# LEGAL REGULATION OF CORPORATE MANAGEMENT IN COMPANIES WITH STATE PARTICIPATION UNDER THE LEGISLATION OF THE FEDERAL REPUBLIC OF GERMANY

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*The state is prohibited from pursuing activities aimed solely at profit-making. First of all, the activities of a state or municipal company should be aimed at meeting public interests of the population. Therefore, services of companies with state participation should serve a public purpose. When there is no public purpose, there is no legal framework for the state's involvement in a company's activities. Corporate management principles ensuring that public companies' objectives are met are only applied when it is mandatory for the company. Constituent documents of public joint-stock companies have to specify the company's objectives and establish management principles to be followed by the company's employees. According to the fiscal legislation regulations, public companies' activities should produce revenue for the budget to the extent it does not contradict the public purposes. Management bodies shall act on behalf of the company. The corporate principle of fiduciary duty prohibits all members of a corporate management body from pursuing activities that would contradict the public interests established in the articles of association.*

*The public interest does not extend special competitive privilege to such companies. Companies authorized to act in the public interest, regardless of their form of incorporation, should comply with the German and European competition laws. A departure from the competition laws by the European Union member states is only allowed when competition has to be limited for the public purpose (Article 106, para. 2 of the Treaty on the Functioning of the European Union).*

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Government involvement in corporations in a market-based economy as implemented in Germany and the European Union (Article 3, para. 3 of the Treaty on European Union) is only justified when it meets the public interests. Fiscal regulations at the federal, local, and municipal levels establish requirements for legitimation of the state's economic activi-

ties via the public interest (public weal). [1] The public interest does not extend special competitive privilege to such companies. Companies authorized to act in the public interest, regardless of their form of incorporation, should comply with the German and European competition laws. A deviation from the competition laws by the European Union member states is only allowed when competition has to be limited for the public purpose (Article 106, para. 2 of the Treaty on the Functioning of the European Union). The corresponding deviations shall be controlled additionally in accordance with a specific directive (the transparency directive and tendering directive) to confirm that the provisions of the European Union Treaty in terms of a competitive, genuine market-based economy (Article 3, para. 3 of the Treaty on European Union) will not be violated by public corporations. [2] When interacting with companies with state participation, the European Union member states should act so that the effect of competition regulations of the Treaty on European Union (Article 101 of the Treaty on European Union) in practice would not be called into question. This includes prohibition of subsidizing public corporations that could cause damage to private companies. Competition conditions for private and public companies should be the same. [3]

The prohibition also applies to companies with state participation, if the government is involved in activities of other business entities via companies controlled by it. The public economic law allows the state, federal lands, and municipalities to decide on incorporation of a public or private company while pursuing public purposes. [4] If the public form of incorporation is selected for business, the government is obliged to comply with the competition laws. [5] The regulations of constitutional law and other German legal acts do not stipulate benefits in the area of competition law for public companies. Articles 101 and 102 of the Treaty on the Functioning of the European Union do not distinguish between public and private organizations and guarantee equal treatment of public and private companies when implementing a genuine competition system. [6]

As described above, business entities are incorporated to achieve the public purposes. Therefore, state is prohibited from pursuing activities aimed solely at profit-making. First of all, the activities of a state or municipal company should be aimed at meeting public interests of the population. Therefore, services of companies with state participation should serve a public purpose. Due to this scale, an agreement is put in place, for example, stating that local power supply, waste recycling, or transport communication should serve public interests. [7] These also include multiple cultural institutions (theaters, museums, etc.). Requirements imposed on public purposes distinguish public companies (regardless of their form of incorporation) from private ones. The state's economic activity is an integral part of administrative activities on public service delivery associated with provision of amenities. When there is no public purpose, there is no legal framework for government involvement in a company's activities.

Companies existing in a market economy based on demand and supply are oriented at economic success and do not focus on answering ethical questions of a value-oriented society. Never failing protection of human rights, social labor conditions and the environment are not the problems that can be solved with a market mechanism. The goal of competition is to improve the consumers' well-being by maintaining an efficient business process of managerial decision-making. Therefore, competition processes require standard provisions approved at the federal level establishing environmental, social, and cultural objectives for companies based on legislative enactments. The current market economy system is notable for presence rather than absence of the corresponding social, environmental, and ethical regulations establishing mandatory boundaries for business decisions. Regulations restricting the scope of environment-damaging, unilateral, mercenary decisions rather than the market have an ethical component. This is why the economic concept of corporate management principles is supplemented by the concept of good company management, corporate social responsibility. The corporate social responsibility concept creates additional behavior models aimed at consideration of social and environmental aspects in the course of business decision-making. Thus, the supplemented concept of corporate management

principles should encourage companies to depart from a strictly commercial focus and set their sights on social responsibility for their decisions.

Germany has public corporations, insurance companies, and banking institutions, as well as state-owned enterprises, legally non-self-sufficient, but engaging in business accounting at the municipal level, that deal with certain issues in the area of public services and amenities as public institutions. However, the state has to supervise these institutions to make sure they contribute to general welfare of the society. This means that the primary objective of these companies is to fulfill its budget functions rather than uphold the principles of profitability and cost-effectiveness. Based on the articles of association, they can be exempt from performing activities related to profit making. The same applies to state-controlled private enterprises. It should be noted that, corporate and economic law developed by the state for private companies applies to companies with state participation incorporated as private companies. The relevant companies are not subject to specific legislative enactments that would violate civil law provisions or extend special privilege to them. Furthermore, competition laws apply to both private and public companies in the same manner. If the government influences such companies, then joint-stock companies laws apply to it (§ 311 of the Joint-Stock Companies Act). [8]

In practice, joint-stock and limited liability companies are selected as forms of incorporation for companies with state participation. The two business entity forms are fundamentally different in their business structures. In a joint-stock company, the managing director is solely responsible for the joint-stock company (§ 76 of the Joint-Stock Companies Act). The supervisory board performs its obligations via the management body (§ 84 of the Joint-Stock Companies Act) and controls it (§ 111, para. 1, of the Joint-Stock Companies Act). Company management tasks cannot be delegated to it (§ 111, para. 4, of the Joint-Stock Companies Act). To improve supervisory functions, it can be authorized to approve certain activities affecting important or fundamental areas (§ 111, para. 4, of the Joint-Stock Companies Act). [9] The supervisory board is not authorized to make strategic decisions. The powers of the general meeting are limited by the regulated main issues, including changing the articles of association, measures related to the organizational and legal agreement on cooperation between companies, increasing the authorized capital, as well as appointment and dismissal of supervisory board members (§ 119, para. 1, of the Joint-Stock Companies Act). Company management powers fall within the authority of the general meeting, if the management body permits it (§ 118, para. 2, of the Joint-Stock Companies Act). The form of incorporation of a joint-stock company cannot be changed by its articles of association (§ 23, para. 5, of the Joint-Stock Companies Act).

When comparing characteristics of both forms of incorporation from the point of view of corporate management and control over public companies, the form of incorporation as a joint-stock company is challenging in terms of limited influence possibilities for subsidiary companies management in case of government involvement. A joint-stock company as a form of incorporation is of value for multi-level organizations at the level of secondary subsidiaries, since they can be obliged to comply with regulations under a management agreement (§ 308 of the Joint-Stock Companies Act). The optimal form of incorporation of a company is a limited liability company, since it has an effective management model for commitment to public purposes and can be narrowed by means of corporate management principles.

The board of directors of a limited liability company under § 37 of the Limited Liability Companies Act is obliged to notify the founders of any and all restrictions imposed by the memorandum of association while exercising their managerial powers. In this regard, the management has to participate only in those transactions that, according to the articles of association, correspond to the company business profile based on § 3, para 1 (2) of the Limited Liability Companies Act. [10]

Determination of the company's business profile is important not only for civil commerce (it is already protected by regulations stipulating company business management powers), it is largely a

company management regulation and an instrument of control for the supervisory board and the general meeting of members at the same time in accordance with § 111, para. 1, of the Joint-Stock Companies Act, and § 46, para. 6, of the Limited Liability Companies Act. Such determination of the company's type of activities primarily allows the government as its founder to make sure that the company's purposes meet the public interests.

According to the fiscal law provisions, public companies' activities should produce revenue for the budget to the extent it does not contradict the public purposes (see Article 94 of the Municipal Code of the Federal State of Bavaria, § 109, para. 1, of the Municipal Code of the Federal State of North Rhine-Westphalia). Ensuring company effectiveness is, according to the commercial laws on private companies, a standard situation that does not require approval in compliance with the articles of association. If no income from the activities performed is spent on a public purpose under specific law provisions (local transportation, cultural development, employment centers), the corresponding socially beneficial objectives should be specified in the articles of association. In this case, the company management, when departing from the principle of economic efficiency, should manage the company in the public interests so that the company's costs would be reimbursed by the government.

According to the mandatory requirements of joint-stock company laws and the co-determination right, all supervisory board members are independent and not subject to imperative subordination, and exercise their control powers independently as supervisory board members. [11] These requirements also apply to supervisory board members of public companies.

At the same time, a viewpoint that commercial law provisions legalized public law directives as opposed to authorities of supervisory board members, since municipal entities perform management functions unlike their companies, is found in literature. [12] However, this interpretation is unjustified. Only when a corporate agreement is entered into, the corporate law establishes powers to issue directives (see § 308 of the Joint-Stock Companies Act). These powers to issue directives are only valid for board members, such as the company managers. The respective powers do not extend to supervisory board members.

All members of the corporation bodies must be mindful of performing the tasks in the best way possible and to public ends as established by the articles of association. Any corporation management body member driven by other interests and pursuing objectives other than the company's objectives is liable to the society for their actions (§ 52 of the Limited Liability Companies Act, § 116, 93 of the Joint-Stock Companies Act). Corporate management principles can only clarify, but not change the existing legal status.

As a member of the company it founded, the state can authorize limited liability company managers to make all important and fundamental decisions, and develop directives in terms of the company's policy, as well as adopt management decisions on involvement in the company's activities related to subsidiaries bound by the management agreement. The memorandum of association can define a list of transactions to be approved by the founders, including the supervisory board. Due to the established corporate management principles, the government can protect public interests. Management bodies are obliged to act on behalf of the company. ■

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