Chapter 4

The Supervisory Board as Company Organ

Jean du Plessis and Ingo Saenger

4.1 Introduction

In this chapter we focus on the supervisory board. A general overview of the supervisory board lays the foundation to a proper understanding of supervisory codetermination, the focus of Chapters 5 and 6. When one analyses the German two-tier board system one should never lose sight of the fact that the supervisory board was introduced into the German law of public corporations\(^1\) by the General German Commercial Code (\textit{Allgemeines Deutsches Handelsgesetzbuch, ADHGB}) of 1861.\(^2\) In other words, more than 130 years of development and refinement have taken place since its origin. It is, therefore, no wonder that some commentators would perceive the German system as complicated or unnecessarily technical.

This inception of the supervisory board, and also the later unfolding of this organ, was not at all without controversy.\(^3\) It was, for instance, generally accepted by the beginning of the 1900s that the supervisory board failed in its task of supervising and overseeing the management board.\(^4\) Somewhat later it was observed that the majority of supervisory boards did not actually fulfil their statutory duties.\(^5\) And even by the 1960s, it was stated by Wiethölter that although the supervisory board could not be viewed as insignificant, it had not overcome all its teething problems.\(^6\)

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1. See also 5.2.3.1.
2.\(^{ADHGB}\) 24 July 1861 with effect from 1 March 1862—see Rudolf Wiethölter, \textit{Interessen und Organisation der Aktiengesellschaft im amerikanischen und deutschen Recht} (CF Müller Verlag, Karlsruhe 1961) 271. It is uncertain whether the requirement for having a supervisory board for AGs was influenced by developments concerning the \textit{Kommanditgesellschaft auf Aktien (KGaA)}—see Wiethölter 281–85.
3. In particular Wiethölter (n 2) 271 ff.
4. Ibid 289.
5. Ibid 290.
The debate on the role of the supervisory board is an ongoing one.\textsuperscript{7} There is an increasing amount of literature to support arguments for and against the supervisory board as an institution,\textsuperscript{8} as well as arguments for and against the effectiveness of supervisory boards.\textsuperscript{9} The importance of this institution is, furthermore, clearly illustrated by the fact that it has always been at the centre of discussions about corporate law reform in Germany.\textsuperscript{10} Although corporations with supervisory boards only account for 30 per cent of total turnover in Germany,\textsuperscript{11} there were approximately 8330 supervisory boards formed for large public corporations, city banks and cooperatives in 1996.\textsuperscript{12}

### 4.2 Qualifications and Appointment of Supervisory Board Members

The appointment and removal of the members of the supervisory board are nowadays\textsuperscript{13} closely linked with the concept of employee participation at supervisory board level, since the supervisory board serves as the forum where the interests of various interest groups are represented in the corporation. These aspects are discussed in detail later in this chapter,\textsuperscript{14} while we will now only point out some of the general principles applying to the appointment and removal of the members of the supervisory board.

\textsuperscript{7} In particular Marcus Lutter, ‘Defizite für eine effiziente Aufsichtsratstätigkeit und gesetzliche Möglichkeiten der Verbesserung’ (1995) 159 ZHR 288 ff and the latest sources quoted by him.

\textsuperscript{8} Wiethölter (n 2) 270, 305, 314.


\textsuperscript{11} Hopt (n 10) 7.


\textsuperscript{13} See, however, 5.2.4.

\textsuperscript{14} See 4.5.