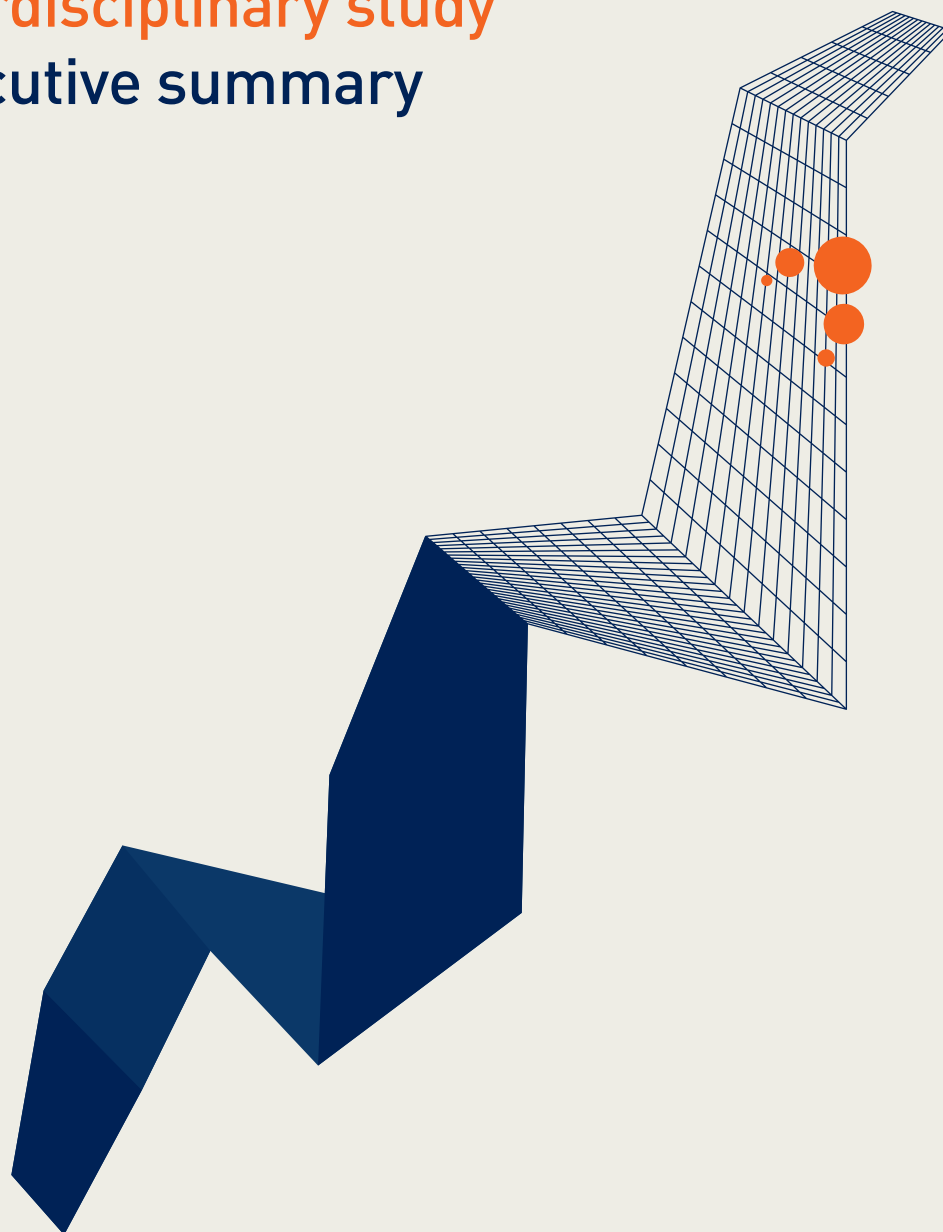


Crisis communication – role of the supervisory board

Interdisciplinary study
Executive summary



In cooperation with:



**HERING
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Crisis communication – role of the supervisory board

Transparent communication between listed companies and their stakeholders, including the public, has been considered corporate governance “best practice” for decades. There is a general consensus that the board of directors should be involved in such a dialogue. However, there is controversial debate, both among scholars as well as among practitioners, as to whether and if so, to which extent and in which manner, the supervisory board may interfere and should be involved in such communication.

In particular, investors are interested in personally discussing any issues of a supervisory nature directly with the chairperson of the supervisory board. Such issues may comprise matters such as the persons to be appointed as members to the board of directors or the supervisory board, the remuneration received by the members of the board of directors or the supervisory board, and the supervision of the board of directors. According to German stock corporation law, the responsibility for such matters rests exclusively with the supervisory board.

Until now, those involved in this debate have given little consideration to particular situations, including crises, which can have a severe impact on the company’s well-being. For this reason, Noerr, Hering Schupener and Professor Axel v. Werder conducted a joint study on crisis communications by supervisory boards. Undertaking an interdisciplinary approach, the study focuses on a broad range of issues, including communication, legal and corporate governance aspects.

The results are based on both an analysis of the legal and communication environment and personal conversations with twelve chairpersons of supervisory boards of companies listed on the German stock indexes DAX, M-DAX and S-DAX, as well as on an evaluation of public press interviews given by chairpersons of supervisory boards in the German media in 2016 and 2017.

The key results of the study are:

Analysis of the communication and legal environment

1. Stakeholders expect, especially in times of crisis, a willingness to communicate. With the number of scholars and practitioners in favour of such communications, chairpersons of supervisory boards can no longer pretend that stock corporation law prohibits them from communicating.

2. Higher expectations are now placed on the personal communication abilities of management and supervisory boards. This is demonstrated by two phenomena: Firstly, managers are personally targeted, often anonymously. Secondly, each individual person’s critical voice has increased power due to social media. Criticism that may have remained unheard decades ago can very quickly reach hundreds of thousands of people nowadays.

3. In a crisis, the reputation of a company is like a fortress wall. Strategic communication helps to build a reputation – especially in “quiet” times – and to protect it in stormy times. Although strategic communication is usually the responsibility of the board of directors, in certain cases it can also be incumbent on the supervisory board and its chair. Chairpersons of the supervisory board who do not carefully prepare for this challenge in good times may not have built up the contacts and personal trust relationships with the media potentially needed in a time of crisis. Members of the supervisory board, especially those of listed companies, should actively concern themselves with their role in company communications in general as well as in crisis situations.

4. These challenges arise in a legal environment with many aspects and issues that have not yet been clarified conclusively.

There are risks involved when supervisory board members or chairpersons issue statements whenever they deem it incumbent on them in light of company interests. Before reaching out to the public, they should always carefully consider whether the issues

which they wish to speak about fall into the supervisory board's responsibility. A vast majority of arguments support the supervisory board speaking only on issues within its responsibility ("communication follows competence"). The supervisory board member may also only benefit from the principles of the "business judgment rule" if his/her statements fall into and do not exceed the supervisory board's areas of responsibility.

Generally, the supervisory board in its entirety, as a collegial body, decides on "whether" and "how" to communicate. However, requiring a board resolution prior to any communication by any member of the supervisory board, usually its chairperson, proves to be very difficult in practice. For more legal certainty, it is in any case advisable to provide rules on the communication competences within the board in the supervisory board's rules of procedure or in separate rules of communication.

Key results of the empirical study on crisis communication in practice

1. Based on the conversations conducted, chairpersons of the supervisory board can be divided into two groups regarding their attitude towards crisis communication. While one group had a very reserved attitude towards external communication, irrespective of the existence of a crisis, most of the interviewed chairpersons were in general, but also specifically in crisis situations, more open towards supervisory board communication. This result corresponds to the increased and increasing media presence of supervisory board chairpersons.

2. The supervisory board's communication heavily depends on the kind of crisis it is addressing. In a consensus crisis (in which the board of directors and the supervisory board work together towards a common goal), some supervisory board chairpersons believe it to be helpful to "go public", issuing statements to the media or holding discussions with investors, to calm

down the situation. In a dissent crisis (in which the board of directors and the supervisory board have differing opinions regarding the cause and/or solutions of the crisis), according to the interviewed chairpersons, the supervisory board chairpersons are initially better prevented from public communication. In such a delicate situation, the only remaining option, if such dissent cannot be resolved, would be to dismiss the directors (the chairperson of the board of directors), which however has to be prepared for and communicated internally before it is externally reported and any explanations given.

3. In general, the supervisory board chairpersons felt comfortable with the current existing legal environment. This finding contrasts with the controversial debate among legal scholars.

4. The supervisory board chairpersons generally willing to communicate in a crisis consider it essential to be adequately prepared, not only regarding the issue to be addressed but also in terms of communication. This preparation also included internal coordination of the company communication that establishes clear rules regarding communication processes and content of any such communication.

5. However, not all of the interviewed chairpersons considered a board internal alignment necessary. The trust relationship between the chairperson and the other members of the supervisory board is thought to be more crucial. As long as the members sensed such trust, they felt comparatively free in their communication. In specific cases, the board in its entirety may be informed of communications subsequently.

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