

Siegline Gahleitner  
Revised by Joachim Preiss

## The essentials of corporate law for workers' representatives II

# Supervisory board participation

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## Introduction

The aim of this paper is to provide an overview of the legal framework governing the participation of workers' representatives in supervisory boards. It focuses on relevant provisions applicable to companies with limited liability and to stock corporations; differences in provisions applicable to cooperative association are only briefly referred to. The paper is meant to provide the basic legal knowledge that is required for exercising functions at the supervisory board. However, it can in no way make up for taking part in specialised seminars or exchanging experiences with other works councils involved in supervisory boards.

## The importance of the supervisory board to workers' participation

**Among the economic participation rights of the works councils as laid down in the Labour Constitution Act, supervisory board participation is of particular importance: at board level, the workers' representatives take, together with the capital side representatives, economic decisions that may be pivotal to the future of the company. The remaining economic participation rights are limited to information, consultation and co-decision rights, and the right to conclude company agreements.**

At supervisory board level, workers' representatives have the chance to **co-determine** economic decisions. Co-determination, however, implies a share of **responsibility**, too. All members of the supervisory board – both workers' and capital side representatives – are personally liable for their conduct in the execution of their mandate. This high degree of liability is to ensure that all members of the supervisory board exercise their mandate with best care. This extensive personal liability is one reason why workers' representatives delegated to the board should really make most effective use of all possibilities as regards co-determination.

Since only one third of the supervisory board members are workers' representatives, and the remaining two thirds are capital side representatives, the former only have limited legal influence on decisions; any time the capital side reaches consensus on an issue, the workers' representatives can easily be outvoted. This "inequality" in the composition of the supervisory board reflects our economic system: **the capital is the determining economic factor**, and economic decisions are taken by the entrepreneur; workers enjoy participation rights; in the end, however, they do not have the power to impede or impose entrepreneurial measures.

Nevertheless, thanks to their knowledge of the workplace, comprehensive training, persistent argumentation and assertiveness, many workers' representatives sitting

on the board actually exert substantial influence upon company policy. In practice, it often depends on the composition of the board's capital side whether or not workers' representatives are given the chance to effectively participate and co-decide.

The workers' representatives' proficiency and knowledge of the workplace are above all appreciated and taken into account in companies in which effective monitoring of the management is truly desired. Therefore, the one-third participation of workers' representatives in the supervisory board can be regarded as a small, but important step towards workers' "**co-decision**". It also has to be borne in mind that the works council appreciates having broad access to information which can be valuable with regard to the protection of employees' interests.

**The participation of workers' representatives in the supervisory board therefore is to be seen as an important added value to the other participation rights and an essential element of everyday company life.**

## Corporations with mandatory supervisory boards

In the following types of companies, supervisory board participation of workers' representatives in the meaning of § 110 Labour Constitution Act is guaranteed by law:

- **Stock corporations**
- **Companies with limited liability** (also in the event that the supervisory board has been established on a non-mandatory basis)
- **Cooperative associations** with at least 40 employees over a long period
- **Mutual insurance associations**
- **Savings banks** in the meaning of the Savings Bank Act

Moreover, workers' participation exists in

- **Private foundations** (also in the event that the supervisory board has been established on a non-mandatory basis)<sup>1</sup>
- **Associations** (with non-mandatory supervisory body)<sup>2</sup>

In addition, some special legal acts provide for workers' representation in the supervisory board, for instance the Federal Act on the Austrian Broadcasting Corporation ("ORF Act") or the Federal Act on the restructuring of the legal circumstances of Österreichische Industrieholding Aktiengesellschaft and of Post- und Telekombeteiligungsverwaltungsgesellschaft ("OIAG Act"). Also, on the occasion of disincorporation of activity lines from enterprises owned by the Federation, a region or a municipality, companies are often established by special acts providing for workers' participation at supervisory board.<sup>3</sup>

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<sup>1</sup> § 22 (4) Private Foundations Act

<sup>2</sup> § 5 (4) Associations Act

<sup>3</sup> See for instance § 5 of the Postal Services Structure Act, § 7 of the Act on the Austrian Federal Railways 1992, Art I of the Federal Act on the Austro Control-GesmbH

# The corporate Structures

The articles of incorporation (stock corporation)

The articles of association (company with limited liability)

**The articles of incorporation (articles of association) are the “basic law” of a company. They contain all fundamental agreements on the legal establishment of the company as well as on the legal relationship between the shareholders.**

The articles of incorporation (articles of association) must at least contain the following information:

- The name and corporate seat of the company
- The object of the business
- The amount of the nominal capital or share capital
- The face value of the shares<sup>4</sup> or initial contributions
- The nature of the composition of the management board (stock corporations)
- The form of publications of the company (stock corporations)<sup>5</sup>

The articles of incorporation (articles of association) are to be adopted before a notary public and registered in the Business Register.

**Besides the minimum of information required by law, the articles of incorporation (articles of association) also contain far-reaching provisions on the structure of the company and distribution of tasks within the different corporate bodies. Therefore it is capital that each supervisory board member is familiar with the articles of incorporation (articles of association).**

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<sup>4</sup> Since 1999, shares may be issued as par value shares or as no-par value shares. In the case of no-par value shares, the pro rata amount of the share capital allocated to each share as well as the number of no-par value shares has to be indicated.

<sup>5</sup> § 17 of the Stock Corporation Act, § 4 of the Companies with Limited Liability Act

## The corporate bodies and their competences

A company consists of several bodies; the different tasks in the framework of the business activity are performed by the management board (directors), the supervisory board, the shareholders' meeting and the auditor.

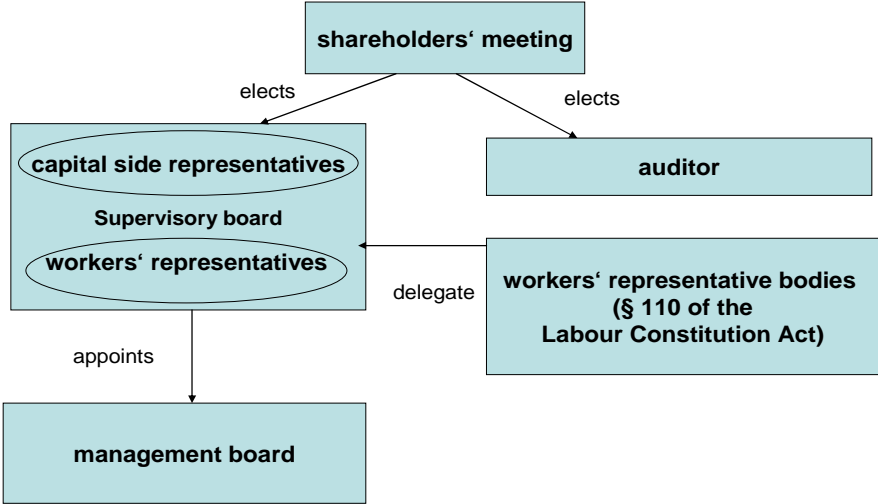
<b>The bodies of a stock corporation and their competences</b>		
<b>body</b>	<b>competences</b>	<b>pursuant to the Stock Corporation Act</b>
management board	management and representation of the company	§§ 70-85, 100, 101
supervisory board	monitor the management board	§§ 86-101
shareholders' meeting	expression of the shareholders' will	§§ 102-124
auditor	control of accounting	§§ 270 et seq of the Commercial Code

<b>The bodies of a company with limited liability and their competences</b>		
<b>body</b>	<b>competences</b>	<b>pursuant to the Companies with Limited Liability Act</b>
directors (management board)	management and representation of the company	§§ 15-28
supervisory board	monitor the directors (management board)	§§ 29-33
shareholders' meeting	expression of the shareholders' will	§§ 34-44
auditor (in medium and large scale companies with limited liability) <sup>6</sup>	control of accounting	§§ 270 et seq of the Commercial Code

<sup>6</sup> Any company with limited liability having established a mandatory supervisory board must have an auditor. An auditor also has to be appointed if the company has reached a certain scale. For the classification of small, medium and large scale companies, please refer to § 221 of the Commercial Code.

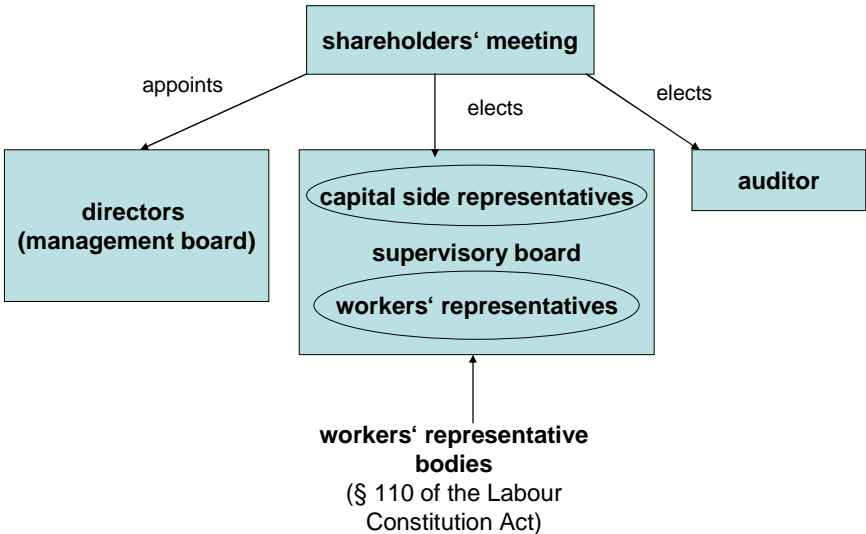
**The appointment of the corporate bodies in stock corporations**

- The shareholders’ meeting elects both the capital side capital representatives and the auditors.
- The workers’ representatives are delegated to the supervisory board by the body representing the workforce pursuant to § 110 of the Labour Constitution Act.
- The management board members are appointed by the supervisory board.



**The appointment of the corporate bodies in companies with limited liability**

The appointment of the corporate bodies in companies with limited liability is centralised within the shareholders’ meeting which delegates both the capital side representatives and the auditor to the supervisory board. The shareholders’ meeting also appoints the directors (management board).



## The shareholders' meeting (stock corporation)

**The shareholders' meeting is the assembly of the shareholders; these are the "owners" of the stock corporation. The shareholders' meeting decides on the basic structure of the stock corporation.**

In particular, the shareholders' meeting decides in the following matters:

- Capital increase or reduction
- Merger with other companies
- Transformation of the stock corporation into another type of company
- Dissolution
- Election of capital side representatives to the supervisory board or their revocation therefrom
- Discharge from liability of management board members and supervisory board members
- Distribution of profits
- Election of the auditors

Moreover, any amendment to the articles of incorporation and other fundamental decisions lie within the powers of the shareholders' meeting.

**Whereas the management board and the supervisory board have to decide in the day-to-day matters of the company, the shareholders' meeting takes the decisions on fundamental or extraordinary measures.**

**Once a year**, the shareholders' meeting is to be convoked by the management board. All the shareholders have the **right to participate** in the meeting. The members of the supervisory board and the management board may participate in the meetings as well. However, they have of course no voting rights. The chairman of the supervisory board chairs the shareholders' meeting. To be valid, each resolution of the shareholders' meeting requires to be certified in the minutes of the debate to be recorded by a notary public. The minutes have to be filed with the Business Register. Unless the law or the articles of incorporation provide otherwise, the shareholders' meeting has a quorum, irrespective of the number of shareholders who have shown up or are represented.<sup>7</sup> However, it has to be noted that in some stock corporations, the articles of incorporation require that a certain amount of the share capital has to be represented to constitute a quorum.

The majority required to constitute a **quorum** varies according to the matter concerned. Unless the law or the articles of incorporations provide otherwise, resolutions by the shareholders' meeting require a simply majority.

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<sup>7</sup> The Stock Corporation Act provides for specific requirements as regards attendance in the case of successive formation or post-formation acquisition within one year from the formation of the company (§§ 30 and 45 of the Stock Corporation Act).

## The shareholders' meeting (company with limited liability)

**As in stock corporations, the shareholders' meeting is the body where the shareholders express their will and take important decisions. However, the shareholders' meeting of a company with limited liability has, in comparison to stock corporations, more extensive powers and greater legal influence on the directors (management board).**

The tasks of the shareholders' meeting include in particular

- The audit and the adoption of the annual financial statements
- The distribution of net profits
- The discharge from liability of the directors (management board) and the supervisory board
- The determination of the financial relations between the shareholders and the company
- The grant of special statutory authority ("Prokura")
- The appointment of the directors
- The control of the directors (power to give orders)
- Changes to the articles of association
- Resolutions on any matter conferred to the shareholders' meeting by the articles of association

**Once a year**, the shareholders' meeting is to be convoked by the directors. In general, only the shareholders are **may participate** in the shareholders' meeting. Supervisory board members may in principle attend if the meeting has been called by the supervisory board (the supervisory board can do so at any time it is required in the interests of the company). Moreover, supervisory board members are entitled to attend the shareholders' meeting in the course of which the auditor is elected. The directors are obliged to attend the shareholders' meeting at any time the shareholders deem it necessary. In principle, at least one tenth of the nominal capital has to be represented to constitute a **quorum**. Resolutions are in general adopted by a simple majority, unless the law or the articles of association determine otherwise.

The adoption of resolutions outside the shareholders' meeting is admissible; resolutions can also be adopted by the shareholders' written votes.

Shareholders' resolutions (including resolutions adopted by written vote) are to be recorded in the minutes immediately after the adoption. The shareholders and the supervisory board members have the right to inspect the minutes; these have to be stored in an orderly fashion.

## The management board (stock corporation)

**The management board is appointed by a “double majority” of the supervisory board. “Double majority” means that to duly appoint the management board, both the majority of the supervisory board members and the majority of the capital side representatives are required.<sup>8</sup>**

The **management board members** are **appointed** for a maximum period of five years. A repeated appointment is admissible.

It has to be noted that the appointment and the conclusion of an **employment agreement** have to be regarded as two different acts. The determination of the employment conditions may, independently from the appointment itself, be conferred to a supervisory board committee. In that committee, workers’ representatives have no voting right, but are to be informed on the results and the content of the employment agreement. However, if the employment agreement is decided on in the plenary supervisory board, workers’ representatives may not be denied their voting rights.

The supervisory board may **revoke the appointment** of a **management board** member only if an important reason for doing so exists. In particular, a gross breach of duties, inability to properly manage the company or a vote of non-confidence by the shareholders’ meeting can result in a revocation of the appointment of the management board. Unless explicitly agreed otherwise, claims arising out of the employment agreement are not affected by the revocation of the appointment.

The management board may consist of one or more persons. If a management board member is appointed as chairman of the management board, its vote is deciding in the event of parity of votes.

The internal affairs of the management board are governed by internal rules. These may either be determined by the articles of incorporation, by the supervisory board or by the management board itself.

**In the conduct of the business of the company, the management board has to comply with the guideline provision of § 70 of the Stock Corporation Act according to which the management board has to manage the company in a way which is required for the benefit of the undertaking, taking into consideration the interests of the shareholders and the employees as well as the public interest. The management board does not obey to orders.**

If the management board consists of more than one person, there may be a distribution of tasks within the body. The right to effect particular transactions or kinds of transactions may be conferred to individual management board members.

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<sup>8</sup> This provision is also referred to as the “shareholders’ protection clause” because it makes sure that the workers’ representatives, together with a minority of shareholders, can in no case appoint a member of the management board without the consent of the majority of the shareholders. A simple majority of workers’ representatives and a minority of capital side representatives is not sufficient as regards the appointment of the management board.

However, vis-à-vis third parties, a restriction of the power of representation of the supervisory board members has no legal effect.

The following tasks fall within the duties of the management board as a whole:

- Determine the internal rules of the management board
- Report to the supervisory board
- Ensure the implementation of an accounting system
- Draw up the annual financial statements
- Present a proposal for the distribution of profits
- Convoke the shareholders' meeting
- Register the stock corporation with the Companies Register

## **The directors (company with limited liability)**

**The directors (management board) of a company with limited liability are appointed by the shareholders' meeting. The articles of association may set forth that particular shareholders be appointed as directors ("managing shareholder"). The right to appoint the directors may not be transferred to the supervisory board.**

There are no legal restrictions as to the **term** for which directors are appointed. In companies with limited liability, the appointment of directors may in principle be **revoked** by a shareholders' resolution. The shareholders do not have to give any important reason for their decision. However, the appointment of directors whose appointment is set forth in the articles of association may only be revoked if pertinent reasons for doing so exist. As regards the directors' employment with the company, the same rules as in the stock corporation apply: a revocation of the appointment does not automatically result in the termination of the **employment contract**.

**A company with limited liability may be managed by one or several directors. In principle, the directors represent the company jointly. The directors have to obey to the orders of the shareholders' meeting. Moreover, the supervisory board exerts control upon the directors.**

The Companies with Limited Liability Act contains no provision which is similar to § 70 of the Stock Corporation Act; only responsibilities vis-à-vis the company are determined: the directors are obliged to apply the diligence of a prudent businessman in the course of their management. Directors breaching their obligations are jointly and severally liable to the company for any damages arising therefrom (§ 25 of the Companies with Limited Liability Act).

## The supervisory board

### The mandatory supervisory board

**The establishment of a supervisory board is mandatory in stock corporations.**

**To companies with limited liability**, this rule only applies to limited extent.

According to § 29 of the Companies with Limited Liability Act, a supervisory board only has to be established

- if both the **nominal capital** exceeds **70,000** euro **and** the **number of shareholders** exceeds 50 (not relevant in practice); or
- if the **average number of employees** exceeds **300**; or
- if the company uniformly manages stock corporations, companies with limited liability with a mandatory supervisory board, or companies with an average number of employees exceeding 300, or controls them by way of a direct equity participation of more than 50 %, and, in both cases, the number of employees of that company and of those companies together in average exceeds 300 (i.e. if the company is the **parent company** of a group of companies, a supervisory board only has to be established in the event that the **number of employees** of the company and **relevant** subsidiary companies exceeds altogether **300**); or
- if the company is an unlimited (i.e. personally liable) partner of a limited partnership and the number of employees of that company and of the limited partnership **together exceeds 300** in average. No duty to establish a supervisory board exists if a natural person who is not excluded from the representation of the company is an unlimited partner of the limited partnership.

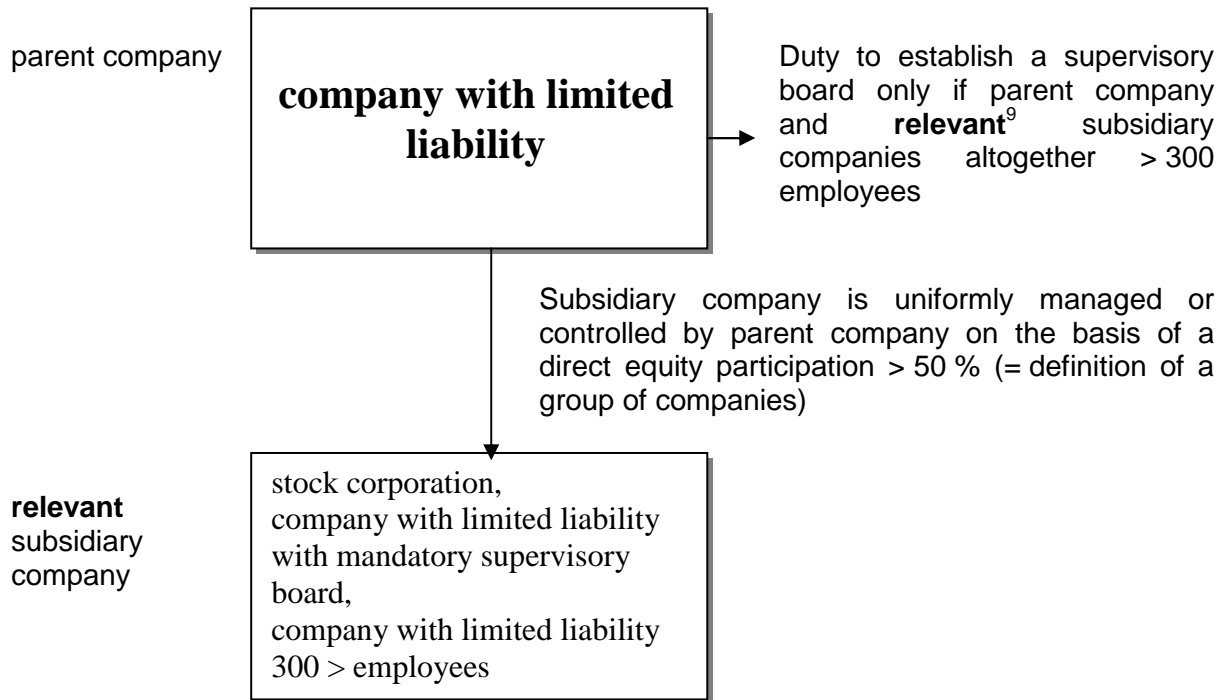
In case the company is uniformly managed by company with a mandatory supervisory board or is controlled by it on the basis of a direct equity participation of more than 50 %, and, in both cases, the number of employees of the company does not exceed 500, no duty to establish a supervisory board exists either (i.e. if **the company is a subsidiary company in the group, a supervisory board only has to be established in the event that the number of employees exceeds 500**).

Due to special legal provisions, the establishment of a supervisory board is in any case mandatory in capital investment companies, commercial enterprises run by the Austrian National Union of Students and construction cooperatives of public utility which are organised like companies with limited liability. Moreover, the duty to establish a supervisory board exists in certain enterprises which have been disincorporated from state-owned companies such as the Austrian Federal Railways or the Austro-Control-GesmbH.

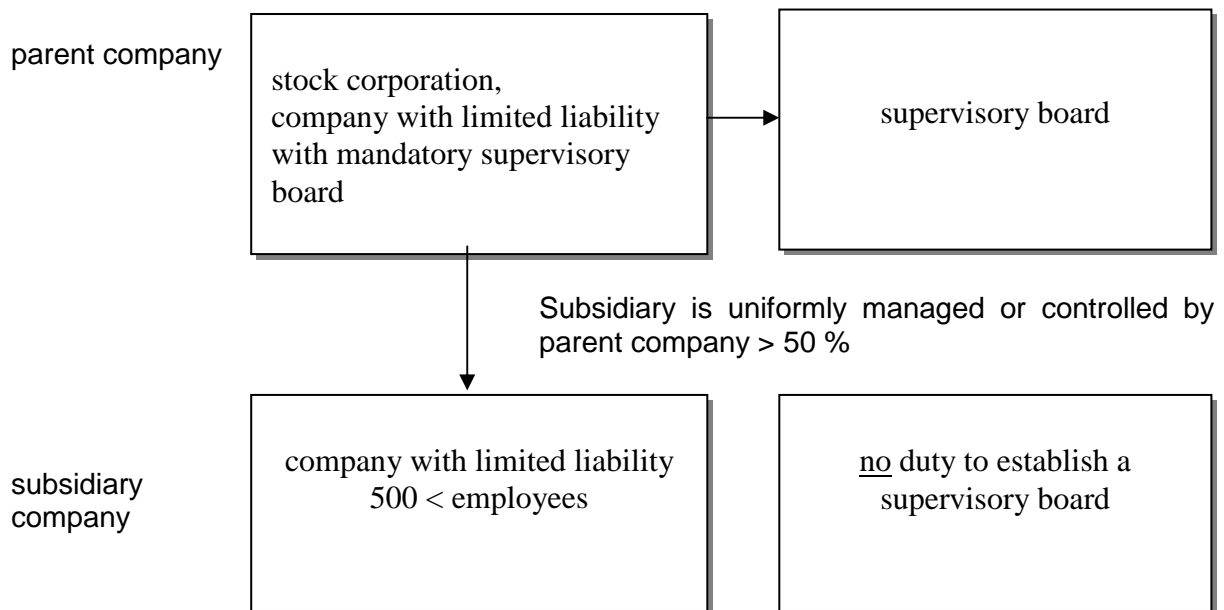
**Not every company with limited liability is obliged by law to establish a supervisory board. Yet, if a supervisory board exists, workers have a co-decision right.**

## The company with limited liability and the duty to establish a supervisory board in a group of companies

### Case 1: Company with limited liability is parent company in the group

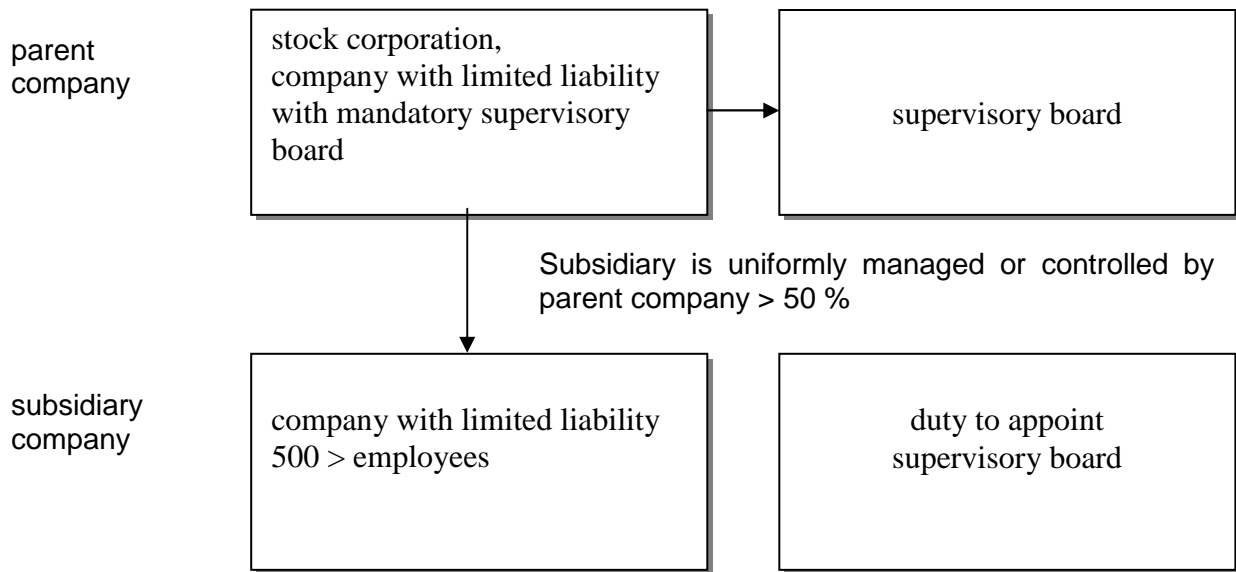


### Case 2: Company with limited liability is subsidiary company



<sup>9</sup> Note that not all subsidiaries are to be considered as relevant. Companies with limited liability with less than 300 employees are not taken into consideration at all (unless they have the duty to appoint a supervisory board for another reason, e.g. capital investment companies)

### Case 3: Company with limited liability is subsidiary company



The **average number of employees** is **determined** by the number of employees at the end of each month within the preceding calendar year. Each January 1<sup>st</sup> the directors have to determine the average number of employees employed in the preceding year. If the average number exceeds 300 or 500 respectively, the next determination of the number of employees has to be made on January 1<sup>st</sup> three years after. A change in the number of employees within the respective three years has no influence on the necessity of a supervisory board. If such determination reveals that the average number of employees does not exceed 300 or 500 respectively, the determination has to be repeated on each January 1<sup>st</sup> of the subsequent years until the number of 300 or 500 respectively is exceeded.

If a stock corporation is transformed into a company with limited liability, the supervisory board may continue to exist provided that the conditions making a supervisory board mandatory are met. It can be concluded from the above that in any case, a mandatory supervisory board continues to exist for a period of three years even in the case that the average numbers of employees remain below 300 or 500 respectively within this period.

**Cooperative associations** with at least 40 employees over a long period have to establish a supervisory board.

**Private foundations** have to establish a supervisory board if the number of employees exceeds 300 or if the private foundation uniformly manages national companies or cooperative associations or if it controls them by way of a direct equity participation of more than 50% and, in both cases, the number of employees of these companies or cooperative associations exceeds 300 in average and the activity of the private foundation goes beyond administrating the shares of the companies or cooperative associations controlled by it.<sup>10</sup>

<sup>10</sup> § 5 (4) Associations Act 2002

Associations in the meaning of the Associations Act 2002 may provide for a supervisory body in their bylaws. If an association with a supervisory board employs, within a period of two years, more than 300 employees in average, one third of the supervisory board members have to be workers' representatives.

### The composition of the supervisory board

**The supervisory board of a company has to consist of at least three capital side representatives. The number of the workers' representatives to be delegated to the supervisory board is determined in relation to the number of capital side representatives elected. For every two capital side representatives, one workers' representative has to be delegated. If the number of the capital side representatives is uneven, one more workers' representative has to be delegated to the board ("one-third-participation").**

§ 86 of the Stock Corporation Act determines the maximum number of supervisory board members in relation to the share capital.

With a share capital of

- ≤ 350,000 euro            maximum of 7 capital side representatives,
- > 350,000 euro           maximum of 12 capital side representatives,
- > 3,500,000 euro        maximum of 20 capital side representatives.

In general, one person cannot be supervisory board member in more than 10 companies. However, mandates in the supervisory boards of companies belonging to the same group of companies and to which the person was elected or delegated in order to protect the economic interests of the Federation, a region or a municipality or of a credit institution which has a permanent banking connection with the company is only counted as one single mandate. **In no case one person may sit on more than 20 supervisory boards.** In principle, any natural, major person who is capable of contracting may become member of a supervisory board. As a matter of course, management board members (directors) may not become supervisory board members in the same company (nobody may control oneself). **The capital side representatives are elected by the shareholders' meeting.** The articles of incorporations (stock corporations) or the articles of association (companies with limited liability) may grant to particular shareholders the right to delegate members to the supervisory board.<sup>11</sup>

If at least three capital side representatives are to be elected in the course of a shareholders' meeting, one third of the share capital represented may request that such election be held separately for each supervisory board member. In such case, a minority of shareholders representing at least one third of the votes cast can impose that a particular person is elected to the supervisory board.<sup>12</sup>

The members of the supervisory board take up their functions as soon as they have accepted their election. No member of the supervisory board may be elected for a period extending beyond the shareholders' meeting which resolves on the discharge

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<sup>11</sup> § 88 of the Stock Corporation Act, § 30 c of the Companies with Limited Liability Act

<sup>12</sup> § 87 of the Stock Corporation Act, § 30 b of the Companies with Limited Liability Act

from liability for the fourth business year after the election (approx. 5 years). The re-election of supervisory board members is admissible.

The election to the supervisory board may be revoked by the shareholders' meeting prior to the end of the term of office. The resolution requires a majority of at least three quarters of the votes cast. The articles of incorporation (stock corporation) or the articles of association (company with limited liability) may replace this majority by another and may impose other requirements.<sup>13</sup>

For the delegation of workers' representatives to the supervisory board, refer to page 33 et seq.

## The tasks of the supervisory board

**The supervisory board is the controlling body of a company. Its main task consists in controlling the management board (directors).**

The following pages provide an overview of the supervisory board's tasks. If particular information concerns stock corporations only, this is noted in brackets.

The supervisory board

- **controls the management board (directors),**
- **consents to particularly important management measures** (transactions requiring the approval of the supervisory board),
- **appoints and revokes the appointment of a management board member** (stock corporations),
- **examines the annual financial statements,**
- **decides on the adoption of the annual financial statements** (stock corporations),
- **convoles an extraordinary shareholders' meeting** if it is required in the interest of the company.

As regards **cooperative associations**, the supervisory board has to supervise the management, examines the financial statements including the balance sheet as well as the proposals for the distribution of profits. Thereon, it has to report to the annual general meeting. It also has to convoke a general meeting if it is required in the interest of the cooperative association. However, no legal provision determines transactions or management measures requiring the approval of the supervisory board; relevant rules may be laid down in the bylaws.

The control of the management board (directors) by the supervisory board is assured through a multitude of different instruments. In principle, the supervisory board has to examine whether a transaction or management measure is

- **legal,**
- **useful,**
- **right from an economic point of view, and**
- **justifiable as regards its social effects.**

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<sup>13</sup> § 87 of the Stock Corporation Act, § 30 b of the Companies with Limited Liability Act

**On the one hand, the supervisory board has to control in retrospect whether the management board (directors) has managed the business of the company as required and appropriate; on the other hand, it preventively supports the management board as an adviser when extraordinary management measures have to be taken.**

The efficiency of the supervisory board strongly depends on the owner structure of the company. Only if the owners are interested in an efficient control of the management board (directors) by the supervisory board, they will, by electing appropriate capital side representatives, enable the supervisory board to effectively perform its monitoring tasks.

**Transactions requiring the approval of the supervisory board are critical as regards the preventive control by and advisory role of the supervisory board.**

In stock corporations and companies with limited liability, the following transactions may only be performed with the approval of the supervisory board:<sup>14</sup>

- The acquisition and the disposal of **shares**
- The acquisition, the disposal and the closure of **undertakings and businesses**
- The acquisition, the disposal and encumbrance of **real estate**
- The establishment and the closure of **branch offices**
- **Investments** which exceed certain acquisition costs in each particular case and in total in one business year
- The **issue of bonds and the raising of loans and credits** which exceed a certain amount in each particular case and in total in one business year
- The **granting of loans and credits**, insofar as it is not part of the ordinary course of business
- The establishment and the closure of **lines of business** and **types of production**
- The determination of **general principles** of business policy
- The determination of principles as regards the granting of **profit or turnover participations** and **pension commitments** to executives
- The granting of **special statutory authority** ("Prokura") (stock corporation)
- The granting of stock options to employees and executives of the company (stock corporation)<sup>15</sup>

Insofar as the supervisory board's (the directors') consent is only required if particular thresholds as to the amounts are reached, these thresholds are to be determined by the articles of incorporation (articles of association). In stock corporations, the thresholds may also be determined by the supervisory board. The thresholds should be fixed in a way to make sure that extraordinary management measures are in any case only taken upon the supervisory board's consent.

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<sup>14</sup> § 95 (5) of the Stock Corporation Act, § 30j (5) of the Companies with Limited Liability Act.

<sup>15</sup> For the granting of stock options to members of the management board, see § 92 (4) of the Stock Corporation Act.

**The articles of incorporation or the supervisory board (stock corporation) or the articles of association (company with limited liability) may determine that further transactions, for which the supervisory board's approval is not required by law, may only be performed upon the supervisory board's consent. This means that the owners as well as the supervisory board may themselves enhance the influence of the supervisory board.**

The influence of the supervisory board varies from one company type to another:

- In stock corporations, the supervisory board is in the best position to exert control.
- In companies with limited liability, the supervisory board is less powerful in several respects: on the one hand, not every company with limited liability has the duty to establish a supervisory board; on the other hand, significant control is exerted by the shareholders' meeting (e.g. adoption of the annual financial statements, appointment or revocation of the appointment of the directors. However, if a supervisory board has been established – be it mandatory or not – it has, apart from the exceptions mentioned above, similar powers as the supervisory board in a stock corporation. The duty to establish a supervisory board also implies extensive obligations in connection with accounting. According to § 221 of the Commercial Code, the annual financial statements and the annual report of small-scale companies with limited liability do not have to be examined by an auditor. However, if a small-scale company with limited liability has a mandatory supervisory board, the annual financial statements and the annual report have to be examined by an auditor.<sup>16</sup>
- As regards cooperative associations, the control powers of the supervisory board strongly depend on the bylaws. The Cooperative Associations Act only contains very general provisions on the supervisory board. In particular, there are no provisions at all concerning transactions requiring the supervisory board's approval.

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<sup>16</sup> § 268 of the Commercial Code

<b>Influence of the supervisory board</b>			
	<b>Stock corporation</b>	<b>Company with limited liability</b>	<b>Cooperative association</b>
Appointment of management board	Supervisory board	Shareholders' meeting	General meeting
Adoption of the annual financial statements	Supervisory board	Shareholders' meeting	General meeting
Determination of further transactions requiring the supervisory boards' approval	Supervisory board, shareholders' meeting	Supervisory board, shareholders' meeting	General meeting
Influence of shareholders over the management board	No right to give orders	Right to give orders	Right to give orders

## **The rights of the supervisory board**

To enable the supervisory board to perform its advisory and monitoring tasks, the legislator has provided the supervisory board with various legal instruments.

### **The information duty of the management board (directors)**

**The management board (directors) has to inform the supervisory board regularly, but at least quarterly, on the progress of the business operations and the state of the company. The management board (directors) has to fulfil its information duties in any case, and not only upon request.**

The report to the supervisory board, which may be made in writing or orally, has to be drawn up by the management board as such. It has to contain a detailed description of the situation of the company and its probable future development. Moreover, on important occasions, the management board (directors) is obliged to report to the chairman of the supervisory board. The chairman has to make the reports available to the supervisory board as such. According to the importance of a matter, an extraordinary supervisory board meeting may be convoked.

If the management board fails to inform the supervisory board, it can be encouraged by the court to comply with the provisions on its information duties, by means of fines of up to 3,600 euro.

## The supervisory board's information right

**The supervisory board may request from the management board (directors) a report on the affairs of the company, including its relationships with group companies.**

Also individual supervisory board members may request a report which has to be forwarded to the supervisory board as such. The management board (directors) may refuse to meet the request; however, if the request is supported by a second supervisory board member, the management board (directors) has to make the report.<sup>17</sup> Since in any case at least two workers' representatives sit on the board, this information right is, from the employees' perspective, a central minority right. The chairman of the supervisory board may also request a report without the support of another supervisory board member.

In principle, the supervisory board's information right concerns **all matters** of the company, including the organisational, financial and staff-related relations with group companies.

In this context, it has to be underlined that the management board (directors) is in principle obliged to inform the supervisory board truthfully and in detail: **no confidentiality provisions are applicable between the management board (directors) and the supervisory board.**

If the management board does not meet the supervisory board's request for information, it can be fined pursuant to § 258 of the Stock Corporation Act (fines of up to 3,600 euro).

## The supervisory board's inspection and examination rights

**The supervisory board may inspect and examine the books and writings of the company as well as its assets, and in particular the cash and the holdings of securities and goods; it may also mandate individual members for this or special experts for particular tasks.<sup>18</sup>**

In general, the inspection and examination rights only become relevant when the supervisory board, as a consequence of a report by the management board (directors), considers it necessary to examine the affairs of the company in greater detail. In general, if the supervisory board decides to inspect and examine the books or assets of the company, a certain mistrust vis-à-vis the management board (directors) may be the reason.

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<sup>17</sup> § 95 (2) of the Stock Corporation Act, § 30j (2) of the Companies with Limited Liability Act

<sup>18</sup> § 95 (3) of the Stock Corporation Act, § 30j (3) of the Companies with Limited Liability Act

## **The transactions requiring the supervisory board's approval**

**In the framework of the transactions requiring the supervisory board's approval, the supervisory board may participate in decisions on management measures that may be important to the future of the company.**

The supervisory board's right to refuse to give its consent to a measure planned by the management board (directors) or to subject its approval to specific conditions is an important legal instrument indeed. It truly enables the supervisory board to fulfil its advisory and monitoring duties.

## **The consultation of experts**

**The supervisory board may consult experts or other persons providing information on particular affairs. Thus, if this is required in particular cases, the supervisory board may adopt a resolution on the consultation of an expert.**

However, the supervisory board may not seek assistance by experts or other persons providing information permanently and on any matter. The supervisory board members are supposed to be themselves in the position to adequately fulfil their duty of monitoring the company.

## **The convocation of the shareholders' meeting by the supervisory board**

**The supervisory board has to convoke a shareholders' meeting if it is required in the interest of the company and if the management board refuses to do so.<sup>19</sup> Nevertheless, the supervisory board will only make use of this right in the event that the supervisory board and the management board (directors) have substantial differences of opinion and if the supervisory board regards it as critical to inform the shareholders.**

In addition, the supervisory board may, when all other means have failed, resort to revoking the appointment of the management board (directors) if an important reason for doing so exists (e.g. gross breach of duties). However, this does not apply to companies with limited liability, where the appointment of the directors can only be revoked by the shareholders' meeting. Thus, in companies with limited liability, the convocation of an extraordinary shareholders' meeting would be the adequate means of exercising the supervisory duty in the event of a gross breach of duties by the directors.

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<sup>19</sup> § 95 (4) of the Stock Corporation Act, § 30j (4) of the Companies with Limited Liability Act

## The report of the supervisory board to the shareholders' meeting

**The supervisory board has to examine the annual financial statements, the proposal for the distribution of profits and the report on the state of the company and has to report them to the shareholders' meeting.<sup>20</sup> In its report, the supervisory board has state in which manner and to what extent it has examined the management board (directors) during the business year, who has audited the annual financial statements and the report on the state of the company and whether, according to the final result, these examinations gave rise to material objections.**

In its report to the shareholders' meeting, the supervisory board may in principle also provide information on any matters having given rise to its objections when performing its general monitoring tasks. Furthermore, it may criticise the management board, insofar as this can be seen, in particular cases, as an adequate means of control.

As regards **cooperative associations**, the supervisory board may request for information on the running of the cooperative association's affairs. At any time, it may inspect the books and writings and examine the cash of the cooperative association. The supervisory board may also temporarily, until the following shareholders' meeting to be convoked immediately is held, suspend management board members from duty. Special statutory authority ("*Prokura*") may only be granted upon the supervisory board's consent. If it is required in the interests of the cooperative association, the supervisory board may convoke a general meeting. Moreover, the supervisory board has to be involved in the audit; in a joint session with the management board, the supervisory board has to adopt the audit report and has to give its opinion on it at the following general meeting.

### Means of the supervisory board to remedy shortcomings

To conclude, the following means and instruments of the supervisory board to remedy shortcomings can be noted:

- **Request information** from the management board (directors)
- Explicitly **criticise** particular management measures or transactions
- **Request** that shortcomings be remedied
- Submit **proposals** to remedy shortcomings
- **Refuse to give its consent** to management measures
- **Refuse to approve** the annual financial statements in the event of shortcomings as regards accounting (stock corporations)
- **Convoke an extraordinary shareholders' meeting**
- **Revoke the appointment of the management board** if an important reason for doing so exists (stock corporations).

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<sup>20</sup> § 96 of the Stock Corporation Act, § 30k of the Companies with Limited Liability Act

## The rights and duties of supervisory board members

A distinction has to be made between the rights conferred by law to the supervisory board as such and the rights and duties of the individual supervisory board members.

**It has to be borne in mind that the supervisory board members are in principle personally liable for their conduct at the supervisory board. Thus, each supervisory board member has to make sure that the supervisory board as such complies with the duties conferred to it by law.**

In particular, the following rights and duties have to be taken into consideration:

- The supervisory board members have the right – but also the duty – to **take part in all meetings of the supervisory board**. By means of sending invitations in due time, it has to be made sure that the supervisory board members are able to exercise this right/duty.
- Moreover, each supervisory board member may **request**, by stating the purpose and the reasons, that the chairman of the supervisory board forthwith **convoke a supervisory board meeting**. The meeting has to be held within two weeks after the convocation. If a request supported by at least **two supervisory board members** is not met, the applicants may **convoke** the supervisory board **themselves** by stating the facts for doing so.<sup>21</sup>
- The **minutes** of the supervisory board meetings **have to be submitted** to the supervisory board members.
- Moreover, the **annual financial statements** and the **audit report** have to be made available to all supervisory board members.<sup>22</sup>
- As regards **stock corporations**, the supervisory board members may in addition **take part in the shareholders' meeting**. In companies with limited liability, the supervisory board members may only take part in shareholders' meetings convoked by the supervisory board in the interest of the company or at which the auditors are elected. Moreover, in stock corporations, the supervisory board members may request that the agenda of the shareholders' meeting as well as the resolutions adopted be submitted to them. As far as **companies with limited liability** are concerned, the supervisory board members may **inspect the minutes** of all shareholders' resolutions.

**Only capital side representatives receive remuneration for their function at the supervisory board. Workers' representatives exercise their mandate on an honorary basis pursuant to § 110 of the Labour Constitution Act. However, they are entitled to receive an adequate compensation for expenses.**<sup>23</sup>

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<sup>21</sup> § 94 of the Stock Corporation Act, § 30i of the Companies with Limited Liability Act

<sup>22</sup> § 273 (3) of the Commercial Code

<sup>23</sup> These expenses may be travelling expenses, expenses related to the purchase of specialised literature, training courses or seminars, etc.

- Supervisory board members may **consult third parties** outside the meeting. Any costs arising from consulting experts have however to be borne by the supervisory board members themselves. They may only consult third persons if, from an objective point of view, they cannot be required to have the specialised knowledge. Moreover, the third parties consulted have to be experts who are bound to a professional obligation to maintain silence on confidential information or with whom an appropriate agreement has been concluded. Thus, in particular cases, workers' representatives may consult their representative body (the Chamber of Labour, or the Austrian Trade Union Federation).
- The Cooperative Associations Act does not contain any provisions on the rights of individual supervisory board members. However, since the supervisory board exists for the same legal purpose as it does in stock corporations or companies with limited liability, it can be concluded that in cooperative associations, supervisory board members enjoy similar participation, information and consultation rights.

### **The duty of care and responsibility**

Since the provisions on the duty of care and responsibility of the management board members (directors) apply accordingly to supervisory board members.

§ 70 of the Stock Corporation Act also constitutes a relevant guideline for supervisory board members; these are bound to its guideline provision on the duty of care and responsibility.

**The supervisory board has to fulfil its monitoring duties in a way which is required for the benefit of the undertaking, taking into consideration the interests of the shareholders and the employees as well as the public interest. Supervisory board members in other types of businesses (companies with limited liability, cooperative associations, private foundations, associations) should accordingly take into account this guideline provision.<sup>24</sup>**

- Each supervisory board member is personally liable to the company for any damages arising from unlawful or culpable conduct. Thus, the liability for damages applies if a supervisory board member has objectively breached his duties, be it by omission or actively, and if the necessary care has not been applied.
- Since omitting necessary measures may also result in the supervisory board members' liability for damages, supervisory board members are obliged to actively monitor the company or to make sure that this is done by others.
- Not exercising as appropriate the supervisory duties may also give rise to liability claims. Thus, in order to fulfil their duty of care and to effectively control the management, workers' representatives should make full use of their knowledge of what is going on in the company.
- Moreover, each supervisory board member is obliged to seek information and reports on all relevant management matters, including on transactions requiring

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<sup>24</sup> The Austrian Supreme Court has applied the guideline provision of § 70 of the Stock Corporation Act accordingly on supervisory board members in companies with limited liability (Austrian Supreme Court on 26-02-2002, decision 1Ob 144/01k)

the supervisory board's approval and having been submitted to it. In the event of a lack of clarity, each supervisory board member has to seek further information in order to ensure that resolutions are taken with best care.

So far, the Austrian Supreme Court has only taken two decisions regarding the responsibilities of the supervisory board. These have set the bar for the duty of care and responsibility very high.<sup>25</sup>

**According to Austrian legal practice, a supervisory board member may be held liable if it fails to employ “the care that can in a particular case be expected from a prudent and conscientious supervisory board member who is a person who has greater knowledge and experience in business or financial matters than an average businessman and who is capable of understanding complex legal and economic interrelationships and of assessing their impact on the company.”**

The latest decision by the Austrian Supreme Court<sup>26</sup> has stipulated that in fact **each individual supervisory board member** has to be **capable of appropriately assessing the affairs of the company**. If in particular cases additional expertise is required in order to take a decision, the supervisory board as such may or even has to consult experts at the company's expense. The Austrian Supreme Court has underlined that in any case, the supervisory board members have to be capable of understanding and assessing reports in order to draw adequate conclusions as regards management measures.

The supervisory board members are jointly and severally liable for damages to the company caused by them unlawfully and culpably. Different degrees of culpability are only relevant as regards claims between the individual supervisory board members.

If a supervisory board member is sued for damages, it has to prove that it has employed the necessary care.<sup>27</sup> The company has to claim and prove that there has been damage and that this damage has been caused by the supervisory board member.<sup>28</sup> Any liability claims against the supervisory board member are barred after five years from the moment at which the damage and the person responsible have come to the knowledge of the shareholders.

The liability of supervisory board members may not be excluded or limited by a contract. According to prevailing opinion, the Act on the Liability of Employees is not applicable to supervisory board members, and in particular not to workers' representatives.

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<sup>25</sup> Austrian Supreme Court on 31-05-1977, decision 5Ob 307/76; Austrian Supreme Court on 26-02-2002, decision 1Ob 144/01k

<sup>26</sup> Austrian Supreme Court on 26-02-2002, decision 1Ob 144/01k

<sup>27</sup> „Shifting of the burden of proof“ (the supervisory board member has to supply evidence that it employed the necessary care). Therefore, it is important to have accurate minutes all supervisory board meetings.

<sup>28</sup> § 84 of the Stock Corporation Act, § 33 of the Companies with Limited Liability Act

**To conclude, it has to be underlined that each supervisory board member is liable and responsible for his conduct. Thus, each member should make use of any means and instruments available to supervise and control the management in order to comply with the exigent legal requirements as regards the duty of care.**

It has to be borne in mind that also being passive and omitting adequate control measures may result in damages to the company for which the supervisory board member may be held liable.

In practice, supervisory board members rarely have to face legal action for damages. This may inter alia be due to the fact that companies fear the loss of image that could arise from suing a supervisory board member. Moreover, in many cases it is quite unlikely that their claims, which may be considerable, are effectively collectible. However, several cases have recently shown that especially in the event of bankruptcy, supervisory board members are likely to be held liable for damage, either by the creditor damaged or by the liquidator. In any case, when exercising one's duties as a supervisory board member, it is vital to bear in mind one's diligence obligations and possible liabilities for damages.

## **The internal rules of the supervisory board**

### **The chairman of the supervisory board**

**Like any collegial body, the supervisory board requires a person to chair its meetings: the chairman and at least one deputy are elected from among the supervisory board by a "double majority" of the supervisory board members. "Double majority" means that the majority of all supervisory board members together as well as the majority of the capital side representatives is required.<sup>29</sup>**

The chairman of the supervisory board has to prepare and **chair the supervisory board meetings**. In particular, he draws up the agenda, sends the **invitations** to the supervisory board members in due time, is the **voice** of the supervisory board vis-à-vis the management board or third parties and has to make sure that the supervisory board is organised in compliance with the legal provisions applicable.

Apart from these tasks, the chairman is on an equal footing with the other supervisory board members. However, the articles of incorporation (articles of associations) may provide that in the event of a parity of votes, the chairman's vote is decisive. In any other cases the vote of the chairman has as much weight as any other member's vote. In practice, the chairman often has substantial influence on the supervisory board's resolutions.

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<sup>29</sup> § 110 (3) of the Labour Constitution Act

## The supervisory board meeting

- **The number of meetings**

**As laid down in the Austrian Stock Corporation Act, the supervisory board has to hold a meeting at least four times in each business year. The meetings are to be held quarterly.**

- **The convocation**

**The chairman has to convoke the supervisory board meeting in due time and by stating the agenda items. “In due time” means that the supervisory board members have to be given sufficient time to prepare for the meeting.**

The meeting can be convoked in written form or orally. In many cases, the articles of incorporation (articles of association) or the internal rules of the supervisory board contain provisions on the form of the convocation.

The law does not explicitly provide for a minimum number of days between the convocation and the actual meeting. However, when choosing the date, the chairman has to make sure that, according to the agenda and the urgency of a matter, the supervisory board members have sufficient time to prepare themselves as appropriate. It is also possible to explicitly determine time lines for the convocation of the meetings in the internal rules. In no case the supervisory board members should be informed on the convocation later than two weeks prior to the start of the meeting.<sup>30</sup>

- **Extraordinary supervisory board meetings**

**Each supervisory board member or the management board (directors) may request, by stating the purpose and the reasons, that the chairman of the supervisory board forthwith convoke an extraordinary supervisory board. The meeting has to take place within two weeks after the convocation.**

If this request is not met and at least two supervisory board members (regardless of them being workers' representatives or capital side representatives) have supported the request, the applicants may convoke the supervisory board themselves. The extraordinary meeting will in any case be chaired by the chairman of the supervisory board.

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<sup>30</sup> Rule no 12 of the Austrian Code of Corporate Governance provides that material and documents required are to be made available at least one week prior to the meeting. However, in order to duly prepare for a meeting, two weeks seem to be more appropriate.

- **The Agenda**

**When convoking the supervisory board, the chairman has to submit the agenda, containing all items which will be subject to debates and resolutions in the course of the meeting. Moreover, he has to submit all documents or material required for the adequate preparation of the meeting to the supervisory board members.**

Individual supervisory board members may request that the chairman add items to the agenda; if this request is not met, an extraordinary meeting may be convoked. However, since all supervisory board members should be given the chance to appropriately prepare for the additional agenda item, the request has to be submitted timely before the meeting. Prior to the start of the meeting, new items may still be added to the agenda; however, no member of the supervisory board may, due to this change, be excluded from voting on possible resolutions. Only if all supervisory board members are present should an item which will result in a resolution be added during the meeting.

- **Consultations prior to the meeting**

The capital side representatives as well as the workers' representatives may prepare for supervisory board meetings by means of consultations. There are no legal provisions on this matter; in any case, silence has to be maintained on confidential information.

**In no case resolutions to be taken at the supervisory board meeting may be anticipated in the course of these consultations.**

In order to best safeguard the interests of employees at the supervisory board, workers' representatives should meet before the meeting and find **a common stance** on the issues to be discussed. It is also advisable to assign particular tasks to individual workers' representatives in order to facilitate an efficient safeguarding of interests.

- **Participants**

**In principle, each supervisory board member has the right, but also the obligation, to take part in all supervisory board meetings. The management board (directors) may be obliged, but is not entitled, to attend the supervisory board meeting in order to report on particular affairs or to answer questions.**

Moreover, upon a supervisory board resolution, experts or persons providing information may attend supervisory board meetings if it is required in particular cases. Should the expertise of the supervisory board not be sufficient to assess an issue, it is even the duty of a prudent and conscientious supervisory board member to consult an expert. The expenses related thereto have to be borne by the company. In any case, an auditor has to be present at supervisory board meetings

where the annual financial statements, the state of the company and the proposal for the distribution of the profits are dealt with.

- **The representation of supervisory board members**

**In principle, the law does not provide for supervisory board members being represented by others. However, the articles of incorporation (articles of association) may permit persons who do not belong to the supervisory board to participate in the meetings of the supervisory board and its committees on behalf of supervisory board members who are unable to attend themselves.<sup>31</sup>**

In many cases, the articles of incorporation (articles of association) permit that other supervisory board members, but no third persons, participate on behalf supervisory board members. In principle, the articles of incorporation (articles of association) could also allow for third persons representing supervisory board members. In any case, the representative has to be empowered in writing by the supervisory board member to be represented. In the framework of resolutions by written vote, supervisory board members may not empower representatives.

- **The quorum**

**In principle, at least three supervisory board members are required to constitute a quorum. In this context, no distinction is made between capital side representatives and workers' representatives.<sup>32</sup>**

Only present supervisory board members, but no representatives are counted. The articles of incorporation (articles of association) may require a higher minimum number to constitute a quorum. It is debatable whether the articles of incorporation (articles of association) may provide that resolutions shall only be taken if the chairman or his deputy is present.

Supervisory board resolutions taken without a quorum have **no legal effect**. Moreover, it is required that the issues of the resolutions are **clearly designated** and **made available** to all supervisory board members **in due time**. If these prerequisites are not met, the resolutions have no legal effect.

**Unless the articles of incorporation (articles of association) provide otherwise, only supervisory board members have the right to vote at supervisory board meetings. The articles of incorporation (articles of association) may also provide for a voting right of representatives empowered by supervisory board members.**

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<sup>31</sup> § 93 (3) of the Stock Corporation Act, § 30h of the Companies with Limited Liability Act

<sup>32</sup> According to § 110 (3) of the Labour Constitution Act, the articles of incorporation (articles of association) may not distinguish between capital side representatives and workers' representatives as regards the quorum.

The articles of incorporation (articles of association) may likewise stipulate that in the event of a parity of votes, the vote of the chairman of the supervisory board is deciding.

No legal provisions exist concerning supervisory board members' voting rights in the event of a **clash of interests**. If a supervisory board member is personally concerned by an issue and therefore unable to take an unbiased decision, he should abstain from voting. A clash of interests can for instance exist if a supervisory board member owns e.g. an undertaking which has applied for a contract on the award of which he should then vote at the supervisory board. In such a case, he is no longer in the position to properly exercise his voting right at the supervisory board. However, no explicit provision obliges him to abstain from voting.<sup>33</sup>

According to the issue of a resolution, the **majorities required to constitute a quorum** vary. These are determined by law or in the articles or incorporation (articles of association).<sup>34</sup> Unless the law or the articles or incorporation (articles of association) provide otherwise, a resolution requires a simple majority of the votes cast. Pursuant to Austrian law, the appointment and the revocation of the appointment of management board members (directors) as well as the election of the chairman of the supervisory board require a "double majority" in the meaning of § 110 Labour Constitution Act.

From the legal perspective, **abstentions** are somewhat problematic: it is not admissible that supervisory board members withdraw from the responsibility for the decisions of the supervisory board. If abstentions are counted as non-votes, abstention from voting may be regarded as non-participation. In case of liability claims, this may cause trouble to the supervisory board member. However, if the articles of incorporation (articles of association) or the internal rules of the supervisory board provide that abstentions are counted, be it as negative or positive votes, abstentions do not conflict with the supervisory board members' obligation to participate in resolutions and are therefore admissible. In any case, abstentions are admissible in the event of a clash of interests. In principle, the internal rules of the supervisory board should explicitly determine how abstentions are to be counted.

As regards the **voting procedures** at the supervisory board, the precept of explicitness applies; this means that every application for a resolution has to be clearly formulated, making it possible for the members to approve a resolution with a simple "yes", or refuse to it with a "no".

In principle, **secret ballots** are not admissible. Since supervisory board members are personally liable for their conduct, their votes have to be traceable. However, "false" secret ballots may take place. This means that while the individual votes remain a secret to the supervisory board members, the chairman records the voting behaviour of the individual supervisory board members, and in the event of liability claims, he is able to provide information on it.

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<sup>33</sup> On the issue of "clash of interests", please refer to rules 44, 46 and 47 of the Austrian Corporate Governance Code.

<sup>34</sup> Apart from particular cases requiring double majorities, the articles of incorporation (articles of association) may not distinguish between capital side representatives and workers representatives as regards the quorum.

Resolutions of the supervisory board may be taken during the meeting or by written vote. However, if **resolutions** are to be taken by **written vote**, the **consent of all supervisory board members** is required. If one supervisory board member objects to this voting procedure, the resolution can only be passed at the supervisory board meeting. As regards the quorum for resolutions submitted to written vote, the same rules as for “ordinary” resolutions apply – at least three supervisory board members have to participate. Moreover, the approval or refusal of the supervisory board members has to be unambiguous and duly signed. The resolution passed by written vote has to be recorded. The voting form may not contain any clause stating that non-votes are regarded as consent.

In practise, it is advisable to give one’s consent to passing a resolution by written vote only if the issue of the resolution does not seem to require any more debate at a meeting or if a resolution is particularly urgent. However, if a supervisory board member considers that it needs further information or if it wishes to highlight further aspects of an issue, it should object to the procedure, thereby making a supervisory board meeting necessary.

- **The location and the language of the meeting**

**There are no legal provisions concerning the location and language of the supervisory board meeting. However, the articles of incorporation (articles of association) may determine a specific location and language. In general, the supervisory board meetings are held at the corporate seat. The choice of the location must allow every supervisory board member to take part in the meetings.<sup>35</sup>**

In Austria, supervisory board meetings are in principle held in German language. Another language may be chosen if this is required due to the composition of the supervisory board or if an independent interpreter is provided by the company.

**In practice, supervisory board meetings are held in another language than German above all in subsidiary companies of multinational groups. Often, the chairman, or even a management board member (director), which has to be supervised, then acts as interpreter. In no case should the supervisory board members consent to this practice, since an objective interpretation is hardly possible under such circumstances. Moreover, a supervisory board member who has to act as interpreter is hardly in the position to fulfil its function with the necessary care.**

- **The minutes**

**Minutes on discussions and resolutions by the supervisory board have to be drawn up and signed by the chairman of the supervisory board.**

There are only few legal provisions as regards the minimum content of the minutes.<sup>36</sup> In any case, the minutes have to contain the location and time of the

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<sup>35</sup> Travel expenses of workers’ representatives are not to be borne by the works council, but by the company.

<sup>36</sup> § 92 (2) of the Stock Corporation Act; § 30g (2) of the Companies with Limited Liability Act

meeting, the names of the attendants, the agenda items, the essential content of discussions, all applications which have been brought forward, outcome of votes, and, upon the request of a supervisory board member, special remarks made by this member or considerations for a vote.

Minutes have to be drawn up on meetings of the **plenary supervisory board**, on **committee meetings** and on **resolutions passed by written votes**.

In practice, the minutes are often approved by a resolution of the plenary supervisory board. This is not mandatory, but it enhances the value of evidence of the minutes. The supervisory board members' approval shows that they regard the minutes as a truthful account of the meeting.

**If a supervisory board member disagrees with the content of the minutes, it should apply for a correction of the minutes or request that its own position be integrated.**

There are in fact **no explicit legal provisions** stipulating that the minutes have to be submitted to each supervisory board member. However, it is recognised by prevailing opinion that the extensive **monitoring task** of the board members cannot be adequately fulfilled if the minutes are not made available. When it comes to liability claims, it is crucial for the supervisory board members to have the minutes at their disposal (shifting of the burden of proof!). Thus, each supervisory board member should carefully file all minutes, and keep them even after their term of office.

- **Supervisory board committees**

In principle, the supervisory board may appoint one or more committees from among its members, namely for the purpose of preparing its discussions and resolutions or to monitor the execution of its resolutions. Moreover, items for resolutions may be conferred to committees; however, **certain competences have to remain within the (plenary) supervisory board**.

- Control of the management
- Examination of the annual financial statements, the proposals for the distribution of profits and the annual report<sup>37</sup>
- Report to the shareholders' meeting
- Adoption of the annual financial statements (stock corporations)
- Convocation of the shareholders' meeting
- Appointment and revocation of the appointment of the management board (directors)
- Election of the chairman of the supervisory board and his deputy
- Appointment and dissolution of supervisory board committees
- Establishment of the internal rules of the supervisory board

The following competences may be conferred to **committees**:

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<sup>37</sup> If the supervisory board consists of more than five members, a committee must be appointed in any case for the review and the preparation of the adoption of the annual financial statements, the proposals for the distribution of profits and the report on the state of the company.

- Determination of the internal rules of the management board (directors)
- Adoption of internal rules for the management board (directors)
- Appointment of the chairman of the management board (directors)
- Determination of additional transactions requiring the approval of the supervisory board
- Approval to transactions
- Granting of loans and credits to management board members (directors)
- Representation of the stock corporation (company with limited liability) vis-à-vis the management board (directors)
- Other tasks as laid down in the articles of incorporation (articles of association)

By means of passing a resolution, the (plenary) supervisory board decides on the appointment of committees and the tasks to be conferred to these. Each committee must at least consist of two supervisory board members. The **one-third-representation** of the workers' representatives' side has to be assured (i.e. one workers' representative for every two capital side representatives). Exceptions to this rule are only admissible as regards committees working on the relations between the shareholders and the company; in these committees workers' representatives neither have seat nor vote.

When committees are appointed, **workers' representatives are delegated** to these committees by resolution of the workers' representatives sitting on the supervisory board. It has to be noted that by appointing committees, the supervisory board cannot simply delegate its responsibilities. The supervisory board members have to make sure that their advisory and monitoring duties are fulfilled with the necessary care and that the committees regularly report on their activities and resolutions to the (plenary) supervisory board.

In practice, a "presidium", in most cases composed of the chairman and his deputy, is established within many supervisory boards. When the presidium deals with duties going beyond the simple preparation of meetings and takes on duties of the supervisory board as such, the one-third-participation of workers' representatives has to be ensured.

In general it has to be taken into consideration that the appointment of committees must not prejudice the legal concept of the supervisory board as a collegial body; the supervisory board members must continue to have an overview of all monitoring tasks. The establishment of a great number of committees is above all advisable in large supervisory boards where efficient work cannot be assured otherwise. If the supervisory board is small, it is better to strive for discussing and passing resolutions in the plenary meeting.

The Act on the Change of the Insolvency Law 1997 stipulates that if certain conditions are met (more five capital side representatives), **an "audit committee" has to be set up** for the review and preparation of the adoption of the annual financial statements, the report on the state of the company, and the proposition for the distribution of profits. This committee prepares the statement of the (plenary) supervisory board. Where supervisory boards have **fewer than five capital side representatives, this function may be assumed jointly by all members**, and no audit committee has to be established.

- **Supervisory board resolutions without legal effect**

Resolutions by the supervisory board may have legal shortcomings, in particular when the supervisory board is not competent in a matter, when the content of the resolution is unlawful or when procedural provisions have been violated.

**The resolution has no legal effect if the supervisory board is not competent in a matter or if procedural provisions which are relevant for the result of a vote have not been complied with. However, the content of a resolution violating the law or the articles of incorporation (articles of association) is legally ineffective only if it contravenes the intent of the law or provision concerned.**

The legal effectiveness of supervisory board resolutions can be challenged through action for a declaratory judgment or, if required, through action for performance or injunction at the court which is competent in commercial matters.

## **Workers' representatives at the supervisory board**

### **Prerequisites for the delegation of workers' representatives to the supervisory board and their delegation within a group of companies**

**The delegation of workers' representatives to the supervisory board is governed by § 110 of the Labour Constitution Act. As laid down in this Act, the workers' representatives are delegated to the board by the central works council or, if the company consists of only one enterprise, by the works council from among all members having the right to vote. For every two capital side representatives, one workers' representative may be delegated to the board ("one-third-participation"). If the number of capital side representatives is uneven, one more workers' representative may be delegated.**

Within the body representing the workforce, the seats are allocated to the different groups according to the D'Hondt method.

The details of the delegation are governed by the Regulation on the Delegation of Workers' Representatives to the Supervisory Board<sup>38</sup>.

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<sup>38</sup> Federal Law Gazette No 343/1974, as amended by Federal Law Gazette No 814/1993

**Only works council members having the right to vote in works council elections may be delegated to the supervisory board. Thus, in no case a member of a trade union not being employed by the company may be delegated to the supervisory board, even if it has been elected to the works council.**

§ 110 of the Labour Constitution Act governs the delegation of workers' representatives to the supervisory board of

- Stock corporations
- Companies with limited liability
- Mutual insurance associations
- Cooperative associations with at least 40 employees over a long period
- Savings banks

As regards the "GmbH & Co KG"<sup>39</sup>, § 110 (7) of the Labour Constitution Act stipulates that the workers' representatives have to be elected to the "GmbH's" (= company with limited liability) supervisory board from among the workforce in its entirety, which means from among the members of the works councils of both the "GmbH" and the "KG" (= limited partnership).

- § 110 (6) of the Labour Constitution Act stipulates that in the **parent company** of a group of companies, one part of the workers' representatives is delegated to the supervisory board by the works councils of the parent company, and the other part is delegated by the works councils of the subsidiary companies, **unless a group works council** has been established by the central works councils.

Pursuant to § 110 (6) of the Labour Constitution Act, works councils of controlled companies may likewise delegate workers' representatives to the supervisory board of the parent company if the controlling company employs not more than half of the workforce of the controlled companies altogether.

The number of workers' representatives to be delegated to the board by the central works council (or works council) of the controlling company is determined by the number of employees of the controlling company in relation to the number of employees of the controlled companies. However, the central works council (or works council) of the controlling company may delegate at least one workers' representative.

This provision which, guarantees at least one mandate to the controlling company, does apply only if the activity of the controlling company is not limited to administrating the shares of the controlled company.

§ 110 (6) of the Labour Constitution Act does however **not apply** to **banks or insurance companies** which are parent companies in a group of companies. (The subsidiary companies do not have the right to delegate workers' representatives to the parent company's supervisory board.)

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<sup>39</sup> A GmbH & Co KG is a limited partnership (KG) with a company with limited liability as general (personally liable) partner and the shareholders of the GmbH (alone or with others) as limited partners.

Since the 1993 Amendment to the Labour Constitution Act<sup>40</sup>, works councils of subsidiary companies may also delegate workers' representatives to the supervisory board of so-called "**holding companies without employees**" if the holding company's activity is not limited to administrating the shares of the controlled company.<sup>41</sup> This provision is meant to ensure that workers' representatives participate in the supervisory board of holding companies if these take decisions which could concern the interests of the workforce of the controlled companies.

Insofar as a supervisory board has been established in a private foundation, one third of the members have to be workers' representatives.<sup>42</sup>

The delegation of workers' representatives of controlled companies to the parent company's supervisory board depends on the **type of the company**.

- According to § 110 (6) of the Labour Constitution Act, only stock corporations, companies with limited liability and cooperative associations can be regarded as **controlling companies**<sup>43</sup>.
- Stock corporations, companies with limited liability with mandatory supervisory boards, companies with limited liability in the meaning of § 29 (2) No 1 of the Companies with Limited Liability Act (number of employees >300-500) and cooperative associations with mandatory supervisory boards can be regarded as **controlled companies** if they are grouped under uniform management or if they are controlled by another company by way of a direct equity participation of more than 50%.

### Delegation by the group works council

**If a group works council has to be established in a group of companies, the group works council delegates workers' representatives to the supervisory board of the controlling company.**<sup>44</sup>

Since the 1993 Amendment to the Labour Constitution Act, the groups works council no longer has to comply with complicated voting procedures when delegating workers' representatives to the parent company's supervisory board.

- When the group works council delegates workers' representatives to the supervisory board, the members of the groups works council coming from the central works council of the controlling company may also nominate workers' representatives. The number of workers' representatives nominated by them is determined according to the number of employees of the controlled company in relation to the number of employees of the controlling company.
- The remaining workers' representatives are nominated from among the members of the controlled companies' central works councils. However, this applies only if the controlled companies are entitled, according to § 110 (6) of

<sup>40</sup> Federal Law Gazette No 460/1993

<sup>41</sup> § 110 (6a) of the Labour Constitution Act

<sup>42</sup> § 22 of the Private Foundations Act

<sup>43</sup> According to the Private Foundations Act, private foundations can also be regarded as controlling companies.

<sup>44</sup> § 88a and § 110 of the Labour Constitution Act

the Labour Constitution Act, to delegate workers' representatives to the parent company's supervisory board.

- The number of group works council members to be nominated by each group which is running for election is determined according to the D'Hondt method. The different groups may draw up common lists.

## **The legal position of workers' representatives at the supervisory board**

**The workers' representatives in the supervisory board have in principle the same rights and duties as the capital side representatives.**

However, there are some exceptions according to § 110 (6) of the Labour Constitution Act:

- The workers' representatives delegated to the supervisory board exercise their duties on an **honorary basis**. They are entitled to receive an adequate compensation for expenses, but are granted no remuneration for their function.
- Workers' representatives are not counted among the minimum or maximum number of supervisory board members according to § 86 of the Stock Corporation Act.
- Pursuant to § 90 (2) of the Stock Corporation Act only capital side representatives, but no workers' representatives may act as substitutes of management board members who are unable to act for a period of time which has to be limited in advance.
- The workers' representatives have above all an important position when the supervisory board votes on **staff-related issues**:

**Supervisory board resolutions on the appointment or the revocation of the appointment of management board members (directors) or on the election of the chairman of the supervisory board and his deputy require, in addition to other prerequisites, the majority of the capital side representatives' votes.**

The **requirement of a "double majority"** is to ensure that a majority of workers' representatives and a minority of capital side representatives cannot impose personnel decisions against the will of the majority of the capital side representatives. However, they can at least impede certain staff-related decisions.

**As regards personnel decisions, the legal position of workers' representatives at the supervisory board is further weakened by § 110 (4) of the Labour Constitution Act; in supervisory board committees on the relations between the company and the management board (dealing for instance with employment contracts), there is no one-third-participation of workers' representatives.**

However, this restriction of the participation rights of workers' representatives does only apply if the supervisory board confers particular personnel decisions to a committee. If questions related to contracts for management board members (directors) are dealt with at the (plenary) supervisory board, workers' representatives may not be excluded. Moreover, the general monitoring duty requires that the supervisory board members excluded from a particular committee may request information on any contract concluded by that committee.

**Apart from the restrictions outlined above, the workers' representatives have in principle the same rights and duties as the capital side representatives. Supervisory board members do not obey to orders.**

## **The participation and co-decision of workers' representatives at the supervisory board**

As explained in the previous chapter, some distinction is made between workers' representatives and capital side representatives as regards participation and co-decision.

First of all, it can be said that the participation of workers' representatives in supervisory board decisions – especially as regards personnel decisions – is legally limited. Apparently, the legislator's intent has been to protect the independence of the management board (directors') as "employer" and to ensure that the capital side representatives are not outvoted. By conferring an "inferior" position to the workers' representatives, the legislator implies that also in the framework of the supervisory board, the workforce and the owner continue to play opposing roles in the meaning of the Labour Constitution Act.

**The activity of workers' representatives at the supervisory board is therefore to be regarded as part of their mandate pursuant to the Labour Constitution Act.**

The workers' representatives at the supervisory board constantly negotiate between two conflicting poles, their loyalty to the company in their capacity of supervisory board members (pursuant to corporate law) and their duties vis-à-vis the workforce in their capacity of workers' representatives (pursuant to the Labour Constitution Act).

The rights of workers' representatives as regards participation and co-decision in the framework of the central monitoring tasks of the supervisory board are not limited by any special provisions. The workers' representatives enjoy unlimited voting rights when matters of great economic importance are dealt with, for instance transactions requiring the approval of the supervisory board or the adoption of the annual financial statements. Thus, as regards decisions on economic matters, the workers' representatives are in principle on an equal footing with the capital side representatives.

In this context, the term of “equality” refers of course to the rights of the *individual* workers’ representatives. As regards participation and co-decision at supervisory board level, the one-third-participation strongly limits the influence of the workers’ representatives (and consequently the influence of the workforce as such). Limited influence does however not mean limited responsibility. In particular, the workers’ representatives cannot, by pointing at their limited power, withdraw from the responsibility for their voting behaviour at the supervisory board.

The following chapters inter alia explore the opinion of Austrian legal experts on various tricky issues related to the “double loyalty” of workers’ representatives.

## Corporate good versus employees’ interests?

The legislator has in principle provided for equality between workers’ representatives and capital side representatives at the supervisory board; however, by introducing some exceptions, he has recognised that the workers’ representatives at the supervisory board exercise their duties in their capacity of representatives of the workforce in the meaning of the Labour Constitution Act.

**The “two-sided status” of workers’ representatives requires that on the one hand, they have to fulfil the duties of a supervisory board member in accordance with corporate law; and on the other hand, they have to defend the interests of the workforce pursuant to the Labour Constitution Act.**

§ 70 of the Stock Corporation Act<sup>45</sup> is to be taken as a guideline for supervisory board members, obliging the supervisory board members as well as the management board members (directors) to exercise their duties in a way which is required for the **benefit of the undertaking, taking into consideration the interests of the shareholders and the employees** as well as **the public interest**. This principle applies alike to capital side and workers’ representatives; however, it does not exclude that the supervisory board members bring forward matters which are of special concern to the group by which they have been elected. Thus, in the framework of supervisory board resolutions, the workers’ representatives may defend the interests of the workforce; accordingly, the capital side representatives safeguard the interests of the shareholders. Defending the interests of particular groups is admissible in the framework of the provision of § 70 of the Stock Corporation Act; however, the interests of the workforce have to be measured against the benefit of the company. Since the same provision stipulates that the interests of the employees have to be taken into consideration, it becomes clear that the legislator does not see an absolute clash of interests, and **even less an incompatibility of corporate good and the interests of the workforce**.

- **Geppert/Moritz** assume that given the numerical inferiority of the workers’ representatives and the thereby reduced influence on supervisory board resolutions, the workers’ representatives are the more required to put a strong accent on the employees’ interests.

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<sup>45</sup> According to Austrian legal practice, the guideline provision of § 70 of the Stock Corporation Act is also applicable to companies with limited liability (Austrian Supreme Court on 22-02-2002, decision 1Ob 144/01k)

- **Marhold** states that in consideration of the rather generally described than clearly defined “code of conduct” for supervisory board members laid down in § 70 of the Stock Corporation Act, it is difficult to judge their conduct of in terms of “legal” or “unlawful”. From Marhold’s point of view, supervisory board members should only be held liable when they have substantially contravened the intent of § 70 of the Stock Corporation Act. This gives them some freedom in defending the interests of the workforce; of course, they remain nevertheless bound to corporate law and their loyalty and responsibility vis-à-vis the company.

To conclude, it can be noted that the involvement of workers’ representatives in the supervisory board is to be seen as part of the participation rights pursuant to the Labour Constitution Act. This implies that at the supervisory board, workers’ representatives defend the interests of the workforce. However, the supervisory board not being a place for one-sided safeguarding of interests, the workers’ representatives, when defending the interests of the workforce, have to perform their tasks in a way which is required for the benefit of the undertaking, within the boundaries of § 70 of the Stock Corporation Act. It remains disputable whether in the event of a clash of interests, priority has to be given to the benefit of the company (in accordance with the Stock Corporation Act) or to the interests of the employees (in accordance with the guiding principles of the Labour Constitution Act).

## **Information right versus duty to maintain silence?**

Corporate good or interests of the employees? The fact that the workers’ representatives on the supervisory board are constantly negotiating between two conflicting poles is illustrated by their duty to maintain silence on confidential information; in many cases, they may in particular be required to keep information secret from their colleagues at the works council.

**In principle, the duty to maintain silence on confidential matters pursuant § 84 (1) sentence 2 of the Stock Corporation Act also applies, in accordance with § 99 of the Stock Corporation Act, to all supervisory board members, including the workers’ representatives. Silence has to be maintained on any confidential information which has come to the knowledge of supervisory board members in the framework of their tasks.**

The duty to maintain silence on confidential matters is laid down by law; it cannot be tightened, neither by the articles of incorporation (articles of association) nor by the internal rules. Any information is to be regarded as confidential if it is accessible to a limited number of persons only and if its passing on would be detrimental to the company. Thus, the supervisory board members’ duty to maintain silence is subject to the objective confidentiality interest of the company. According to relevant literature, typical secrets and confidential information in this meaning may be information on the turnover, the cost structure, research results, product developments, the sales strategy, client lists, the cash flow, or data on investment or product planning.

The content and manner of negotiations at the supervisory board are subject to confidentiality, too.

**In principle, workers' representatives at the supervisory board are, to the same extent as capital side representatives, liable for damages caused by a breach of confidentiality. It has to be recognised that an extensive duty of confidentiality is the prerequisite for efficient cooperation between the supervisory board and the management board (directors).**

However, under some conditions the **passing on of confidential information** may be regarded as justifiable:

In particular cases, also maintaining silence may cause damages (uncertainty and unrest among the workforce, danger of industrial action. Thus, **in some particular cases** and to limited extent, confidential information may be passed on to third persons if it is required for the **benefit of the company**.

- **Floretta** presumes that in some exceptional cases, passing on confidential information does not necessarily mean breaching the duty of confidentiality. According to Floretta, workers' representatives may in particular pass on information if their duty of confidentiality substantially conflicts with their loyalty to the workforce, and if keeping silence would cause greater damage to **the employees than would passing on information cause to the company**. In such a particular case, the workers' representatives may inform, **to the extent required**, the competent representative body on confidential matters that have come to their knowledge in the framework of their tasks at the supervisory board.
- **Geppert/Moritz** state that workers' representatives may pass on confidential information to the workers' representative body if the issue concerned falls within the scope of its responsibilities and if **the interests of the workforce prevail over the confidentiality interest of the company**. This condition is met if potential damages to the workforce concerned outweigh potential damages to the company.
- **Marhold** recognises that the confidentiality provisions of the Stock Corporation Act fully apply to workers' representatives. Nevertheless, Marhold emphasizes that **within the scope of the information rights** pursuant to the Labour Constitution Act, workers' representatives are **not required to maintain silence on confidential information vis-à-vis the works council**. Workers' representatives are not bound to confidentiality provisions in any matter on which the supervisory board has an information duty or on which the works council has an information right according to the Labour Constitution Act.

The passing on of information to third persons who are not members of the works council also has to be measured against the objective confidentiality interest of the company. Consulting experts on particular matters and outside supervisory board meetings is admissible in the event that a supervisory board member cannot be expected, from an objective point of view, to possess the expertise required. Accordingly, supervisory board members have the right to consult their statutory representative body in supervisory board matters. As a matter of course, supervisory board members may only consult persons who are bound to a professional duty of confidentiality or with whom an appropriate agreement has been concluded. Costs for consulting experts are to be borne by the supervisory board members.

## The liability of workers' representatives at the supervisory board

As mentioned in the chapter "The rights and duties of supervisory board members", § 99 Stock Corporation Act stipulates that § 84, which governs the management board members' (directors') duty of care and responsibility towards the company, is accordingly applicable to supervisory board members.

**§ 110 of the Labour Constitution Act does not provide for any exceptions as to the liability of workers' representatives. In principle, all supervisory board members, regardless of them being capital side representatives or workers' representatives, may be held liable to the same extent.**

According to prevailing academic opinion and the legal practice of the Austrian Supreme Court, the Austrian Act on the Liability of Employees and its provisions on the limitation of employees' liability are not applicable to workers' representatives at the supervisory board. However, **Kerschner** states that the Act on the Liability of Employees should remain applicable insofar as this does not conflict with the statutory provisions on the protection of creditors.

The duty of workers' representatives to defend the employees' interests does in no case imply a limitation of and even less an exoneration from their duty of care and responsibility. As regards **breaches of the duty of care und responsibility**, workers' representatives do **not enjoy a special position**, but are treated as any other supervisory board members. According to the Austrian Supreme Court's decision of 1977, a supervisory board member is to be regarded as a "**prudent and careful supervisory board member**" if it

**"possesses, in business and financial matters, greater experience and knowledge than an average businessman and if he has the capacity to appreciate complex legal and economic interrelationships and to assess their impact on the company."**<sup>46</sup>

These most exigent requirements have been widely criticised by relevant literature, and in particular the requirement that each *particular* supervisory board member must be qualified to such extent. According to prevailing academic opinion, the supervisory board is set up as a **collegial body**; therefore, not the individual member, but the supervisory board as such has to fulfil the requirements. It is considered that the legislator, by establishing the supervisory board as a collegial body, has recognised that it is necessary and useful that several persons cooperate closely in order to perform the supervisory board's tasks. Thus, not each particular supervisory board member is required to have the capacity to monitor the management board (directors), but the overall composition of the supervisory board has to ensure that the board is in the position to fulfil all duties as appropriate.

In 2002, the Austrian Supreme Court rejected this opinion<sup>47</sup> and confirmed its 1977 decision. In the latter, the Austrian Supreme Court has stated as follows:

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<sup>46</sup> Austrian Supreme Court on 31-05-1977

<sup>47</sup> Decision 1 Ob 144/01k of 26-06-2002

“Each member of the supervisory board is to have the knowledge and the experience required to adequately perform all tasks conferred to the supervisory board. This includes in any case the capacity to appreciate the reports to the supervisory board with adequate expertise in order to draw appropriate conclusions in view of decisions to be taken on management measures (...). Therefore, each supervisory board member has to be in the position to understand information provided, including, should the need arise, information given by experts.”

The Supreme Court has also underlined that the requirements vary from one company to another (the requirements in a large bank may be different from those in a local brewery). However, all supervisory board members are at least required to adequately understand what is going on in “their” company.

The requirements on the **workers’ representatives** are not less exigent than those on the capital side representatives. In general, the workers’ representatives often have considerable knowledge of what is going on in the **workplace** and the branch of industry, which is useful and required for the function at the supervisory board. In many cases, their knowledge in these areas may exceed that of capital side representatives. Specialised knowledge is only required as regards their profession; the most important reason for their election being the confidence placed on them by employees. In addition, to the extent required for their function at the supervisory board, workers’ representatives also need to have a good understanding of **legal matters and business administration**.

As mentioned before, provisions on the liability of supervisory board members are applicable to both workers’ representatives and capital side representatives. According to § 99 of the Austrian Stock Corporation Act, liability for damages may be constituted if the damage is causally related to the exercise of a function at the supervisory board, and if the supervisory board member is unable to supply evidence that it has acted in compliance with its duties or that it has not committed the breach of duty culpably (i.e. negligently or intentionally) or that the damage would have occurred even if it had employed the necessary care.

**The Austrian Trade Union Federation has contracted a group insurance policy for all its members who have been delegated to a supervisory board pursuant to § 110 of the Labour Constitution Act. This insurance covers all financial damages arising from negligent breach of the duty of care and responsibility.**

At present, the performance under this policy covers damages to the amount of 72,673 euro. The premiums are paid by the Austrian Trade Union Federation. The workers’ representatives, insofar as they are members of the Austrian Trade Union Federation, are automatically insured from the day of their official delegation to the board. It is nevertheless advisable inform, via an affiliated union, the Austrian Trade Union Federation on the delegation to the supervisory board.

In addition to the group insurance for union members, workers’ representatives may of course contract an individual liability insurance for their function at the supervisory board. However, since individual liability insurances only cover a part of the specific

“professional risk” of supervisory board members, such an insurance does not seem very useful.