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Confidentiality in SE boardrooms - the legal background

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Confidentiality in SE boardrooms

Overview

- Confidentiality obligation of members of SE executive organs
 - According to European Company Law, Art. 49, 51 SE Reg
 - According to German Law on Stock Companies §§ 116, 93, 404 Stock Co. Act
 - In the case of SEs listed on the Stock Exchange, as insider, according to Securities Trading Act §§ 13,14,38
- Secrecy as SE Works Council member (in particular in relation to employees' representatives in the SE supervisory organ)

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Confidentiality obligation

- European Company Law
Art. 49: Information about the SE, which, if disclosed, could be prejudicial to the interests of the company
 - Yardstick is the interests of the company
 - So, on the one hand, more than shareholders' interests, because the company also includes, at least, the workers' interests
 - On the other hand, more than secret (smaller group of people): larger group of people / public
 - Passing info on within executive organ (advisers) is permitted
 - Loss or damage: basically of a financial nature
 - Individual duty to check, theory that only the Management Board is responsible for communication is incorrect

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- Consequences in event of breach of obligation
 - Liability under Art. 51 SE Reg according to national law, so § 116 German Stock Co. Act compensation
 - Dismissal from the Supervisory Board § 103 Stock Co. Act at request of Supervisory Board for cause in respect to the person himself
 - Possibly also termination of employment relationship
 - Penalty according to § 404 Stock Co. Act: only someone who, without authorisation, divulges a secret which has become known to him as Supervisory Board member

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Confidentiality obligation

- According to German Law on Stock Companies
- Confidentiality regarding
 - Confidential reports and confidential discussions (§ 116)
 - Confidential details and secrets of the company, namely trade and business/industrial secrets (§ 93)
 - which have become known to them due to their work on the Supervisory Board
 - Passing info on within organ (advisers) is permitted
 - Loss or damage: basically of a financial nature
 - Individual duty to check, theory that only Management Board is responsible for communication is incorrect
- Consequences of breach of obligation
All already dealt with in European Law

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Insider securities § 12 Securities Trading Act

are **financial instruments** (definition in § 2 STA) which are **listed for trading** on a national stock exchange or are included in the **regulated market** or in the **open market**,

which are listed in **another EU member State or EEA State** for trading on the organised market

Insider information § 13 STA

Is **definite information** about **circumstances not known to the public** which **refers to** one or more **issuers** of insider securities or **to the insider securities themselves**,

and which, if it becomes publicly known, **is likely to have a considerable influence** on the **Stock Exchange or market price** of the insider securities.

likely = circumstances which a **sensible investor would take into account** in his decision (these also include such **circumstances** which have a **sufficient probability** of occurring)

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Ban on insider dealing § 14 STA

- The following actions are prohibited:
 1. **using insider information** to **buy** or **sell** insider securities on one's **own** or **someone else's account** or for another person
 2. **giving insider information** or **making it accessible** to another person **without authorisation**
(e.g. employer to WC in the context of its **duties = authorised**; advisers/consultants may also come under this)
 3. **based on insider information, recommending** to another person that he **buy** or **sell** insider securities or otherwise **leading** another person to do so.

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Ad-hoc publicity and self-exemption §15a STA

a) The issuer must

- **Immediately publish insider information** which directly concerns him
- Directly concerns issuer in particular when it refers to **circumstances** which have occurred in his **field of activity**
- **Problem: multi-phase decisions, Supervisory Board deals requiring agreement:** sufficient probability – investor view – but task of the SB
- According to BaFin (Federal Financial Supervisory Authority), self-exemption regularly permissible; see details on this under b) (next slide)

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Ad-hoc publicity and self-exemption §15a STA

b) The issuer is

- **exempted** from the publication obligation **as long as** required to **protect his** legitimate **interests**, there is no fear of **misleading the public**
- and he **can guarantee** the **confidentiality** of the insider information.
- **Publication must then be carried out as soon as the above-mentioned features cease to apply.**

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Secrecy as SE Works Council member

- Regardless of their whereabouts, members of an SE Works Council are obliged (§41 SEBG (SE employee participation law) not to disclose or make use of any
 - trade and business/industrial secrets made known to them on the grounds of their belonging to the SE Works Council (objective secrecy interests of the company)
 - and which have been expressly described by the management as subject to secrecy.

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Secrecy as SE Works Council member

- The obligation does not apply in respect to:
 - Members of the SE Works Council (§41 Para. 3 No. 1)
 - Employees' representatives on the Supervisory Board or Administrative organ of the SE (No. 3) and
 - Interpreters and experts who are consulted for support (No. 4)
- In all these cases, however, the information must be expressly passed on as subject to secrecy

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Legal consequences of violations

- Compensation or claim for injunctive relief under civil law
- Termination of the employment relationship
- Penal provisions § 45 SEBG (SE employee participation law)
 - Use of secret: prison sentence of up to two years or fine
 - Disclosure of secret: prison sentence of up to one year or fine (but up to two years if disclosure was remunerated or carried out with intention of enriching oneself or enriching or prejudicing another)
 - The crime is prosecuted only if charges are pressed.

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**Vielen Dank für die Aufmerksamkeit!
Thank you for attentiveness!**

Dr. Roland Köstler

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Annex: Gesetzestexte/ Legal provisions

Art. 49 SE- Verordnung / Regulation

The members of an SE's executive organs must not pass on any information about the SE which, if disclosed, could be prejudicial to the interests of the company, even after leaving office; this does not apply in cases where such disclosure of information is required or permitted under the provisions of national law applicable to stock corporations (public limited companies) or is in the public interest

§ 116 Clause 1 + 2 Stock Co. Act

Duty of care and responsibility of the Supervisory Board members

§ 93 applies in respect to the duty of care and responsibility of the Supervisory Board members, with the exception of Paragraph 2 Clause 3 on the duty of care and responsibility of the Management Board members, mutatis mutandis.

The Supervisory Board members are, in particular, bound to secrecy regarding any confidential reports they have received and confidential discussions.

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Annex: Gesetzestexte/ Legal provisions

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§ 93 Para. 1 Clause 3 Stock Co. Act Duty of care and responsibility of Management Board members

The Management Board members must maintain silence about any confidential details and secrets of the company, namely trade or business/industrial secrets, which become known to them through their work on the Management Board.

Art. 8 SE Directive Para. 1 Reservation and confidentiality

(1) Member States shall provide that members of the special negotiating body or the representative body, and experts who assist them, are not authorised to reveal any information which has been given to them in confidence.

The same shall apply to employees' representatives in the context of an information and consultation procedure.

This obligation shall continue to apply, wherever the persons referred to may be, even after the expiry of their terms of office.

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Annex: Gesetzestexte/ Legal provisions

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§ 41 SEBG (participation law) Para. 2 – 4 Secrecy: confidentiality

(2) Regardless of their whereabouts, the members and replacement members of an SE Works Council are obliged not to disclose nor to make use of any trade or business/industrial secrets which have been made known to them on the grounds of their belonging to the SE Works Council and which have been expressly described by the management as being subject to secrecy. This continues to apply even after they have left the SE Works Council.

(3) The confidentiality obligation of the SE Works Council according to Para. 2 does not apply to the

1. members of the SE Works Council
2. employees' representatives of the SE, their subsidiaries and works when, due to an agreement according to § 21 or to § 30, they should be informed about the content of the information and the results of the consultation;
3. employees' representatives on the Supervisory or Administrative organ of the SE and
4. interpreters and experts who are consulted for support.

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§ 41 SEBG (participation law) Para. 2 – 4

Secrecy: confidentiality

- (4) The confidentiality obligation under Paragraph 2 applies, accordingly, to
1. the members and replacement members of the special negotiating body;
 2. the employees' representatives of the SE, their subsidiaries and works;
 3. the employees' representatives who, in any other way, take part in an information and consultation procedure;
 4. experts and interpreters.