



**GGI SIG Webinar
Corporate
Governance &
Compliance**

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Crisis as trigger for enhanced compliance



Diligence of a managing director in times of (ongoing) COVID-19 risks

- Implementation of business management measures
- Adapt measures already taken or take further measures
- Situation-specific adaptation of liquidity planning (insolvency; dividends; bonuses)
- Data protection (cases of infections in the company)
- Labour law (short-time work, implementation of home-office)
- Apply for short-time work grants and for loans with state guarantees, other subsidies

Diligence of a MD – new challenges



- Measures to be taken to prevent the spread of the virus at the workplace
- Keep the production and customer accessibility guaranteed during the pandemic
- Switch to online facilities in order to maintain operations
- Check the business continuity plan
- Check performance of contractual obligations (force majeure?), notify customers and adapt contracts for the future
- Check cash requirements (no dividend payout? bonuses?)

Responsibility of the MD



Organisational responsibility of the management

- Principle of general responsibility and universal competence
- Creation of departmental responsibilities possible (limited effect on liability), because:
- Mutual monitoring obligation
- Joint and several liability for resolutions adopted jointly
- Assumption of control responsibility for all functions that are carried out or are to be carried out in the company

Responsibility of the MD



- Risk management as a sign of good governance
 - timely identification and diagnosis as supporting elements of an efficient and adequate risk management
- Planned reduction of vulnerabilities
 - creation of operational scope for action
 - ad hoc combating of crisis situations to the controllable residual risk
- The establishment of a CMS is a consequence of the duty of care of the management

Responsibility of the MD



Delegation of duties to

- properly selected,
- competent
- instructed
- integrated
- staff who are granted the necessary resources to carry out the delegated tasks.

Civil liability

- Section 84 (1) Austrian Stock Corporation Act (*AktG*) and Section 25 (1) Austrian Limited Liability Company Act (*GmbHG*)
- Application of the diligence of a prudent entrepreneur
- Wrong entrepreneurial decision in itself not contrary to duty
(*Business Judgement Rule*)

Business Judgement Rule



- The managing director acts in accordance with the due care and diligence of a prudent and conscientious manager if, when making a business decision
 - is not guided by extraneous interests
 - on the basis of appropriate information,
 - acting for the benefit of company.
- No civil or criminal liability (embezzlement) for decisions within the Business Judgement Rule

For managers and supervisory board members potentially "*dangerous*" offences (examples):

- o Embezzlement
- o Accounting offences
- o Fraud
- o Bribery
- o Illegal gift acceptance
- o Money laundering
- o Environmental offences
- o Price agreements
- o Forgery of documents
- o Negligent physical injury (e.g. COVID-19)

Supervisory Board responsibility



Civil liability

- fault-based liability (as with managing directors)
- liability rules apply without distinction to all members of the Supervisory Board
- liability irrespective of whether remuneration is paid
- no moderation under the Employee Liability Act
- the level of care to be observed is to be determined with regard to the knowledge and skills typically required of a Supervisory Board member

Supervisory Board responsibility



Graduated monitoring duties of the Management Board

- depends on the situation of the company
- in normal cases, accompanying monitoring of the business activity is sufficient
- supporting control when the situation of the company deteriorates
- In case of crisis:
 - increased frequency of meetings,
 - expansion of the catalogue of transactions requiring approval
 - more intensive exercise of the right to ask questions and receive information
 - as a last resort, the discovery of serious compliance violations by a member of the Management Board may make it necessary to dismiss him.

Austrian Corporate Governance Code



- The Austrian Corporate Governance Code, as of January 2018, is a regulatory framework for the responsible performance and control of companies, oriented towards the sustainable and long-term creation of value
- The Austrian Corporate Governance Code is available at <http://www.wienerbourse.at/corporate/kodex.htm>
- The Code is primarily aimed at listed companies (but: best practice!)
- The Code gains validity through the voluntary commitment
- Section 243 b UGB provides for a mandatory corporate governance declaration by capital market-oriented companies
- Recognition of the Code is an admission requirement for the Prime Market of the ATX

Austrian Corporate Governance Code



The Austrian Corporate Governance Code contains

- L Rules (Legal Requirements) - Mandatory legal compliance
- C Rules (Comply or Explain) - Reasons must be given for deviations
- R Rules (Recommendations) - Best practice recommendations
- L Rule 15: the MD shall take appropriate measures to ensure compliance with laws relevant to the enterprise
- C rule 18 a : the MD reports at least once a year on the precautions taken to fight corruption in the company
- C Rule 70: the MD describes in the management report the main risk management instruments used with regard to non-financial risks.

Compliance must be made a top priority



The MD of the organization shall ensure that

- the CMS is developed, introduced, maintained, regularly reviewed, documented and, if necessary, improved;
- the necessary prerequisites for the CMS are created within the framework of both the structural and the procedural organisation;
- the necessary resources are available for the CMS depending on the results of the compliance risk assessment;
- based on the results of the compliance risk assessment, measures to reduce compliance risks are taken and implemented

Tone at the Top



Supervisory Board

- has a significant influence on the importance management attaches to compliance management

Managing Directors

- are responsible for the establishment and further development of compliance management
- determines the "tone at the top" by the degree of management attention

Management

- is responsible for implementation in daily business operations

Contact information



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**Thank you very
much for your
attention.**

We hope you will further participate in
our GGI SIG Corporate Governance &
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