

# The International Bar Association Company Director Checklist – Germany

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## INTRODUCTION

This Company Director Checklist has been designed as a practical guide to the main obligations and procedures of a listed public company under the German Stock Corporation Act (***Aktiengesetz, AktG***) and other relevant German legislation. The Checklist does not reflect any special regulations applicable to Company Director of regulated entities (like banks or insurers).

German stock corporations have a two-tier system with a management board, managing the business of the company, and a supervisory board, supervising the work of the members of the management board. This Checklist is mainly tailored for members of the management board and not supervisory board members. It applies to a public company that is listed on the stock exchange.

This Checklist is a general guide that is not intended to be a substitute for professional advice. It will, however, highlight to a member of the management board those situations where professional advice may be required. This checklist was updated as at 15 **March 2022**.

Disclaimer: This Checklist is general and should not be relied on for advice. Hogan Lovells International LLP and the authors disclaim any liability in respect of anything done in reliance on this publication. This Checklist was prepared with directors of a listed public company in mind. However, specific legal advice and, where appropriate, tax and accounting advice should be sought in all circumstances. Unless otherwise specified, reference to a "section" (abbreviated as "s") or "part" is a reference to a section or part of the German Stock Corporation Act (*Aktiengesetz, AktG*).

	Action/Issue	Comments/Notes
<p><b>Appointment</b></p> <p>1. How are you appointed, by whom and for how long?</p>	<ul style="list-style-type: none"> <li>Your appointment requires a resolution of the supervisory board (s 84 para 1 sentence 1) and your acceptance of the appointment.</li> <li>You can be appointed for a maximum term of five years. However, according to a recommendation of the German Corporate Governance Code ("<b>GCGC</b>"), the maximum period for first time appointments shall not exceed three years.</li> <li>The appointment can be renewed or extended, but, again, only for a period of up to five years.</li> <li>The appointment can be revoked for good cause. In particular, a gross breach of your duties, incompetence as a director and the withdrawal of trust by the shareholders' meeting (s 84 para 3 sentence 2) would justify the revocation of the appointment.</li> <li>Any changes to the management board (or to the power of representation of the members thereof) must be registered in the commercial register (s 81 para 1).</li> </ul>	<ul style="list-style-type: none"> <li>The whole supervisory board has to resolve upon your appointment. This competence cannot be delegated to a committee of the supervisory board (s 107 para 3 sentence 7).</li> <li>If your appointment is invalid (e.g. due to defects of the supervisory board resolution concerning the appointment), but you actually act for the company, you will be treated as if your appointment had been valid until your appointment is revoked by the supervisory board or until you resign from your office.</li> <li>Changes of members of the management board could have significant influence on the market price of the company's shares and thus might trigger ad hoc disclosure obligations the Market Abuse Regulation, (EU) No 596/2014(<i>Marktmissbrauchsverordnung, MAR</i>).</li> </ul>
<p>2. What is the interrelation between your appointment and your service agreement?</p>	<ul style="list-style-type: none"> <li>Parallel to your appointment you will enter into a service agreement. For that purpose the company must be represented by its supervisory board.</li> <li>The provisions of the service agreement specify inter alia your compensation, your right to paid vacation, your right to continued payment of salary in case of illness etc.</li> <li>The term of your service agreement will usually correspond to term of your appointment. The service</li> </ul>	<ul style="list-style-type: none"> <li>Your service agreement is not an employment agreement, i.e. employee protection provisions will only apply in particular cases. Your duties as a director are generally laid down by law and cannot be amended by the service agreement.</li> <li>If the service agreement is invalid, but you actually act for the company, the service agreement will be treated as though it was valid (which means, in particular, that you can validly claim your</li> </ul>

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	<p>agreement can provide that it will automatically be extended, if your appointment is renewed or extended.</p> <ul style="list-style-type: none"> <li>• If your appointment is revoked for good cause, this does not automatically have an effect on your service agreement. However, the service agreement can be terminated for good cause (s 626 German Civil Code) as well. The requirements of a good cause might differ.</li> <li>• The termination of the service agreement for good cause has to take place within two weeks after the supervisory board has gained knowledge of the facts justifying the termination for good cause.</li> </ul>	<p>remuneration) until it is terminated.</p> <ul style="list-style-type: none"> <li>• The termination for good cause will be made by the company which will, again, be represented by the supervisory board.</li> <li>• It is disputed in the legal literature whether, for the two weeks time limit, all members of the supervisory board must gain knowledge or whether it is sufficient that only one member of the supervisory board or the chairman of the supervisory board has gained the relevant knowledge. According to the prevailing opinion the knowledge of the supervisory board as corporate body is decisive which means that the period starts on the day on which the supervisory board can resolve on the revocation of the appointment in a meeting. If the meeting is not convened in due course, the period starts on the day on which the meeting could have been held in case of timely convening of the meeting.</li> </ul>
<p>3. What are the most important provisions regarding your remuneration under German law?</p>	<ul style="list-style-type: none"> <li>• It is the supervisory board's duty to procure that your remuneration (including pensions or the like) is reasonable (s 87 para 1). This means that: <ul style="list-style-type: none"> <li>○ it must be at appropriate with regard to your tasks and performance,</li> <li>○ the structure of your remuneration has to aim at a sustainable development of the company;</li> <li>○ variable benefit components should have a calculation basis of several years (at least two years).</li> </ul> </li> <li>• Since 2021 the supervisory board must establish an abstract system of remuneration for the management board with certain minimum disclosures, such as the</li> </ul>	<ul style="list-style-type: none"> <li>• Even if the determined remuneration violates these rules, it does not affect your right to claim the conditions stipulated in your service agreement. But it could lead to claims against the members of the supervisory board.</li> </ul>

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	<p>determination of a maximum compensation (s 87a para 1 sentence 2).</p> <ul style="list-style-type: none"> <li>• The remuneration can be reduced, if the company's situation deteriorates after your remuneration has been determined (s 87 para 2 sentence 1).</li> <li>• The general meeting has to resolve on the approval of the remuneration system (s 120a para 1). However, such resolution does not create any rights or obligations and does not affect the obligation of the supervisory board.</li> <li>• The management board and the supervisory board are required to prepare a remuneration report containing information on the remuneration of the individual board members, which must be made publicly available (s 162).</li> </ul>	
4. How do I resign?	<ul style="list-style-type: none"> <li>• Generally the resignation requires a declaration by the member of the management board which must be received by at least one member of the supervisory board. Quite often the articles of association of the company contain provisions regarding the time and form of the resignation of members of the management board.</li> <li>• The resignation is generally independent from the termination of the service agreement. Therefore, the impact of the resignation on the service agreement must be reviewed in the individual case.</li> </ul>	<ul style="list-style-type: none"> <li>• Normally, the member of the management board intending to leave and the supervisory board agree on the time and conditions of the resignation. Then the required documents (resignation letter with regard to the term of office and termination agreement with regard to the premature cancellation of the service agreement) will be prepared accordingly.</li> </ul>
<b>Ongoing Duties</b>		

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<p>5. What is the duty of care (s 93, 116)?</p>	<ul style="list-style-type: none"> <li>• The duty of care requires you to exercise your duties with the care of a diligent and conscientious manager (s 93 para 1 sentence 1). The same standard applies to the members of the supervisory board (s 116 sentence 1).</li> <li>• This means that you are obliged to use your best efforts to promote the purpose of the company.</li> <li>• In addition, you are obliged to comply, and you have to procure that the company complies, with statutory law, the articles of association and by-laws of the company.</li> </ul>	<ul style="list-style-type: none"> <li>• As a guideline to fulfil the duty of care, you always have to ask yourself whether a dutiful independent director of a company of the same type who does not operate with his own funds but is obliged towards external interests, similar to a trustee, would act in the same way.</li> </ul>
<p>6. What are your other main duties as member of the management board?</p>	<ul style="list-style-type: none"> <li>• Your primary duty is to lead the company at your own responsibility (s 76 para 1). In addition, you have in particular the following duties: <ul style="list-style-type: none"> <li>○ representation of the company</li> <li>○ acting in accordance with the company's constitution</li> <li>○ summoning of the general meeting</li> <li>○ preparation and implementation of shareholders' resolutions</li> <li>○ preparation of financial statements</li> <li>○ filing of insolvency procedures (cf. 15 below)</li> <li>○ establishment of a risk management system</li> <li>○ report to the supervisory board and to the shareholders' meeting</li> <li>○ protection of the company's assets (i.e. maintenance of the company's capital)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• The members of the management board are responsible for the management of the company. However, certain measures require approval of the supervisory board or the approval of the shareholders' meeting. Such measures may be determined by statutes, case law or your company's articles of association.</li> <li>• Whereas the principle is that the company is represented by the members of the management board, the supervisory board takes over this function, if the company has to be represented in agreements with members of the management board.</li> </ul>

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7. To whom are your duties owed?	<ul style="list-style-type: none"> <li>In principle your duties are owed to the company itself.</li> </ul>	<ul style="list-style-type: none"> <li>This means that you do not owe your duties to shareholders, to employees, to creditors of the company or to the public. However, it has to be taken into account that the interests of the stakeholders (shareholders, employees, creditors and the public) have an impact on the definition of the best interest of the company.</li> <li>As an exception to the principle above, under certain circumstances, shareholders or creditors can have own claims against the members of the management board in case of a violation of their duties.</li> </ul>
8. How much can you delegate and rely on others?	<ul style="list-style-type: none"> <li>In principle, the members of the management board can delegate some of their duties to other members of the management board or to employees.</li> <li>However, some duties must be fulfilled by the members of the management board personally (e.g. filing for insolvency, applications for registration with the commercial register etc.)</li> <li>In case of delegation, the members of the management board remain partly responsible. The individual who shall act instead of the member of the management board must be <ul style="list-style-type: none"> <li>carefully chosen,</li> <li>properly instructed and</li> <li>adequately supervised.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>You should always document the delegation of your duties in written form to enable you to prove the delegation and therefore the reduction of your own duties.</li> </ul>

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9. What is the Business Judgement Rule (s 93 para 1 sentence 2)?	<ul style="list-style-type: none"> <li>If, (i) at the time of taking an entrepreneurial decision, (ii) you acted free of private interests and inappropriate impacts, (iii) on the basis of adequate information, (iv) for the benefit of the company, you will not be liable for failing to meet the duty of care (cf. 4 above). Regarding (ii) - (iv), it is required, but also sufficient that you acted in good faith.</li> <li>The Business Judgement Rule only applies to entrepreneurial decisions, i.e. decisions where you cannot be certain on the outcome at the date of the decision. In addition, the decision must be in accordance with the law. Therefore, the Business Judgement Rule is not applicable, if the law requires a certain decision.</li> </ul>	<ul style="list-style-type: none"> <li>In order to evidence the prerequisites of the Business Judgement Rule, it is advisable for you to document the steps and factors of the decision-making process, in particular with regard to (iii).</li> <li>You can seek external advice (e.g. expert opinion), but you still have to review the information provided via external advice carefully.</li> <li>Members of the management board who violate their duties shall be jointly and severally liable to the company for any resulting damage (s 93 para 2 sentence 1).</li> </ul>
10. What is the position on conflicts of interest?	<ul style="list-style-type: none"> <li>You owe a duty of loyalty (<i>Treuepflicht</i>) to your company. This means that you are obliged to act in the best interest of the company and to avoid conflicts of interest.</li> <li>Hence, you have to refrain from competitive acts like executing an office for a competitor (s 88 para 1), holding significant shares in a competitor etc.</li> <li>You are also not allowed to disclose confidential information or trade and business secrets of the company.</li> <li>You are only entitled to enter into agreements on behalf of the company or third parties represented by you, if such authorization is expressly granted to you by the supervisory board or in the articles of association</li> </ul>	<ul style="list-style-type: none"> <li>Certain (competitive) acts can be approved by a prior approval of the supervisory board (e.g. appointment as a member of the supervisory board of a competitor).</li> </ul>



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	(exemption from the restrictions of s 181 German Civil Code ( <i>Bürgerliches Gesetzbuch, BGB</i> )).	
11. What do you have to observe with regard to the other corporate bodies of the company (i.e. shareholders' meeting, supervisory board)?	<ul style="list-style-type: none"> <li>• There are three corporate bodies in a German stock company: The management board (<i>Vorstand</i>), the supervisory board (<i>Aufsichtsrat</i>) and the general meeting (<i>Hauptversammlung</i>).</li> <li>• The management board is responsible for the management (day-to-day business) of the company and its members represent the company.</li> <li>• The supervisory board monitors and advises the members of the management board and appoints the members of the management board.</li> <li>• The supervisory board cannot give instructions to the members of the management board, but certain measures require the approval of the supervisory board.</li> <li>• The company is represented by the supervisory board in case of transactions with the members of the management board (s 112).</li> <li>• Generally, the management board convenes the general meeting. The general meeting is the corporate body in which the shareholders exercise their rights. It mainly decides on the basic issues of the corporation (articles of association, capital increases and decreases, mergers, spin-offs, liquidation etc.).</li> <li>• The shareholders have only limited information rights. The shareholders can ask questions at the general meeting, which must be answered if they concern matters of the company and are relevant for agenda items. S 131 para 3 contains a list of reasons pursuant to which the members of the management board are</li> </ul>	<ul style="list-style-type: none"> <li>• Typical issues that need an approval by the shareholders' meeting are decisions that have a significant influence on the shareholders' rights. There is some case law concerning for example the spin-off of important part(s) of the company. Therefore, you should seek legal advice as soon as possible, whenever a significant measure for the company is planned.</li> </ul>

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	<p>entitled to refuse to answer question.</p> <ul style="list-style-type: none"> <li>The general meeting cannot give instructions to the members of the management board, but certain measures require the approval of the general meeting and within the scope of the competences of the general meeting the members of the management board are obliged to implement the resolutions of the general meeting.</li> </ul>	
12. Understand that turning a blind eye may not be enough	<ul style="list-style-type: none"> <li>If the members of the management board have reasons to believe that employees of the company or other members of the management board or members of the supervisory board have violated the law, the members of the management board have to investigate the matter and to ensure that the law is observed and claims of the company are enforced.</li> </ul>	<ul style="list-style-type: none"> <li>The measures required depend on the circumstances in the individual case. In case of doubt, legal advice should be obtained.</li> </ul>
13. Understanding your personal disclosure obligations as a director of a listed company	<ul style="list-style-type: none"> <li>You have to notify your company and the German financial supervisory authority BaFin (<i>Bundesanstalt für Finanzdienstleistungsaufsicht</i>, "<b>BaFin</b>") within three days, if you carry out a transaction concerning shares or derivative instruments issued by your company (Art. 19 para 1 MAR).</li> <li>According to a recommendation of the GCGC (s E.2) the members of the management board shall disclose any conflicts of interest to the other members of the management board and the members of the supervisory board.</li> </ul>	<ul style="list-style-type: none"> <li>The "Directors' Dealings" notifications must be published by the company within three days (Art. 19 para 3 MAR).</li> <li>The fine in case of a violation of the "Directors' Dealings" notification duties amounts to up to EUR 500,000 (Art. 30 para 2 subpara 1 lit. i (iii) MAR).</li> </ul>

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14. Understanding what the company must do to comply with its statutory obligations	<ul style="list-style-type: none"> <li>You have to ensure that the company complies with statutory obligations. Due to the number of statutory obligations, the following list only contains some examples of more important statutory obligations: <ul style="list-style-type: none"> <li>disclosure of the annual financial statements (including balance sheet, profit and loss statement, notes), management report, report of the supervisory board</li> <li>disclosure of interim reports as required under the provisions under the WpHG</li> <li>immediate publication of price sensitive information in accordance with the provisions of the MAR.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Since it is a duty of the members of the management board to ensure the company's compliance with the law, the breach of obligations by the company can lead to a liability of the members of the management board (s 93 para 2 sentence 1).</li> </ul>
15. Understand your potential liability under other acts and the systems adopted by your company to minimise breaches	<ul style="list-style-type: none"> <li>The company has to act in compliance with tax, security and anti-trust regulations, as well as environmental and health and safety regulations.</li> <li>The members of the management board have to ensure that an appropriate compliance system is established.</li> </ul>	<ul style="list-style-type: none"> <li>There are special liabilities of the members of the management board in case of violation of the company's tax duties.</li> <li>There are also special liabilities in case of violation of the company's duties concerning social security contributions.</li> </ul>
<b>Special Circumstances</b>		
16. What is the position if the company may be insolvent?	<ul style="list-style-type: none"> <li>If the company's losses amount to half of the share capital, you have to convene a shareholders' meeting and inform the shareholders' meeting of these losses (s 92 para 1) without undue delay. In case of a breach of this obligation, you are personally liable for any damages incurred. You are also liable under penal law.</li> <li>If the company is unable to pay (<i>zahlungsunfähig</i>) or over-indebted (<i>überschuldet</i>), you have to file for insolvency at the latest three weeks after the inability to</li> </ul>	<ul style="list-style-type: none"> <li>Inability to pay means that the company cannot fulfil the obligations to pay which are due (s 17 para 2 InsO). Over-indebtedness means that the assets of the company do not cover the existing liabilities, unless the continuation of the company is predominantly likely, considering the circumstances (s 19 para 2 InsO).</li> <li>As an overall advice, if your company is close to insolvency or insolvent, you should immediately</li> </ul>

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	<p>pay or the over-indebtedness has occurred (s 15a German Insolvency Code, <i>Insolvenzordnung, InsO</i>). If you breach this obligation, you are personally liable for any damages incurred. You are also liable under penal law.</p> <ul style="list-style-type: none"> <li>• When the company has become unable to pay or over-indebted, you are not allowed to make payments unless such payments are nonetheless in accordance with the care of a diligent and conscientious director (s 92 para 2 sentence 1).</li> <li>• The same applies to payments to shareholders as far as such payments were bound to lead to the company's inability to pay unless this was unforeseeable even upon applying the duty of care of s 93 (s 92 para 2 sentence 3). Payments in question might be dividends, granting of loans to shareholders or repayments of shareholder loans, but there always has to be an inner connection between the relevant payment and the inability to pay. If you breach this obligation, you are personally liable towards to the company for any impairment of the insolvency assets.</li> </ul>	<p>consult legal advice in order to protect yourself against personal liability.</p> <ul style="list-style-type: none"> <li>• Payments which are allowed under s 92 para 2 sentence 2 are e.g. payments for which the company receives a consideration of the same value as the asset, payments which have to be made in order not to prevent the success of potential efforts for restructuring, or payments which are made in order to prevent a threatened criminal prosecution (e.g. payments for social security). If you breach this obligation, you are personally liable for any impairment of the insolvency assets.</li> </ul>
17. What special responsibilities and liabilities are associated with a public offer?	<ul style="list-style-type: none"> <li>• If shares of a listed company (regulated market) shall be offered to the public or if shares such company shall be admitted for trading, a prospectus must be published in accordance with the provisions of the Securities Prospectus Act (<i>Wertpapierprospektgesetz</i>) and EC regulations, unless an exemption under the relevant provisions is applicable.</li> </ul>	<ul style="list-style-type: none"> <li>• You may be liable, if a false statement is made in a prospectus, e.g. if there is a wrong assessment of assets, liabilities, profits and losses. You should seek legal and accounting advice as soon as possible.</li> <li>• There may be some more requirements to fulfil depending on the stock exchange and market segment you choose for the issuance.</li> </ul>

	<b>Action/Issue</b>	<b>Comments/Notes</b>
18. What special responsibilities and liabilities are associated with a takeover of the company?	<ul style="list-style-type: none"> <li>• In case of a public offer for the purchase of shares of a listed company (regulated market) an offer document must be approved by the BaFin and must be published. Among other things, the document must contain information about the offer, the bidder, the compensation to be paid to the accepting shareholders etc.</li> <li>• The management board and the supervisory board of the target company must publish a substantiated statement regarding the takeover offer.</li> <li>• The members of the management board must not take any action which could hinder the success of the offer.</li> </ul>	<ul style="list-style-type: none"> <li>• Legal advice should be sought as soon as possible, if your company is the (potential) target of an intended takeover.</li> </ul>
<b>Self Defence</b>		
19. Good corporate governance processes	<ul style="list-style-type: none"> <li>• You are responsible for the conduct of an effective monitoring and controlling system. It is also your obligation to install an effective compliance system.</li> <li>• The management board and the supervisory board are required to comply in principle with the regulations of the GCGC and they must report on an annual basis whether or not the company complies with the provisions of the GCGC (s 161 para 1 sentence 1).</li> </ul>	<ul style="list-style-type: none"> <li>• You (respectively the board of directors) should delegate the management of the compliance system to a carefully selected and qualified compliance officer, who should take care of the setting of standards in compliance and who monitors the compliance with all legislation.</li> </ul>
20. Indemnities	<ul style="list-style-type: none"> <li>• The members of the management board are not liable to the company for actions which are based on lawful resolutions of the general meeting. However, in case of a severe breach of the obligations, the liability is not excluded to the extent that claims of creditors of the company are not fulfilled by the company.</li> <li>• Theoretically, a third party or a shareholder could grant an indemnity to the member of the management board.</li> </ul>	<ul style="list-style-type: none"> <li>• Generally, it is not possible to agree on a reduction of the statutory liability in the service agreement or in the articles of association.</li> </ul>

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	<p>However, in practice such agreements are quite seldom. In addition, it has to be taken into account that such indemnity does not affect the direct liability of the member of the management board.</p>	
21. Insurance	<ul style="list-style-type: none"> <li>• A directors and officers (D&amp;O) insurance can protect you from potential liability. The company is allowed to pay the premiums for this insurance as part of your remuneration.</li> <li>• But there must be a retained amount of at least 10% of the damage up to the amount of the fixed remuneration of the management board member for 18 months.</li> </ul>	<ul style="list-style-type: none"> <li>• D&amp;O insurances regularly work on a "claims-made"-basis. This means, that the insurance pays for damages that have been bred within the contract period and also have been claimed within the contract period. You should pay special attention to the terms and conditions of the contract and negotiate a so called late-allegation-period (<i>Nachmeldefrist</i>) of five years, because, pursuant to German provisions, a damage claim against you can be alleged up to five years after you have ended your engagement as a director.</li> </ul>