

Dr. Friedrich Isenbart

Insurance Supervision

Stricter BaFin-rules for supervisory bodies of insurers

The German Federal Financial Supervisory Authority BaFin tightens its requirements for members of insurance undertakings' supervisory and administrative bodies. Imprecise regulations though raise questions.

As a reaction to the financial crisis, the German government in July 2009 issued regulations to control members of supervisory and administrative bodies of credit institutions and insurance companies.

The German Insurance Supervision Act (VAG) since then regulates duties of disclosure, requirements on expertise and trustworthiness as well as sanctions in case members of a supervisory or administrative body violate the duty of care. In order to put requirements in precise terms, BaFin published first instructions in a guidance notice in 2010. In the new version published in December 2012¹, BaFin revises and tightens the requirements.

Constant training required

From now on, BaFin applies stricter measures to assess the expertise and trustworthiness of members of supervisory and administrative bodies. According to sec. 7a para. 4 s. 1 VAG, mandate holder have to possess the necessary expertise and need to be trustworthy. They have to understand the business performed by the insurance under-

¹ BaFin: Guidance notice on the monitoring of members of administrative and supervisory bodies pursuant to the German Banking Act (KWG) and the German Insurance Supervision Act (VAG), 3rd December 2012

taking, assess its risks and, if necessary, implement changes of the undertaking's management.

Newly appointed body members may obtain the required expertise through training after appointment. In addition, BaFin now demands further training from all mandate holders: all members of supervisory and administrative bodies have to make sure that their decisions are based on the latest state of knowledge. Therefore, they need to receive continuing training by "appropriate measures". Against the background of constantly changing regulatory and economic conditions, this requirement is comprehensible but still vague.

In particular, it remains unclear how the further training should look like and how it has to be certified. Members of supervisory and administrative bodies should in any case keep their expertise up to date. All further training should be documented.

How much time is sufficient?

Members of supervisory and administrative bodies have to be trustworthy. Individual circumstances must not be an obstacle to the exercise of a supervisory mandate. According to BaFin's new guidance notice, the trustworthiness of a member of a supervisory or administrative body is dependent on his time commitment. The careful and diligent exercise of the mandate requires appropriate personal availability in terms of time. BaFin does though not define the time scope considered appropriate. The sole indication for the time needed is the legal limitation of the number of mandates to five mandates as a maximum (sec. 7a para. 4 s. 4 VAG).

Furthermore, a member of a supervisory or administrative body is regarded not trustworthy by BaFin if there are conflicts of interest. According to the new guidance notice, BaFin assumes conflicts of interests especially in connection with the mandate holders' own economic activities. Conflicts of interests may for example arise if the body member, a close relative of the member, or a company managed by the member has business relationships with the supervised insurance undertaking which might cause some kind of economic dependency on the undertaking.

BaFin does not determine in which case a business relationship leads to some kind of economic dependency. The German Insurance Association did therefore raise the ques-

tion whether such dependency is already given if a member of a supervisory or administrative body is insured by the undertaking to be supervised.

Information has to be requested actively

Beyond the requirements concerning expertise and trustworthiness, BaFin now also specifies the duties of members of supervisory and administrative bodies. Basically, mandate holders have to fulfill their monitoring and control functions with due care in order to identify and remedy infringements of the principles of proper management of the insurance undertaking (sec. 87 para. 8 VAG). This includes attending and preparing meetings as well as following the undertaking's development between meetings.

Members of supervisory and administrative bodies have the right to receive all information needed from the executive management. BaFin now points out that this is not a passive right. Monitoring and controlling the executive management is according to BaFin not possible without actively requesting information from the executive management.

The old version of the guidance notice only stated that an active use of the right to information might be considered. Thus, BaFin specifies and tightens the monitoring duty. Members of supervisory and administrative bodies will now find it more difficult to justify own mistakes: Having received no information is no apology anymore for not detecting infringements.

Moreover, BaFin now intervenes unusually extensively into the body members' individual organization: The Supervisory Authority urges mandate holders to prepare meetings more conscientiously. Commonly used decision proposals should not be handed out within meetings but already before meetings. BaFin also regards meeting preparation solely by employees as insufficient. Thus, BaFin underlines the personal responsibility of every member of supervisory and administrative bodies.

Tough sanctions envisaged

A violation of the duties mentioned has consequences. BaFin can demand the dismissal of board members according to sec. 1b para. 6 VAG after unsuccessful warning. The Supervisory Authority can prohibit the person affected from exerting a mandate or from conducting business activities. If there is a major violation of duties, BaFin might demand dismissal and prohibit the exercise of the mandate even without prior warning.

According to sec. 1b para. 4 No. 3 VAG, BaFin also has the possibility to appoint a special representative in place of the dismissed body member.

The risk of a violation of duties and following BaFin sanctions increases for members of supervisory and administrative bodies due to the tightened requirements of insurance supervision. Though some regulations remain imprecise, the new guidance notice still sets a framework for the proper monitoring and control within the management of insurance undertakings. BaFin points out that it wants proactively acting, informed and committed people in the self-control of the insurance industry.

Dr. Friedrich Isenbart
Rechtsanwalt

Wilhelm
Partnerschaft von Rechtsanwälten
Reichsstraße 43
40217 Düsseldorf

Tel: + 49 (0)211 687746 - 21

Fax: + 49 (0)211 687746 - 20

www.wilhelm-rae.de

friedrich.isenbart@wilhelm-rae.de

AG Essen: PR 1597