Tasks of the supervisory board in transition – ESG backlash, digitalization and political conflicts of interest

Briefing

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The practices of German companies are currently being shaped by a range of legal challenges, which at the same time are specifically influencing the work of their supervisory boards:

- Supervisory boards will only be able to respond properly to **changes in the geopolitical environment** in their monitoring and advisory functions if they keep a close eye on political developments and, besides this, play their part in scenario analyses and flexible business strategies put forward by the management board. In this way, they enable their company to respond quickly to changes and make use of opportunities.

- The development of **cyber resilience** and use of **artificial intelligence** in companies are forcing supervisory boards to continually improve their skills in these fields to keep pace with the management board.

- The topic of **ESG** is in a **state of flex**: in the light of the dramatic changes and potential transatlantic conflicts in how it is applied, supervisory boards are called on more than ever to assist the management board in developing and implementing an ESG strategy and then to monitor it. When doing so, they have to clarify whether and to what extent companies should voluntarily keep to their existing standards regardless of the applicable statutory requirements. Supervisory boards have to start by critically examining how their company implements national requirements, EU requirements and requirements in other countries where it carries on business. At the moment, special attention has to be given to the situation in the United States.

- In view of the political challenges of our times, members of the supervisory board are also faced with the question of whether to **take a political stance** in public. This is allowed to a certain extent. Whether it is appropriate in a specific situation must be agreed with the management board, at least where general political standpoints are concerned.

- The **requirements for supervisory work** are changing with the current developments. It is certainly a good idea for supervisory boards to view crises as opportunities and to convey this attitude in discussions with the management board.

I. Geopolitical environment

The geopolitical situation is more important than ever for international companies. Global conflicts have intensified considerably in recent years (such as the Middle East conflict), especially since Russia's aggressions against Ukraine. The United States, United Kingdom and EU have in particular responded to these events by imposing sanctions. The EU recently adopted its 18th sanctions package.[1] Keeping track of all of this is a challenge in itself.

Companies are also affected by the unpredictability and spontaneity of US customs policies. Protective tariffs and other protectionist measures, as well as corresponding countermeasures, are currently being introduced and replaced in quick succession with hardly any advance warning, creating significant challenges for strategic corporate planning.

[1] https://www.bundesregierung.de/breg-de/service/archiv-bundesregierung/eu-sanctions-2336106, retrieved on Sep. 10, 2025.

Supervisory boards must develop strategies that enable the company to respond quickly to such changes. This requires it to work closely with experts in trade and customs law in order to better assess the risks and opportunities of such political measures.

II. Cyber resilience and artificial intelligence

Digitalisation has not only altered traditional business models at break-neck speed but also opened up new gateways for cyber criminality. While technological advances such as artificial intelligence (AI) enable more efficient workflows, at the same time they present companies with complex challenges.

Cyber attacks no longer only affect the IT departments of companies. If a company is covered by NIS2 legislation, the entire business is obliged to take appropriate, proportionate and effective technical and organisational measures to guarantee data security. As a result, cyber security has a direct impact on the company's management, making it one of the matters the supervisory board has to oversee.

The growing importance of artificial intelligence and its implementation in business processes is also a key issue. If work processes are supported by AI or even executed by them in full, control mechanisms have to be developed ensuring that they are used responsibly and with low risk. This is stipulated in Regulation (EU) 2024/1689[2] (known as the **AI Act**), which requires risk management systems to be implemented when using high-risk AI systems and establishes transparency, recording and reporting obligations. To be able to adequately deal with such challenges in their company, supervisory boards also have to have a solid understanding of cyber security and the matters covered by digital transformation.

Criminals are also taking advantage of artificial intelligence. This increases the risk of cyber crime (DDoS, malware, CEO fraud). Individuals are also increasingly becoming targets of criminal activity. Use of "deepfakes" is meanwhile widespread. Members of supervisory and management boards play a special role here, since they have a great deal of responsibility and hence scope for action. The scope for attacks is equally broad, bringing significant risks for companies. Members of the supervisory board have to be able to recognise attacks against themselves while also keeping track of any risks of attacks on the company and management board. Against this backdrop, the supervisory board faces increased demands in terms of expertise and training in the fields of technol-ogy and artificial intelligen-ce.

Due to the fast pace at which technology is progressing and the rapid growth in potential uses, supervisory boards have to continuously hone their skills by taking part in training.

III. ESG

Despite the current discussions on deregulation in the area of environmental, social and governance (**ESG**) in Germany, Europe and the United States, the topic remains significant. This is because the aspects addressed by it, such as climate change and supply chains free from forced labour, remain relevant for many companies. This means that supervisory boards are also still required to look at what is taking place nationally and at a European level and to follow events in the United States, the largest economic power.

1. National and European developments

Over the past few years, it initially looked as though legislation such as the German Supply Chain Due Diligence Act (*Lieferkettensorgfaltspflichtengesetz*) (**Supply Chain Act**) and the European ESG directives such as the *Corporate Sustainability Reporting Directive* (**CSRD**) and the *Corporate Sustainability Due Diligence Directive* (**CSDDD**) would set new binding standards.

The situation has now changed: the current German parliamentary coalition agreement explicitly plans to abolish the Supply Chain Act and to implement the CSDDD into national law as restrictively as possible.[3] The government draft to reform the Supply Chain Act was put forward on

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1689, retrieved on Sep. 10, 2025.

3 September 2025. The intention is for it to apply for the transitional period until the CSDDD is implemented and to abolish the reporting requirements under the Supply Chain Act so that reporting will only be required under the CSRD. Besides this, the plan is that fines will only be imposed for serious human rights violations.[4]

Omnibus Initiatives I[5] and II[6], presented by the European Commission on 26 February 2025, aim to amend the CSDDD, CSRD, Carbon Border Adjustment Mechanism (CBAM), Taxonomy Regulation and InvestEU Regulation. A postponement of the deadlines for implementation and applicability as part of the "*stop the clock*" proposal under Omnibus Initiative I was adopted by the European Parliament on 3 April 2025 and by the Council of the European Union on 14 April 2025.

Omnibus Initiative III[7] aims to reduce the administrative burden on agricultural businesses. A total of 25 amendments to the legal provisions of the Common Agricultural Policy (CAP) are planned in order to simplify implementation, increase the competitiveness of farmers and improve crisis resilience.

On 21 May 2025, the Commission proposed extending certain risk mitigation measures in its Omnibus Initiative IV[8]. To achieve this, a new category of "small mid-cap"[9] companies (**SMCs**) is to be introduced. Companies are classified as SMCs if they have 250 to 749 employees and a turnover of up to €150 million or a balance sheet total of up to €129 million. The introduction of this new category is intended to create incentives for growth. Among other things, the Omnibus Initiative IV aims to reduce the scope of application of the General Data Protection Regulation (GDPR), Prospectus Regulation and EU Battery Regulation.

2. Developments in the United States

In the United States, pressure on regulations in all ESG-related areas, such as environmental protection, efforts to keep supply chains free of human rights violations and issues related to DEI (*diversity, equity, inclusion*), has increased. In its executive order "*Ending Illegal Discrimination And Restoring Merit-Based Opportunity*"[10], the Trump administration has heralded a turning point in the area of DEI. The positions represented in the discussion are often irreconcilable: for some, ESG is a symbol of excessive bureaucracy and a shackle on economic development. Others see ESG regulations as an opportunity and a necessary driver of urgently needed sustainable transformation of the economy and businesses.

This disparity is a real challenge for management and supervisory boards. Companies have to look carefully at how they deal with this change in situation. A first step is to identify what the legal situation is, setting the stage for development of their ESG strategy. This stems from the obligation to comply with the law. This is because the foreign subsidiaries of a German parent company are in principle obliged to comply with local law. Although this is not a new phenomenon, it is being made more difficult by developments in the United States: standards are increasingly being set by decrees rather than through the traditional legislative process and announced on social media.

Besides this, the question of whether and to what extent companies take back existing policies or do not implement planned policies is at the discretion of the management.

They essentially have the following options for responding:

- They can discontinue voluntary DEI policies and measures worldwide and limit sustainability reporting to the legal minimum.

- They can continue to stand up for their DEI values and policies around the world, making exceptions only for the US where and to the extent required by law.

[3] https://www.koalitionsvertrag2025.de/, p.62, retrieved on Sep. 10, 2025.

[4] https://www.noerr.com/en/insights/federal-cabinet-resolves-reforms-to-the-german-supply-chain-act-and-implementation-of-the-csrd, retrieved on Sep. 10, 2025.

[5] https://commission.europa.eu/publications/omnibus-i_en, retrieved on 06.07.2025.

[6] https://commission.europa.eu/publications/omnibus-ii_en, retrieved on Sep. 10, 2025.

[7] https://agriculture.ec.europa.eu/overview-vision-agriculture-food/eu-actions-address-farmers-concerns_en#ref-2025-cap-simplification-and-competitiveness-package, retrieved on Sep. 10, 2025.

[8] https://single-market-economy.ec.europa.eu/single-market/simplification_en, retrieved on Sep. 10, 2025.

[9] https://ec.europa.eu/commission/presscorner/api/files/attachment/881208/Factsheet%20-%20Small%20mid-caps.pdf, retrieved on Sep. 10, 2025.

[10] https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity, retrieved on Sep. 10, 2025.

- They can maintain their DEI policies and contest detrimental measures imposed by US authorities in US courts.

- They can maintain their ESG policies but tone down external communication on the subject to the extent that this is legally possible and not considered an unlawful circumvention.

3. Consequences for the supervisory board

The supervisory board is required to support and monitor the management in the development and implementation of an ESG strategy and to critically examine how the relevant laws – whether national, EU or US – can be complied with in future.

This applies both to creating or improving a functioning sustainability-related information and communication system and to establishing reliable control mechanisms in the supply chain. The supervisory board must prepare for the legal changes now so that it is able to monitor their implementation by the company in accordance with its duties. With regard to statutory audits, close communication with auditors is recommended so that the company is also prepared for new audit requirements.

Regardless of regulatory requirements, the issues addressed by ESG remain relevant for companies: climate change, for example, affects production capabilities and sales markets, while human rights violations in supply chains attributable to the parent company jeopardise the reputation of the entire group and can lead to claims for damages even at this stage. In addition, scientific findings show that diverse teams work more effectively and successfully.

When it comes to adapting the firm's sustainability strategy to changing regulatory conditions, the management board and supervisory board have to think about aspects like the ones set out below as sparring partners:

- Impact of ESG issues, especially climate change, on the business model (keyword: resilience)

- Significance of products or services for the transformation of the economy in the area of sustainability (keywords: competitive advantage, business opportunities)

- Significance of ESG issues for the company's reputation as an economic value

- Risks of claims for damages due to human rights violations (especially due to activities in common law jurisdictions)

- Significance of the sustainability strategy for the company's stakeholders

One important point is for the supervisory board to incorporate the ESG targets inferred from the sustainability strategy into management board compensation. If this already sufficiently promotes the implementation of certain DEI/ESG measures by the management board, the supervisory board also has to review the contents and wording of the system. As many companies had to submit their management board compensation system for approval at this year's annual general meeting four years after first dealing with it, supervisory boards had to deal with this issue (mostly at very short notice) and had to comment on it in preparation for the general meeting season.

IV. Communication by supervisory boards

For a long time, supervisory boards were a body that was seen but not heard and rarely appeared in public outside annual general meetings. This has changed in the meantime, with it now largely being clear that the chair of the supervisory board may also communicate externally within certain limits. Currently, questions are arising in this area, especially when it comes to expressing political opinions.

1. Principle: authority of supervisory boards to communicate externally

The supervisory board is in principle allowed to engage in communications outside the firm. It has its own authority to communicate if and to the extent that matters specific to the supervisory board or falling within its area of competence are concerned (communication follows competence). This applies in particular to questions relating to personnel matters and compensation of the management board, management measures requiring approval, aspects of its own organisation and composition, and investigation into possible compliance violations and management board liability.

This authority to engage in communication is established in practice (see interdisciplinary study by Noerr, FGS Global and Professor Axel v. Werder (Technical University of Berlin)[11], Study on the role of the supervisory board in corporate communications). Many supervisory board chairs conduct talks with investors, and likewise with the media or representatives from politics and society, which can help to build trust in the market in critical situations.

If the management board and supervisory board have continued to develop their sustainability strategy in the current regulatory environment, it may also be advisable to involve the supervisory board in communications with investors and other stakeholders. However, accompanying communication by the supervisory board, especially in strategic issues falling within the primary responsibility of the management board, will only strengthen the management board if the supervisory board ensures that both bodies speak with one voice through joint or at least coordinated communication in the interests of the company.

2. Political positioning

In the light of political developments in Germany, the EU and the United States, some companies have also expressed their opinions on general political subjects not just relating to the company's business activities in public. Taking a stance in such a way raises the question of whether and to what extent members of the management board and supervisory board may and should express their political views publicly. Inevitably, a member of a governing body will have to consider and weigh up whether the statements could discriminate against employees, whether they may be directed against non-prohibited parties, how business associates will react to them and of course what values a company stands for and whether it should defend these in public discourse or otherwise. More of-ten than not, it is members of the management board who are affected by this. However, members of the supervisory board are also faced with the question of whether the supervisory board must, or at least should, coordinate a line of communication with the management board, how it should react to a possibly uncoordinated position taken by the management board and how it should position itself as a supervisory body.

When assessing such statements, it is also possible to distinguish between remarks made by a member of the supervisory board in order to pursue the corporate purpose and those made by someone as a private individual outside their role as a board member. Such political statements must always be compatible with the fiduciary duties which a member of the supervisory board owes to the company. This applies both to statements made in an official capacity and to those made as a private individual, although in the latter case even greater consideration must be given to whether personal freedom of expression can or must take precedence over the interests of the company.

If members of the supervisory board comment in public in their capacity as a board member or to staff, they can profit from the business judgment rule and not be subject to claims for any communications detrimental to the company where the requirements are met. This requires that the statements are made on the basis of appropriate information and for the benefit of the company. The board member must set aside their own interests and any extraneous influences. Whether this is the case must always be assessed on a case-by-case basis.

[11] https://www.noerr.com/en/insights/study-on-the-role-of-the-supervisory-board-in-corporate-communications, retrieved on Sep. 10, 2025.

Due to the scope and impact of political comments by management and supervisory boards in public, it is advisable for boards to always confer closely in the interests of the company and to speak with one voice.

V. Requirements for supervisory board work

The key component of the supervisory board's work is to advise and oversee management by the management board. The topics pinpointed above illustrate just how dynamic the business landscape is.

1. Critical examination of management by the management board

The supervisory board can only oversee management if it is in the position to understand, critically examine and evaluate the strategies, risks and measures taken by the company's management.

The basis for this is, first and foremost, sufficient information about the impact of current developments on the company and the planned countermeasures. To be able to comprehend and critically monitor these measures, a member of the supervisory board must also acquire knowledge on the above-mentioned aspects that enables them to critically question the explanations provided by the management board, in addition to possessing the necessary expertise in business and legal matters. This certainly does not mean that the supervisory board member has to become an expert in all the areas mentioned.

What is crucial is for supervisory board members to look at the issues that are particularly relevant for the company concerned on a regular basis. In view of the increasingly complex decisions and the growing demands of case law on how due diligence is exercised in the performance of duties, it is becoming increasingly common practice to consult external experts for opinions (*business judgment rule opinions*) on important decisions. These can protect from liability, but in any case help them to organise the issues, acquire knowledge and ask the right (critical) questions to the management board in each specific case. According to the principles of the ISION case law of Germany's Federal Court of Justice (*Bundesgerichtshof*), protection from liability may be considered in this case if the external advisors are professionally qualified and independent and have provided advice on the basis of sufficient information. In addition to this, the supervisory board must subject the results to a plausibility check.

2. Disruption and crises as a chance for the supervisory board's work

Crises also bring opportunities. Supervisory boards should also bear this in mind especially in times like these.

Markets, technologies, legal requirements and social influences are in a state of flux. The resulting changes must be viewed positively in order to find better and quicker responses than competitors.

The supervisory board can support such a development positively by asking the management board specific questions and making suggestions. These include, for example:

- How are competitiveness, innovation and adaptability of the products, services and corporate organisation ensured?
- Can cooperative alliances contribute towards this?
- Are the necessary investments being made to achieve the strategic goals?
- Are the plans accurate?
- Is it ensured that investments are made in line with strategic agendas?
- Is there regular communication about strategy, leadership and personnel development at all relevant levels of the company?

Regular and constructive interaction on all these aspects often improves a company's chances of moving forward in a disruptive and crisis-ridden environment.

VI. Bottom line: supervisory board as a strategic advisor and communicator

The current geopolitical situation and the dynamic nature of the economic environment in global goods and capital flows requires international companies to be more agile than ever in their strategic management. Alongside this, digitalisation and technological advances in artificial intelligence are rapidly changing traditional business models and offering opportunities for innovation. But regulatory developments have also become a driving factor that continually forces companies to question and adjust their strategic direction at ever shorter intervals.

Against this backdrop, the management board's core task is to ensure the company's long-term competitiveness and success. The management board must develop a strategy, implement it in plans and measures, and communicate it to stakeholders. The supervisory board's task is to advise on the development of the strategy and to retrospectively review how it was implemented. In practice, the highly dynamic nature of the business environment and the associated realignment of business activities are increasingly shif-ing the role of supervisory board towards that of a future-oriented sparring partner that proactively advises the management board, questions its motives and encourages and challenges it on strategic issues. The Government Commission on the German Corporate Governance Code recently outlined the role expected of the supervisory board in practical guidance in line with this thinking. At the same time, investors and other stakeholders also expect the supervisory board to communicate externally on issues falling within its remit.

ESG is exemplary for the need to involve the supervisory board at an early stage in designing and refining the company's sustainability strategy. It is the supervisory board which in particular has to integrate the ESG targets derived from the sustainability strategy into the board members' compensation system so as to promote implementation of the strategy using suitable performance criteria. For this reason, it is vital for committees to engage in dialogue about any strategic plans or realignments and the progress made in implementing them at an early stage and on a regular basis in ESG questions as well. This also illustrates the role that the supervisory board should play in practice in dealing with the current discussion on the ESG backlash.

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