimum of two Supervisory Board meetings a calendar year. See AktG § 110 (3).
23. A 2014 study by the Hay Group found that German Supervisory Board members who chair Audit Committees on average earn EUR 330,000 annually. The same study found that other German Supervisory Board members earn on average EUR 125,000 annually. Heiner Thorborg, "Meinungsmacher Aufsichtsräte: Risiko statt Rotwein," *Manager Magazin*, February 16, 2015, <http://www.manager-magazin.de/unternehmen/artikel/aufsichtsrate-gehalt-risiko-und-ansprueche-a-1017885.html>.
24. Deutscher Bundestag (German Parliament), Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst (Law on Equal Participation of Women and Men in Leadership Positions in the Private and Public Sector), May 2015.
25. Women on Board Index, Frauen in die Aufsichtsräte, April 2019 [https://www.fidar.de/webmedia/documents/wob-index-185/2019-06/190114_Studie_WoB_Index_185_III.pdf].
26. Daimler AG, "Committees of the Supervisory Board" and Daimler AG, "Annual Report 2018," accessed April 30, 2020, and Daimler AG, "Annual Report 2018," accessed April 30, 2020, <https://www.daimler.com/company/corporate-governance/supervisory-board/committees.html> and [daimler-ir-annual-report-2018.pdf](https://www.daimler.com/annual-report-2018).
27. From Daimler AG, "Committees of the Supervisory Board."
28. Deutsche Bank AG, "Report of the Supervisory Board," Annual Report 2017, accessed April 30, 2020, <https://annualreport.deutsche-bank.com/2017/ar/deutsche-bank-group/report-of-the-supervisory-board.html>.
29. Michael Marquardt, "A Year and a Half Later, VW Board Still Stuck in Low Gear," *Directorship Magazine* (National Association of Corporate Directors), September/October 2017, pp. 58-59.
30. Volkswagen AG, [Annual Report 2017](https://www.vw.com/annual-report-2017), Report of the Supervisory Board, June 7, 2018, p. 12
31. Supervisory Boards and Their New Role As a Strategic Business Coach: Opening the German Black Box of Upper Echelons, by Marc Eulerich and Marcus Stiglbauer. Published in *Corporate Ownership & Control*, Volume 9, Issue 3, 2012.
32. See in particular: The academic evidence on the impact of codetermination on company performance is inconclusive. Both Hauser-Ditz (2002) and Stettes (2007) conclude that econometric studies do not deliver clear lessons from the impact assessments of codetermination on enterprise performance. Hopt and Leyens (2004, p. 8) raise additional concerns. They conclude that "...the dividing lines within the supervisory board are detrimental to efficient cooperation with the management board. The basic problems of size (up to 21 members) and the inability of the German system to impose adequate qualification standards are further consequences of codetermination." Tollet (2005) notes that the absence of executives in the Supervisory Board limits the information flow, restrains informed debates, and results in "ineffective monitoring."
 Odenius, *Germany's Corporate Governance Reforms: Has the System Become Flexible Enough?*, IMF Working Papers, p. 9.
33. Ansgar Thießen, *Handbuch Krisenmanagement*, Second Edition (Wiesbaden: Springer Fachmedien, 2014), pp. 271-277.





Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organization”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

Deloitte is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax and related services. Our global network of member firms and related entities in more than 150 countries and territories (collectively, the “Deloitte organization”) serves four out of five Fortune Global 500® companies. Learn how Deloitte’s approximately 330,000 people make an impact that matters at www.deloitte.com.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms or their related entities (collectively, the “Deloitte organization”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser.

No representations, warranties or undertakings (express or implied) are given as to the accuracy or completeness of the information in this communication, and none of DTTL, its member firms, related entities, employees or agents shall be liable or responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.