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06.09.2016

German Tax and Legal News

Duty of members of the supervisory board to keep information confidential - No attribution of knowledge to represented company

The duty of a member of the supervisory board to keep information confidential also applies vis-a-vis the company that he/she represents in the supervisory board; the knowledge cannot be attributed to the company.

Members of the supervisory board have certain duties to keep confidential any information obtained, also vis- à-vis the employer that they represent on the supervisory board. It is neither possible to attribute the knowledge to the employer nor to generally release members of the supervisory from their confidentiality obligations.

Facts
The plaintiffs request damages from the defendant, a direct bank, based on alleged wrongful advice in connection with securities transactions. The plaintiffs and the defendant entered into agreements regarding custody accounts that also included financial services. The financial services were rendered by A AG which was granted the respective powers of attorney by the plaintiffs. The advice was rendered by employees of A AG. An authorized officer of the defendant acted as a member of the supervisory board of A AG. During supervisory board meetings, the topic of wrongful advice of customers with custody accounts was discussed. The plaintiffs were of the opinion that the knowledge of the authorized officer gained in his/her position as member of the supervisory board of A AG was to be attributed to the defendant. As a result, they claim that the defendant would have been obliged to inform the plaintiffs about the wrongful advice.

Decision
In its decision dated April 24, 2016 (case no. IX ZR 108/15) the Federal Supreme Court (Bundesgerichtshof – BGH) rejected claims for damages of the plaintiffs. It held that the defendant had not breached its duties resulting from the custody account agreements, as it had not breached any disclosure or advisory obligations. The knowledge gained by the authorized officer in his/her position as a member of the supervisory board is not attributable to the defendant.

According to the applicable provisions of the German Stock Corporation Act, members of the supervisory board are obliged to maintain secrecy with regard to all confidential matters discussed in supervisory board meetings. The company, in the present case A AG, has a justified interest that confidential matters discussed by the bodies corporate, in particular relating to the company's main business areas, are kept confidential.

The confidentiality obligation of members of the supervisory board extends to all persons who are not members of the corporate bodies of A AG and, as a result, also apply vis-à-vis the defendant. The fact that the authorized officer is an employee of the defendant does not lead to a different result. The obligations deriving from the employment agreement do not take precedence and prevail over the confidentiality interest.

According to the BGH it is also not possible to release the member of the supervisory board from his/her duty of confidentiality for certain matters in advance, for example upon his/her election by the general meeting. A release must be limited to certain matters and can only be granted by the management board of the company.

Practical Advice
The ruling of the BGH emphasizes that it shall not be possible to make any compromises regarding the duties of confidentiality of members of the supervisory board. It also explicitly points out the division of competencies within stock corporations as provided for by statutory law.

The ruling is of importance for both, members of the supervisory board as well as companies whose employees are members of supervisory boards of other companies, and should be respected in daily business. Members of supervisory boards who infringe their

confidentiality obligation because they (erroneously) believe to be obliged to disclose confidential information vis-à-vis their employer may face personal liability which can and should be avoided by adherence to the standards set by the BGH.

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