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7.1 General Remarks

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7.1.1 Concept of the corporate body

- 390 The company limited by shares acts as a corporation through its corporate bodies. These are parts of the company itself and not merely those authorised to act for it or represent it. They are the external manifestation of corporate will and bind the company not only through the conduct of lawful business activities, but also for any loss or damage caused by unlawful conduct (CO 722)¹. This rule represents a case of the application of the general liability attaching to corporate bodies (*cf.* CC 55 II). In addition, the company limited by shares can be held liable under the criminal law provided a person in the company commits a criminal offence and this person cannot be identified on account of deficient company organisation².
- 391 Corporate bodies of a company are any persons who participate effectively and decisively in the formation of a company's will or intentions by virtue of possessing independent autonomy of decision in an essential sphere of responsibility belonging to

¹ *Cf.* BGE 105 II 289. The counterpart of the liability of the company limited by shares for the lawful and unlawful acts of its corporate bodies is the liability of the corporate bodies towards the company (CO 754 et seq.); *cf.* N 548 et seq. below.

² *Cf.* SPC 100^{quater}. In this case, the company will be penalised with a fine of up to CHF 5 million. If the act in question is an offence under articles 260^{ter} [criminal organisation], 260^{quinquies} [funding of the terrorism], 305^{bis} [money laundering], 322^{ter} [bribery of Swiss public officials], 322 ^{quinquies} [bribery of Swiss public officials, bribery/granting of advantages] or 322^{septies} [bribery of foreign public officials], then the company will be penalised irrespective of the liability under the criminal law of any natural persons provided the company has failed to take all reasonable organisational precautions required to prevent the offence. The court fixes the fine on the basis in particular of the seriousness of the offence, the seriousness of the organisational failure and of the loss or damage incurred as well as according to the financial capabilities of the company (SPC 100^{quinquies}).



the legal entity (BGE 122 III 225)³. Thus, the status of a corporate body can result from the articles of association as well as from the actual organisational structure: this means that not only formal corporate bodies are deemed to be entrusted with administration and management, *i.e.*

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those persons elected or appointed by the competent corporate bodies, but also material or *de facto* executives, in other words persons who actually make decisions reserved for corporate bodies or who perform actual management tasks and thereby co-determine in a crucial way the formation of company aims and direction (BGE 128 III 29; BGE 117 II 432). Depending on the circumstances, therefore, the secretary of the board of directors, for example, or the corporate bodies of the parent company could be deemed to be "de facto corporate bodies" of the subsidiary if they influence that subsidiary in a specific manner.

- 392 Although the liability of the company limited by shares arises only when the corporate body is performing his business activities and not when he is acting as a private individual, this is nonetheless the case if the action can objectively be perceived as falling within the scope of the person's corporate functions. In accordance with the rulings of the Swiss Federal Supreme Court, the right to act on behalf of the company by the members of the board of directors and other persons delegated by the board to carry out management functions (*cf.* CO 718) includes all legal acts that can be seen to be consistent with the objects of the company (*cf.* BGE 116 II 320; BGE 111 II 284; BGE 96 II 439).

7.1.2 Legally required and optional corporate bodies

- 393 By law, the company limited by shares possesses three corporate bodies: (i) the general meeting (CO 698-706b); (ii) the board of directors (CO 707-726); and (iii) the auditors (CO 727-731a)⁴.

- 394 Each of these three bodies has its own sphere of duties that it cannot in principle transfer to any other body and that it will not permit any other body to encroach upon (the so-called "parity principle"). This division of powers is further strengthened in that the board of directors is given certain explicitly inalienable and irrevocable responsibilities (CO 716a). This means that influence from the general meeting is not permitted and neither is a delegation "upwards", *i.e.* from the board of directors to the general meeting. The statutory corporate bodies are in addition required to carry out their functions effectively and regularly. Even the single shareholder of a one-person company, for instance, must hold board meetings required for specific performance of management duties, keep a record of them, have the annual accounts reviewed by the auditors and hold at least one general meeting each year. If a company limited by shares lacks one of these corporate bodies, a court can order the dissolution

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³ In contrast, a mere auxiliary person is someone who simply carries out routine everyday work that has no entrepreneurial significance or who merely assists in the decision-making process by providing technical, commercial or legal assistance (*cf.* BGE 117 II 432; BGE 117 II 570). In contrast to the liability for corporate bodies (CO 722), in the case of negligent or criminal acts by auxiliary personnel for the company limited by shares, there is the possibility of relief from liability if it can be proven that the company used all the care due in the circumstances (*cura in eligendo, instruendo et custodiendo*) or that the loss or damage would have occurred anyway even if due care had been applied (CO 55 I).

⁴ In addition, the law provides for two additional corporate bodies in certain extraordinary cases: the liquidators in the event of the dissolution of the company limited by shares (CO 740 et seq.; *cf.* N 641 below) and the administrator in bankruptcy if there is a deferral of bankruptcy proceedings in the event of overindebtedness (CO 725 a II).



of the company after the expiry of a warning period if requested to do so by a shareholder or creditor (*cf.* CO 625 II)⁵.

- 395 The company limited by shares is at liberty to provide for further corporate bodies in the articles of association or in the organisational regulations (*e.g.* advisory boards; committees of the board of directors); these optional bodies, however, may not be given any duties that are reserved by law to the three compulsory corporate bodies.

⁵ This provision is being repealed as part of the revision of the law on the *GmbH* and replaced by a new provision relating to the defects in the organisation of the company (*cf.* D-CO 731b).