Special Audit – An effective tool for a company's Supervisory Board

The Austrian Stock Corporation Act (Aktiengesetz) provides but a brief description of the main duty of a Supervisory Board: supervising a company's management. This does not just involve supervision per se: it also encompasses playing a part in the business and the decision-making process, along with planning and strategic guidance.

This means that the Supervisory Board works closely with the Board of Directors – and is therefore subject to the same high standards in terms of due diligence.This is especially true if quick and efficient auditing of unclear processes within a company is required. In this case, the Supervisory Board of a joint-stock company holds comprehensive auditing and inspection rights, pursuant to § 95 of the Austrian Stock Corporation Act (Aktiengesetz, AktG). Pursuant to section 30j of the Limited Liability Companies Act (GmbH-Gesetz), this also applies to the Supervisory Board of a limited liability company.

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Of course, the Supervisory Board can start off by referring to internal documents and supervisory measures. Supervisory systems set up within the company as required by law (internal control, including internal audits) do stress thoroughness, speed and efficiency, but they also come with a disadvantage that should not be underestimated: employees are subordinate to the company's management, from a disciplinary perspective, and have (to be able) to go on working alongside their managers after an audit has been carried out. However, conflicts of interest are sometimes inevitable if – for example – the activities of the Board of Directors need to be examined on behalf of the Supervisory Board. At the same time, an audit can help to positively validate the Board of Directors' actions.

Audits that meet the due diligence criteria of the Supervisory Board require knowledge of details and specific skills that might go beyond the experience and resources of the members of the Supervisory Board themselves. In these instances, § 95 (3) AktG gives the Supervisory Board the option of a "special audit pursuant to Austrian Stock Corporation law" (Aktienrechtliche Sonderprüfung). This is not just the tool of choice if losses already occurred, but also, and especially, if it seems necessary to take a close look at ongoing business operations or to put supervisory measures into practice in order to protect the company from an imminent threat.

In particular, § 95 (3) AktG grants the Supervisory Board the option to authorize an external expert to carry out a special audit. The Supervisory Board has the right – and, if there is reasonable suspicion, even the obligation – to have the facts of the matter examined as part of specific individual investigations, and to instigate measures on the basis of the expert's report.

The following overview clearly lays out the advantages of a special audit based on § 95 (3) AktG:

- The issues to be investigated are clearly delineated, but they can also be expanded depending on how the audit progresses.
- Investigations can be started at any time. It is not necessary to wait for the end of the financial year or of a particular business case. This can be in the company's interests, as it can even avoid the start of official (regulatory) investigations.
- The resources required for the audit (respondents, documents) are clearly defined.
- In coordination with the auditors involved, additional experts (e.g. technical, financial or insurance specialists etc.). can be brought in, if required.
- The Supervisory Board, as the controlling body, is "in charge" of the investigation and the representative of the company. The company's management can therefore participate in the audit by providing information, but has no opportunity to exert a (restricting) influence on the investigations.
- The final report drawn up by the experts serves as a neutral basis upon which law enforcement authorities may carry out further investigations. As a result of such comprehensive reporting, thorough and transparent cooperation with the authorities on the part of the Supervisory Board and/or the experts can prevent further official steps such as, for instance, house searches.
- As part of their activities, experts bear particular specialist liability as laid down in § 1299 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch, abbr. ABGB).
- Initially, the costs for a special audit of this nature are to be borne by the company. However, depending on the findings of the audit, these costs can be asserted against the appropriate party in the form of a claim for damages.

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The experience of our task force shows that a special audit demands (and is demanding for) a legal team that is well-versed in all aspects of special audits: from structuring going over forensic investigation of the facts to the drafting of the individual report. Simply defining the status quo is not enough – the Supervisory Board has to be given a detailed list of recommendations:

Our legal analysis of the situation therefore weighs up the risks of litigation, if necessary. Documents are prepared in such suitable and specialized manner that judicial proceedings may be instigated swiftly, if needed.

If required, our special audits task force can also provide a comprehensive overview of recommendations under labour law with regard to employees affected as well as provide information on the contractually possible consequences for steps to be taken against members of the Board of Directors.

Our work also focuses on advising the Supervisory Board on how to use the findings of the audit, as well as "reputation management".

Special audits always require a combination of technical, commercial and legal expertise. This is why the members of the LGP task force make use of their decades of experience in all areas of special audits in their work. On this basis, we work closely with the Supervisory Board in question to develop strategies in order to minimize risks for the company, to foster optimum cooperation with authorities, to prevent damages and to efficiently recoup any monetary losses incurred by the company. ■

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