Unternehmensführung durch Vorstand und Aufsichtsrat. Aktien-, Kapitalmarkt- und Bilanzrecht, Corporate Governance. Handbuch. Hrsg. von **Peter Hommelhoff, Klaus J. Hopt, Patrick C. Leyens**. – München: Beck 2024. XXII, 1.339 S. – ISBN 978-3-406-78257-2.

Reviewed by **Pierre-Henri Conac***

I. The renowned professors *Peter Hommelhoff*, *Klaus Hopt*, and *Patrick Leyens* have edited a major, innovative, and wide-ranging manual (*Handbuch*) on the subject of "Unternehmensführung durch Vorstand und Aufsichtsrat". It covers the rules applicable to the members of the managing board (*Vorstand*) and of the supervisory board (*Aufsichtsrat*) of public limited liability companies (*Aktiengesellschaft*) under company law, capital markets, and accounting law.

Company law and securities market law have undergone significant changes in recent years, so that the publication of this manual is very timely. And this is not just another manual: it includes 51 contributions from 65 authors who comprise almost all the best German and Austrian academics in the field. In addition, one valuable characteristic of the book is the cooperative approach characterizing many of the entries. While an academic has often combined efforts with a lawyer or an auditor, contributions are sometimes co-authored by a current or former managing or supervisory board member of a large company, thus giving the perspective of individuals who have firsthand experience in dealing with these developments. This combination brings a useful dimension to the issues discussed. Particularly valuable also is the general presentation of the legal framework at the beginning of almost every contribution.

The importance of the evolving duties and rules presented in the manual cannot be underestimated. The European Commission's desire to promote sustainability has led to the adoption of very detailed disclosure requirements, such as the European Sustainability Reporting Standards (ESRS) imposed by the Corporate Sustainability Reporting Directive (CSRD).[1] The Corporate Sustainability Due Diligence Directive (CSDDD),[2] which includes substantive requirements, was still under discussion when the book was finalized, but the proposal is nevertheless analysed in several contributions. In addition to this complex European regulatory framework, there are also national reforms, such as the 2021 "Lex Wirecard" (Gesetz zur Stärkung der Finanzmarktintegrität, FISG), where German legislators, like others, reacted to a major scandal described as the German Enron. In fact, almost 20 years ago *Klaus Hopt* had anticipated that such type of scandal

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1 Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, OJ 2022 L 322/15, as regards corporate sustainability reporting.

2 Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ 2024 L 1760.

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could occur in Germany.[3] All these developments and societal expectations have a direct impact on the obligations and responsibilities of members of the managing and supervisory boards. Their situation is even more challenging because they are faced with legal uncertainties due to the proliferation of rules originating from various texts which are not always coordinated. This is why this manual is a must-have for companies and advisers as it adopts a holistic view of each topic.

II. The book is organized into eight parts. The first seven parts comprise chapters which for their part are made up of multiple contributions. The last part contains an extensive list of selected references organized along the seven parts. This provides a useful tool for researchers. Because of the great number of contributions, it is not presently possible to cite or analyse all of the them as that would go far beyond the scope of this book review. Some articles will nevertheless be highlighted.

1. The first article (*Klaus Hopt/Patrick Leyens*) touches on the most fundamental issues as it provides a global overview of all aspects of the manual. It describes the principles and the development of corporate governance from the perspective of company law, securities law, and accounting law. This contribution underlines the rise of emerging risks and introduces the concept of "Pflichtenentwicklungsrisiko". The term is very well chosen as the legal situation is constantly evolving. As stated, since 2019 and the Commission's "European Green Deal", the legal environment of large German and European companies has been marked by the growing importance of sustainability and ESG (Environment, Social, and Governance) requirements, the increased protection of human rights, and the goal to limit global warming to 1.5 degrees as foreseen by the Paris Agreement of 2015. These evolutions, which imply a rise in compliance duties and risks, are very well described as a "megatrend". However not all evolutions come from the European Union (EU). For instance, German case law from 2013 required the managing board to implement a compliance system. Several German companies have been subject to climate actions. A German law on supply chain (Lieferkettensorgfaltspflichtengesetz) entered into force in 2023. All sources are covered, including *soft law*, i. e. the Deutscher Corporate Governance Kodex. The Kodex is a precursor of the law, as it sometimes inspires legislation and case law. Its importance is all the greater given that this area is partly left to the Member States. This first part also includes a contribution by a member of a supervisory board who reminds us that among all these requirements from legislators and expectations from market participants, competitiveness should not be forgotten (*Karl-Ludwig Kley*). These developments take place in a framework of international soft-law, European hard-law, and national constitutions, which is also described (*Stephan Harbarth/Moritz Reichenbach)*. A contribution on comparative law shows that, despite differences in corporate governance systems, these trends are international (*Susanne Kalss*).

The chapter that follows contains articles dedicated to sustainability and ESG standards. This focus is not surprising since this is where we find the most important developments for public interest entities and other companies covered by the European legis-

3 *Klaus Hopt*, Ein Debakel à la Enron ist auch in Deutschland denkbar, Handelsblatt of 21 February 2002, p. 8.

lation. Moreover, there is also a "spillover" effect. Requirements imposed on companies subject to the EU legislation affect in practice other types of companies as well, e. g. private limited liability companies (Gesellschaft mit beschränkter Haftung, GmbH). Some risks are clear. For instance, members of the management and supervisory boards may be subject to financial penalties, including criminal sanctions, if they fail to produce the sustainability report as requested by articles 19a and 29a of the Accounting Directive (2013/34/EU). The CSDDD, which includes substantive requirements, is also examined in great detail. An interview describes the best practices for the supervisory board in the field of ESG, this being described as a "key issue" ("Chefsache") and also as a moving target (*Margret Suckale*). This has led to an intensification of the communications between the supervisory board and the managing board, a tendency that is reflected in several other contributions. Finally, the important role of the Kodex is the subject of several contributions. The advisory code now defines the social interest of listed companies, and the 2022 amendments to the Kodex provide that social and environmental factors are to be taken into account in addition to long-term economic objectives.

2. The second part deals with the duties of the managing board and its members. They face the greatest risk of liability. The first article describes the powers and duties of the managing board (*Peter Henning / Jan Lieder*). This body enjoys considerable freedom and can take into account stakeholder expectations as long as it ensures the long-term profitability of the company. The article notes that some companies have even appointed a chief sustainability officer (CSO), who is usually not a member of the managing board. The use of artificial intelligence as a tool to prepare decisions is also presented (*Gerald Spindler † / Andreas Seidel*). The authors recall that the law applying to the managing board adheres to a principle of technical neutrality, so that artificial intelligence can be used. Among the duties linked to information technology are the protection of personal data under the 2016 General Data Protection Regulation (GDPR) and protection against cyber-risks. These duties are another source of liability risk for companies. The governance of groups – both in a German as well as in a cross-border context – is also presented (*Peter Hommelhoff*). The contribution underlines that supply chain legislation, whether German or European, is to a certain extent turning subsidiaries into divisions of the parent company. The author also shows that European legislation, which implies centralization, considerably affects the German approach to the regulation of groups. Another article provides the experience of the Deutsche Bank – which faced serious compliance issues – in developing its company culture and ethical standards (*Karl von Rohr*); in fact, it is all the more interesting that the finance sector is usually a precursor for the regulation of listed companies. Another article in the second part is devoted to the four pillars of the governance system: the risk management system (*Risikomanagementsystem*), internal control system *(internes Kontrollsystem*), internal revision system (*internes Revisionssystem*), and compliance management systems (*Christoph Klahold*). These requirements lie at the heart of the duty of care of the managing board. Their intensity has increased for listed companies as a consequence of the Wirecard scandal. Articles that follow deal with, among other issues, the role of whistle-blowers, which many items of sector-specific (capital markets, competition law …) and cross-sector legislation (Hinweisgeberschutzgesetz, HinSchG) rely on to improve compliance (*Klaus*

Ulrich Schmolke); the regulation of related-parties transactions (*Tobias Tröger*); and insider trading prohibitions and the disclosure regime for listed companies (*Rüdiger Veil*). The strong influence of the EU legislature is felt in all of these regulations.

3. The third part deals with the supervisory board. This body must oversee the management board, but it has also several special duties, such as supervising the company's system of governance. Those duties originate from hard law (Aktiengesetz) and from soft-law (Kodex), and they are also influenced by the expectations of institutional investors (*Markus Roth*). As part of these expectations, the chairman of the supervisory board may engage in dialogue with investors as underlined by several contributions. However, there must be a close cooperation with the managing board to ensure a "one voice policy". The definition of independence as applicable to the members of the supervisory board, an issue which is left to the Kodex, diverges from EU recommendations. Institutional investors play a significant role and expect an independent supervisory organ. They impose their own analysis of independence. The importance of having independent members as an element of good corporate governance is illustrated again by the case of Wirecard, which had no independent members before its admission to the former Dax-30. The duty of loyalty (*Treuepflicht*) and the duty to avoid conflicts of interest – both of which are subject to hard- and soft-law provisions and which include special rules in groups of companies – are also discussed (*Christoph Kumpan*). The rules applicable to representatives of the employees as required by codetermination (*Mitbestimmung*), which is so important in practice, are also addressed (*Kumpan*). As the title of the manual clearly implies, the supervisory board should be considered to also be responsible for setting the overall direction of the company. In this regard, one contribution underlines this dimension of co-entrepreneurship (*Mitunternehmerfunktion*), which is linked to the supervisory function (*Norbert Winkeljohann*).

4. The section on the liability of the company's organs is one of the shortest but could be the most important for members of the managing and supervisory boards. Indeed, the risk that they could be sued has increased even if the business judgment rule constitutes a strong protection. In this context, a knowledge of the technical and rarely discussed rules relating to directors' and officers' liability insurance (D&O Liability) is essential. One contribution is devoted to this complex subject (*Walter Doralt/Horst Ihlas*). The possible liability of members of the company's organs in the case of listed companies is also addressed (*Alexander Hellgardt*).

5. The fifth part focuses on the shareholders' general meeting and especially on the role of institutional investors in corporate governance. The role of the latter is increasingly important as a result of European requirements and the greater ease with which voting rights can be exercised. Activist investors, especially hedge funds, have a bad reputation in Germany. However, the Wirecard scandal, once again, has shown that "even" activist investors can play a positive role in the field and that the company should engage with them without prejudice (*Martin Gelter/Katja Langenbucher*). Companies also cannot ignore the influence of proxy advisers, especially as there are essentially only two main proxy firms. Several contributions mention the strong influence of institutional investors, proxy advisors, hedge funds wealth managers, and even private-equity investors. As also mentioned in several contributions, the rise of these investors implies

a direct dialogue between the organs of the company and all these investors. At the same time the company must respect the prohibition against communicating inside information as required by the Market Abuse Regulation.

6. These developments have resulted in the creation of new disclosure obligations and, as a consequence, have created new liability risks. The importance of sustainability issues appears again through the duty to publish a sustainability report (*Nachhaltigkeitsberichterstattung*). It reminds us that not only shareholders but also stakeholders have been recognized as having an interest in the way companies are managed (*Eberhard Vetter*). Through disclosure, the real goal is to promote a sustainable approach in the management of companies. Due to its wide dissemination, the sustainability report stands at the core of the efforts of EU legislators to achieve this goal. In addition, for listed companies there is a duty to publish a declaration as to the management of the company (*Erklärung zur Unternehmensführung*), something which is designed to strengthen corporate governance (*Sebastian Mock*). Here again, disclosure is used by legislators as a tool to influence the behaviour of companies. With the introduction of a special report on sustainability information, the role of auditors, who must develop skills in the field of sustainability, has been extended (*Joachim Hennrichs*). The subject of administrative sanctions imposed by BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht), the newly-established APAS (Abschlussprüferaufsichtsstelle), and ESMA (European Securities and Markets Authority), whose role is growing, is also presented (*Bettina Thormann*). The risks of sanctions are high due to the scope of the new disclosure requirements. Finally, from a practical perspective, an article is devoted to the risk of sanctions in the event of a violation of disclosure or substantive requirements, considering as well how attempts can be made to reduce these risks (*Dirk Uwer / Julia Vorländer*).

7. The final part deals with specific situations where, for example, the company finds itself in a crisis situation (*Christoph Thole*). Another contribution covers the situation of family companies, which are so important in Germany, Austria, and Switzerland (*Gerd Krieger*). These companies are not just small and medium-sized enterprises, as they can also be large unlisted or even listed companies. It is therefore useful to devote specific developments to them. The last article looks at state-controlled companies, which may also be small or very large (*Christoph Teichmann*).

III. The obligations of members of the management board and of the supervisory board have grown significantly, especially as a consequence of corporate scandals (Wirecard) and the sustainability requirements imposed mostly by the EU legislature. Consequently, the legal environment of managers has been subject to major changes and is more risky, as many duties are new and issues have not yet been addressed by courts. A legal environment that is overly regulated, overly litigious, or overly politicized makes the task of managing companies difficult. From this point of view, the publication of the Letta[4]

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4 *Enrico Letta*, Much More than a Market – Speed, Security, Solidarity: Empowering the Single Market to Deliver a Sustainable Future and Prosperity for all EU Citizens (April 2024), <https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf> (18 March 2025).

and Draghi[5] Reports, which stress the need to strengthen the competitiveness of European businesses, is a welcome development. The publication on 26 February 2025 by the European Commission of two Omnibus Directives postponing the timetable for application of the CSRD and the CSDDD, and introducing some regulatory relief, is a step in the right direction.

The need for expert and detailed guidance on all the aspects of these legal developments, also from a practical perspective, is all the more important. This impressive manual fills this need perfectly. It is a true compass, one that can be easily used by companies and their advisers, and one that addresses all the issues indicated above. Its original approach – arranged by topic – and its articles with a practical orientation make it immediately useful. In an evolving European and national regulatory context, it constitutes a unique, comprehensive, and detailed guidebook for managers, legal departments, academics, lawyers, and also courts. It should be met with a well-deserved success in Germany and beyond.

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Besprochen von **Tatjana Josipović***

Die Kodifizierung des rumänischen Privatrechts im neuen Zivilgesetzbuch / ZGB (Nou Cod Civil), das am 1. Oktober 2011 in Kraft getreten ist, stellt eine originelle Kombination von rechtlichen Transplantationen und der autonomen Entwicklung des rumänischen Rechts dar. Zum einen wurden in das ZGB zahlreiche Rechtsinstitute des Privatrechts aus fremden Zivilgesetzbüchern, die verschiedenen Rechtskreisen angehören, aus internationalen Konventionen und wissenschaftlichen Projekten über die Grundsätze des Privatrechts sowie aus dem EU-Recht, der europäischen Rechtsprechung und der Rechtslehre europäischer Staaten übernommen. Zum anderen spiegelt die Regelung der einzelnen privatrechtlichen Institute die spezifische geschichtliche Entwicklung des rumänischen Privatrechts wider, die durch die Vereinheitlichung des Rechts, welche zu Beginn des 20. Jahrhunderts nach der Vereinigung verschiedener Provinzen in einem Einheitsstaat erfolgte, durch die Transformation des Rechts nach dem Verlassen des sozialistischen Rechtskreises sowie durch die Rechtsangleichung nach dem Beitritt zur Europäischen Union geprägt ist.

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5 *Mario Draghi*, The Future of European Competitiveness (9 September 2024), <https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en> (18 March 2025).

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