# Germany

## Liability of members of German *Vorstand* (executive board)

by Frank Wooldridge

*Frank Wooldridge*

Executive board members of a German public company ('directors') must exercise the care of a sound and conscientious business manager (*Aktiengesetz* (AktG) para. 93(1) No. 1). This general clause is thought to be applicable to all the duties of directors, for example in relation to their managerial responsibilities, their fiduciary duties and duties arising out of specific provisions of the AktG, see para. 80, 81, 83, 88, 91(2) and 92 thereof. The standard is not that of an ordinary businessman, but that of a man in a leading and responsible position as the manager of other people's property in a specific enterprise. The test is an objective one, and individual abilities are not taken into account. Furthermore, inability or inexperience is not an excuse. When an action is brought against them, it appears that directors have to show compliance with this strict rule (AktG, para. 93(2), No. 2). The general view is that the due care requirement is an absolute one, irrespective of subjective fault involving some degree of blameworthiness (*Vorwerfbarkeit*) and any failure, however slight, may result in a requirement to pay damages. However, the German courts and academic commentators do not always seem to have adopted this view.

### DIRECTOR'S, SPECIFIC LIABILITIES

Directors are required to have a general insight into management and business conditions, and to have some understanding of the connections between law and society. They should understand the fundamental structure of their own company and have an elementary knowledge of the framework and organisation of companies in general. They should also have some idea of fundamental legal concepts such as directors' fiduciary and other duties. Such fiduciary duties have become recognised through the medium of decisions of the courts rather than that of the *Aktiengesetz*, but breaches of such duties will usually come within para. 93. When new laws affecting business enterprises are enacted, it may be advisable for directors to take legal advice on such laws: ignorance of them could possibly result in liability. Directors should also be aware of matters relating to the product which the company makes and should certainly be able to comprehend the annual balance sheet. A higher degree of care may be required from professionally qualified directors, such as lawyers, certified accountants, or bankers. This was made apparent in a case heard by the *Landgericht* of Düsseldorf in 1994 (*Die Aktiengesellschaft* 1994, at p. 330) in which the court held that the manager of a private company who was an experienced lawyer and who had also served on the board of a large public company, could not escape liability in respect of the private company by pleading that he had relied on an expert opinion which he had requested.

A director is also liable for failure to control his colleagues. If each director has particular functions allocated to him by the statutes of the company, the contract of employment or the company rules (*Geschäftsordnung*: see AktG, para. 77), then such a director is, in principle, liable in respect of his own sphere of activity. However he may become liable for the activities of fellow directors if he has exercised inadequate supervision over them, or has failed to intervene where the wrongful conduct of a director has become known throughout the business, or where such conduct has failed to become public knowledge through his own lack of care. The division of functions between different directors in one of the ways described in this paragraph does not release any of them from their duty of supervision (*Überwachungspflicht*), which may be exercised with the help of agents, where necessary. Many of the decisions of the courts concerning the duties of directors involve this duty of supervision.

Directors must not disclose confidential information and secrets of the company, in particular trade and business secrets, which have become known to them as a result of their service on the management board (AktG, para. 93(1), No. 2). This provision encompasses all the business projects and policies aimed at by the enterprise and applies in relation to the objectives, course, and results of discussions of board meetings. Unfortunately 'labour directors' (*Arbeitsdirektor)* who must be appointed in certain large companies, have sometimes been said to have acted in breach of this requirement, as have employees' representatives and representatives of banks on the supervisory board, who are bound by a corresponding obligation of secrecy.

### BURDEN OF PROOF

In an action under AktG, para. 93, the company is required to produce evidence of acts of the directors which have caused damage. As far as the proof of causation is concerned, inference from the surrounding circumstances or the rules of prima facie evidence will support the company's action. Furthermore the question of causation is left to the discretion of the judge in accordance with the provisions of para. 287 of the *Civil Procedure Code*. Damage is presumed in the special cases mentioned in AktG, para. 93(3), a detailed account of which is beyond the scope of this short article. The general view is that the burden of proof is placed upon the director to show that he exercised the care of a diligent and conscientious manager. However it has been argued by some writers that this reversal of the normal civil burden of proof (which has also been held to apply to private companies and co-operative societies), only applies to the extent that a director has to show that he has not been guilty of subjective fault. According to Goette, who takes an intermediate view, in an influential article in the *Zeitschrift für Gesellschaftrecht* for 1995 (at p. 648) the plaintiff has to demonstrate that the damage has been suffered by reason of an act or omission of the director, which may possibly constitute a breach of duty, whilst the director has to show that he has fulfilled his duties, or has not been guilty of subjective fault (conduct which is morally blameworthy), or that the damage would still have ensued if he had complied with his duties.

The Supreme Court may have alleviated somewhat the burden of proof placed on the officer of a co-operative society who had delegated duties to a possibly dishonest or incompetent consultant in a recent case: see *NJW* 1997, 1905. It required the co-operative society to prove that the officer had allowed the consultant to receive payment for advisory services which were not included in the settlement agreed upon, whilst the officer was required to prove that she had made payments to a competent consultant, who had rendered the appropriate services for such payment, which led to concrete results which were beneficial to the co-operative society. Thus, in this case, the burden of proving that no breach of duty had occurred in relation to particular matters was laid on each party. Such an approach is perhaps justified in particular cases, especially perhaps where certain duties are delegated. The application of the relevant German rules governing the burden of proof, whatever their precise nature, may well depend upon the facts and circumstances of the particular case and in many cases it may be hard to predict the outcome. Although the German rules would generally seem to impose a greater burden on directors than do those that are applicable in the UK, they appear workable, although the operation of para. 93(2), No. 2 is open to some dispute. In some situations – in which the burden placed on that company is lessened – its effect is easy to understand. Thus, for example, a company might assert that its actual assets and resources were less than those shown in the books. The directors would then be called on to explain this deficiency, the reason for which should be within their knowledge. They might well hope to convince the court that this depletion did not take place through any fault of their own, but resulted from inaccurate bookkeeping, for which they could not be held responsible, the assets having been disposed of in specified ways (see *BGH BB95*, 1754, a case which concerned a private company).

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It would seem that the adoption of a standard of care for directors similar to that which prevails in Germany might be opposed in the UK, especially by directors of small companies and part-time directors. The reversal of the burden of proof, whatever it might entail, would probably also be unpopular in business circles. However there seems nothing objectionable in asking directors to explain matters within their knowledge.

## JOINT AND SEVERAL LIABILITY

The statutes or company rules (*Geschäftsordnung*) of an AG (*Aktiengesellschaft,* public stock corporation) often provide that directors shall act by majority resolution. If the resolution is in breach of the company's statutes or the law, the directors who vote for it may incur joint and several liability for damage resulting from it, as may directors who did not vote for the resolution, but who subsequently help to carry it out. Persons who wish to avoid such liability may help themselves to do so by refusing to put their signature to particular transactions and expressing their opposition to them. Furthermore it may sometimes be necessary for them to report such transactions to the supervisory board, which may take various courses of action, including the dismissal of directors, the calling of a general meeting, or ordering that certain transactions may only be carried out with the consent of the supervisory board.

**CLARIFICATION NEEDED?**

The general view is that the due care requirement is an absolute one, irrespective of subjective fault involving some degree of blameworthiness (*Vorwerfbarkeit*) and any failure, however slight, may result in a requirement to pay damages. However, the German courts and academic commentators do not always seem to have adopted this view.

Each director who participates in a wrongful act is responsible to the company for the entire resultant damage. However the director will be entitled to a contribution from the other directors who participate in the wrongdoing, the amount of which will vary according to the degree to which they participated in the wrongful act and the nature of the wrongdoing (see art. 426 and 254 of the *Civil Code*).

## RELEASE FROM LIABILITY

Directors will not be liable to the company in damages if their action depends on a lawful resolution of the general meeting (AktG, para. 93(4), No. 1). Such a resolution may be passed because the directors have referred a question of the management of the company to the general meeting (AktG, para. 119(2)), or because a matter is otherwise within the competence of the general meeting. However the general view is that subsequent ratification of a breach of duty does not relieve the directors from liability. Such liability is also not precluded because the supervisory board has approved the transaction (AktG, para. 93(4), No. 2). The company may, as a general rule, only waive the damage claim or enter into a settlement after three years, and if a minority representing at least 10% of the stated capital does not object (AktG, para. 93(4), No. 3). Thus the discharge or *Entlastung* of the directors by the general meeting only expresses a general approval of the management's performance: it does not effect a waiver of claims for damages (AktG, para. 120(2)). A controversial exception to this rule is available by a unanimous vote in favour of the discharge (*BGHZ 29.385*). It should be emphasised that no one may exercise voting rights, whether by voting in respect of their own shares or acting as a proxy, or a resolution whereby they become discharged or released from an obligation, or on a determination of whether the company shall assent to a claim against them (AktG, para. 136(1)).

## BRINGING ACTIONS AGAINST DIRECTORS

Although the standard of care imposed is rather higher than is the case in the UK, actions by the company, acting either through the supervisory board (*Aufsichtsrat*) or the general meeting, against directors who fail to comply with the standard (AktG, para.112 and 147) are comparatively rare in Germany.

Two interesting decisions of the *Landgericht* of Düsseldorf concerning, inter alia, actions against directors, are reported in the leading German company law journal *Die Aktiengesellschaft* of 1994, at p. 328 and 330. The first of these cases concerned the duty of a company to pursue claims against members of the executive board of an insurance company, where breaches of AktG, para. 93 and 116, as well as of an insurance statute, were alleged to have occurred by the plaintiff, a member of the supervisory board of the defendant company. The breaches in question appeared to be serious (certainly in their financial consequences) and deliberate, involving impermissible financial transactions through the medium of wholly-owned subsidiaries with a rather dubious company set up in London. The supervisory board resolved not to sue the finance directors and the chairman of the executive board of the insurance company in respect of the alleged breaches of their duties. The *Landgericht* held that the plaintiff could avoid the resolution of the supervisory board (which was a nullity) because this board had not given proper attention to the welfare of the insurance company when deciding not to bring proceedings. The relevant directors had been responsible for wrongful acts which had caused very considerable damage to their company; an action could therefore be brought on behalf of the company, against the delinquent directors. Rather surprisingly, the *Oberlandesgericht* (Regional Appeal Court) of Düsseldorf held, on appeal, that the resolution of the supervisory board was not a nullity, because its members had acted within the scope of their business judgment (*Die Aktiengesellschaft* 1995, at p. 416). The German Supreme Court adopted a stricter view than the Regional Appeal Court, holding that if the supervisory board came to the conclusion that directors were liable for damages, they should then consider whether action against them would be likely to have a positive result. If they so decided they must pursue the claim unless there were overriding or equally significant contra-indications based on the welfare of the company (*Die Aktiengesellschaft* 1997, at p. 377).

**DEGREE OF CARE**

When new laws affecting business enterprises are enacted, it may be advisable for directors to take legal advice on such laws: ignorance of them could possibly result in liability. A higher degree of care may be required from professionally qualified directors, such as lawyers, certified accountants, or bankers.

As an alternative to the bringing of an action by the supervisory board on behalf of the company, AktG, para. 147 provides for such an action to be brought by the general meeting. Furthermore it also provides for a statutory derivative action. However, the requirement that this should be supported by shareholders representing at least one-tenth of the company's stated capital, who are required to pay their own costs if they are unsuccessful (contingency fees are not recognised in Germany), makes this action of limited value. The position of minority shareholders, however, may be improved as a result of the provisions of the new art. 147(3), incorporated into the AktG by the *Law of 30 April* 1998 (*BGBl I.783*). It is noteworthy that in the second of the two actions heard by the *Landgericht* of Düsseldorf in 1994, which was concerned with similar alleged breaches of duty to the first one, the court held that the duty of good faith owed by the shareholders to their company might sometimes require such shareholders to vote in favour of the company bringing an action against its directors under AktG, para. 93. The court held that the negative vote cast twice in the general meeting of the defendant holding company against supporting the lack of proceedings on behalf of its subsidiary – the insurance company – and which resulted from the negative vote of the defendant 50% shareholder in the holding company should be disallowed. The reason for this decision was that the latter vote was contrary to the shareholder's duty of good faith to the holding company (a *Gesellschaft mit beschränkter Haftung* (GmbH) which held 50% of the share capital of the insurance company) – and to his fellow 50% shareholder in the holding company – the plaintiff. The court also held that the plaintiff shareholder could obtain damages on behalf of the holding company against the defendant shareholder (*Die Aktiengesellschaft* 1994, at p. 330).

However the Regional Appeal Court at Düsseldorf took a different view from the *Landgericht* concerning the effect of the two contested resolutions of 1992 and 1993 contending, somewhat surprisingly, that there had been no breach of the defendant shareholders duty of good faith, and that shareholders have a wide discretion when casting their vote. It also held that no claim for damages could be brought on behalf of the holding company (*ZIP 1996*, at p. 1083). A claim for damages by the insurance company based upon two resolutions of the general meeting of that company in 1994 and 1995 was upheld by the Regional Appeal Court of Düsseldorf (*Die Aktiengesellschaft* 1997, at p. 231). The judgment of the court deals with a number of issues. It held that a finance director of the AG was liable in damages to it by reason of his breach of this duty of care under AktG, para. 93(1). He was responsible for making very substantial payments to an investment company which had an accommodation address in London without taking security, and the AG suffered very considerable losses as a result of its failure. The court held that no person conducting the business of another in a responsible way would have acted in such a manner without taking security. As the court emphasised, there seemed to have been a considerable element of blameworthiness or subjective fault on the part of the director.

In addition to the possibility of an action against directors who breach their duties under AktG para. 93, or who commit other breaches of their duties, there are alternative methods of action against such directors. Thus it may be possible to dismiss them if there is just cause (*wichtige Gründe*), subject to the possibility of their reinstatement by a court. Such cause may be held to exist if a motion of no confidence is passed by the general meeting, or if there have been breaches of the director's duty of care (which will be treated as including breaches of his fiduciary duties, for example of not anticipating corporate opportunities). However if such a director has a contract of employment, his dismissal may result in an action for damages (AktG, para. 84)

## COMPROMISE OF CLAIM

Provided the requirements of AktG, para. 93(4) are complied with, a compromise of a claim for damages against a director under para. 93(2) may take place. The period of three years which is required before such a compromise can take place is intended to give sufficient time for the quantification of damages. However such a compromise will not extinguish director's liability for damages towards the creditors (AktG, para. 93(5). The requirement of the gross violation (*grob Pflichtverletzung*) of the duty of care of a diligent and conscientious manager will obviously limit the frequency of such claims under para. 93(5), as will considerations of cost, and possible lack of knowledge on the part of creditors of a claim for damages by the company against the directors.

## CONCLUSION

The detailed rules governing the standard of care of the directors of an AG results from the jurisprudence of the courts and the writings of jurists. The German approach appears to work in practice, although sometimes the precise result of litigation involving the application of para. 93(1), No. 1 and 93(2), No. 2, is difficult to predict. This appears inevitable in the case of general clauses. It may be unfortunate that the exact scope of the rule governing the reversal of the burden of proof is not entirely clear. It may well be the case that different approaches are adopted by the courts, dependent on the facts of the case, and that this situation may not merit undue concern. It appears that in the past the German courts have given insufficient attention to the need of directors faced with a difficult choice to exercise their business judgment, but their approach to this question now seems to be changing, as is apparent from the dicta in the decision of the High Court reported in *Die Atkiengesellschaft* 1997, at p. 377.

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# Belgium

## Planned legal framework for the changeover to the Euro

by Daniel M Tomasevic

On 20 February 1998, the Belgian Government approved a bill on the Euro ('the bill'). The bill purports to provide a legal framework with respect to the changeover to the Euro in Belgium. Accordingly it enshrines some of the principles and ideas found in the *National Changeover Plan*, issued in August 1996, which provides a general framework for the preparation of the Belgian economy for the successful introduction of the single currency.

This review of the bill will touch on the following issues:

- continuity of contracts;
- dual pricing;
- fiscal, social security and labour implications of EMU;
- conversion and rounding issues;
- substitution of reference interest rates;
- increase and rounding of capital;
- redenomination of securities; and
- continuity of contracts.

The bill does not contain any general provision on continuity of contracts after 1 January 1999. Such continuity will be sufficiently ensured in Belgium by EC regulation (Regulation 1103/97, OJ L162/1) – which has direct effect and primacy – in particular art. 3 thereof which reads as follows:

*'The introduction of the Euro shall not have the effect of altering any term of a legal instrument or of discharging or excusing performance under any legal instrument, nor give a party the right unilaterally to alter or terminate such an instrument.'*

However with respect to particular contracts, i.e. contracts governing relations between vendors and consumers – in as much as these agents have been defined in the *Law of 14 July 1991 on Business Practices and Consumer Information and Protection* – the bill intends to prohibit clauses whereby the vendor has the unilateral right to terminate or to amend the contract because of the introduction of the Euro (art. 57). These clauses will generally be regarded as abusive. They will only be regarded as licit if the vendor is able to show that the clause has really been negotiated between the parties and has not been imposed upon the consumer as is often the case in that kind of relationship.

This will somehow restrict the freedom given to the parties by art. 3 of Regulation 1103/97 which ends as follows: 'This provision is subject to anything which parties may have agreed.' This concern has been underlined by the Council of State, an advisory body to the government, in its opinion issued in April 1998, where it said that the bill goes beyond what is provided by Regulation 11032/97. Accordingly, if passed by Parliament, this provision of the bill could well be challenged before the Belgian courts, and ultimately before the Court of Justice of the EC by way of preliminary reference under art. 177 of the EC Treaty.

## DUAL PRICING

Pursuant to the *Law of 14 July 1991 on Business Practices and Consumer Information and Protection,* prices and rates in Belgium have to be indicated in BEF (Belgian francs). Compulsory pricing in BEF will remain for the period between 1 January 1999 and 31 December 2001.

> **IMPACT OF THE EURO**
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> The introduction of the Euro will have an important impact on financial markets, especially in a country such as Belgium, where public debt and private savings are amongst the highest in the world.

The bill does not provide for compulsory double-pricing. However the government is granted the power to impose such compulsory double-pricing (art. 54). Accordingly the government, if necessary, will impose dual pricing either as a general measure or, with respect to trade, of specific services or goods for which such double pricing is particularly needed.

Furthermore the bill provides that for specific contracts, i.e. consumer credit contracts (governed by the *Law of 12 June 1991 on Consumer Credit*) and mortgage contracts (governed by the *Law of 4 August 1992 on Mortgages*) issued in Euros, the counter-value of the contract must also be shown to the borrower in BEF.

## FISCAL, SOCIAL SECURITY AND LABOUR IMPLICATIONS

The bill (art. 9ff.) provides that, as from 1 January 1999, individuals and companies will be entitled to fill in their tax return (VAT, income tax, etc.) in Euros. Equally they will be able to submit documents in Euros to social security institutions (art. 58).