

11.11.2025

BACK TO BASICS: HOW COMPANIES AND MANAGERS SHOULD APPROACH SUSTAINABILITY



Many people are currently asking themselves: How should companies and their management bodies actually deal with sustainability, corporate social responsibility, ESG, resilience, future viability, or whatever name you want to give it, in the current environment? We, too, have given this matter further consideration from our legal perspective. And we have come to a clear conclusion: in view of the general duties of care incumbent on management, it would be negligent to simply brush the issue aside. If this were to cause damage to the company, the managers involved could even face personal liability (this is also relevant for D&O insurers, by the way!). An objective assessment – naturally taking all other relevant aspects into account – is and remains important. We will also stay on the ball and highlight selected aspects of the topic in a series of blog posts in the near future. In this blog post, we will start with a general assessment of the situation.

INITIAL SITUATION

Companies are currently facing a multitude of changes and uncertainties: a tense geopolitical situation, a volatile global economy, difficult external economic conditions (including US tariffs, resource bottlenecks, etc.), domestic economic stagnation and digital transformation. Dealing with these issues alone is challenging enough. According to a recent economic survey, one in three companies in Germany plans to cut staff in 2026, and investment is also likely to decline in 2026. In terms of sustainability, there is also the ESG backlash in the US, new targets set by the current EU Commission in the Clean Industrial Deal, uncertainties about or resulting from changes to sustainability-related laws that have emerged from the implementation of the previous Green Deal, such as the Directive on Sustainability Reporting (Corporate Sustainability Reporting Directive, CSRD), the EU Supply Chain Act (Corporate Sustainability Due Diligence Directive, CSDDD) and the EU Deforestation Regulation (EUDR), to name but a few. In this environment, does it even make sense to continue focusing on sustainability?

DESIRE FOR STABILITY

Stable legal and economic conditions are usually seen as a key locational advantage for the economy. Of course, the opposite is also true. From a macroeconomic perspective, uncertainty is not exactly a growth driver. Of course, not every uncertainty can be resolved single-handedly. However, IW Director General Hüther recently criticised in the *heute* journal, a German news program, that the German economy lacks planning security for a green transformation and that there are investment brakes that need to be removed (see here: [> Hüther: "Müssen uns Klimaschutz leisten"](#)). Of course, there is no consensus on whether climate protection is a competitive advantage or exactly the opposite. All of this is open to political debate.

THE DECISION-MAKING CRITERIA FOR COMPANIES AND THEIR MANAGEMENT

This does not help companies at all at present. So what can be done? Managers are not politicians. Their actions are subject to clear legal guidelines. This can certainly help here. The general diligence requirements for board members and managing directors are regulated in Section 93 of the German Stock Corporation Act (AktG) and Section 43 of the German Limited Liability Companies Act (GmbHG) (largely identical in content). According to Section 93 AktG, board members must "*exercise the care of a prudent and conscientious manager in their management of the company*". And further on it says that they should make business decisions "*on the basis of adequate information for the benefit of the company*". Being guided solely by political trends can prove problematic in this context. It is also inadvisable to make decisions based on sweeping judgements.

Rather, it is advisable to create an appropriate basis for decision-making and, building on this, to make commercially justifiable decisions. This means that board members and managing directors should give appropriate consideration to all aspects that are objectively relevant to the specific situation. Otherwise, in the event of an unfavourable development of the company, there is a risk of allegations of breach of duty and, as the case may be, personal liability of the managers for damages incurred. Regardless of the sustainability laws currently under discussion, all *sustainability* aspects that are relevant to the company in question in the respective decision-making situation should thus also be taken into account in the decision-making process (see Walden, NZG 2020, 50 et seq. for details: "*Corporate social responsibility: rights, obligations and liability of the board of directors and supervisory board*"). Of course, board members and managing directors are not expected to have magical abilities. If uncertainties cannot be clarified further, they must make upcoming decisions – as usual – under conditions of uncertainty.

APPROPRIATE CONSIDERATION OF SUSTAINABILITY ASPECTS CONTINUES TO BE SENSIBLE

Dismissing sustainability aspects as insignificant from the outset in view of current political developments could therefore prove to be a dangerous bias. This is evidenced, for instance, by the fact that the banking supervisory authority continues to regard ESG risks as a challenge to the security and stability of banks. Thus, it considers it necessary for banks to (also) take these risks into account in their risk management. It stands to reason that this also makes sense for companies in the real economy, not least because the measures taken by banks have a foreseeable impact on their customers – the companies in the real economy. Companies should consider this when making decisions. The same applies to the identification and exploitation of opportunities that may arise for the company in connection with sustainability. This is also reflected in the sustainability-related recommendations of the German Corporate Governance Code (DCGK) which remain relevant today and which the vast majority of DAX, MDAX and SDAX companies comply with, as evidenced by their declarations of conformity (see our blog post [> Nachhaltigkeit ist out! Oder doch nicht? Ein Faktencheck.](#) | [ADVANT Beiten](#)). It therefore makes perfect sense, for instance, to make internal efforts to "*understand the financial effects on the undertaking over the short- medium- and long-term of risks and opportunities arising from the undertaking's impacts and dependencies on climate change*" (to quote one of the objectives set out in ESRS E1) – regardless of whether or not the company is required to report on this externally in accordance with CSRD. Incidentally, the EU insurance supervisory authority EIOPA already warned years ago about a concentration of sustainability-related liability risks among insurance companies and – similar to the banking supervisory authority in its area – called for appropriate risk management measures.

COMPLIANCE OBLIGATION ON TOP

Furthermore, management is and remains obliged to comply with applicable laws – regardless of whether these are considered "good" or "bad". Compliance with applicable laws is not at the discretion of management and is thus particularly liability-sensitive. Management should also keep an eye on the risks arising from legal uncertainties, especially in the area of sustainability. This applies not only to new sustainability laws (e.g. the above-mentioned European legal acts, as soon as and to the extent that they apply) but also to general legal norms that also apply to sustainability-related issues (see, for example, our blog post [> Climate Change Litigation Update: Are Companies Liable for CO₂ Emissions?](#) | [ADVANT Beiten](#)), and finally also sustainability-related contractual agreements.

CONCLUSION: BALANCING SHORT-TERM AND LONG-TERM CONSIDERATIONS

In the end, decision-making in times of uncertainty remains particularly complex. However, a systematic approach to problem-solving based on proven methods, as ultimately suggested by the diligence requirements applicable to management, is helpful. In other words: Understand the problem accurately, break it down into its constituent parts, gather the relevant information and arrive at a synthesis based on an assessment and weighting. In our view, it is particularly important (and equally challenging) to find an appropriate balance between short-, medium- and long-term aspects, i.e. to reconcile "today" and "tomorrow" as well as possible.

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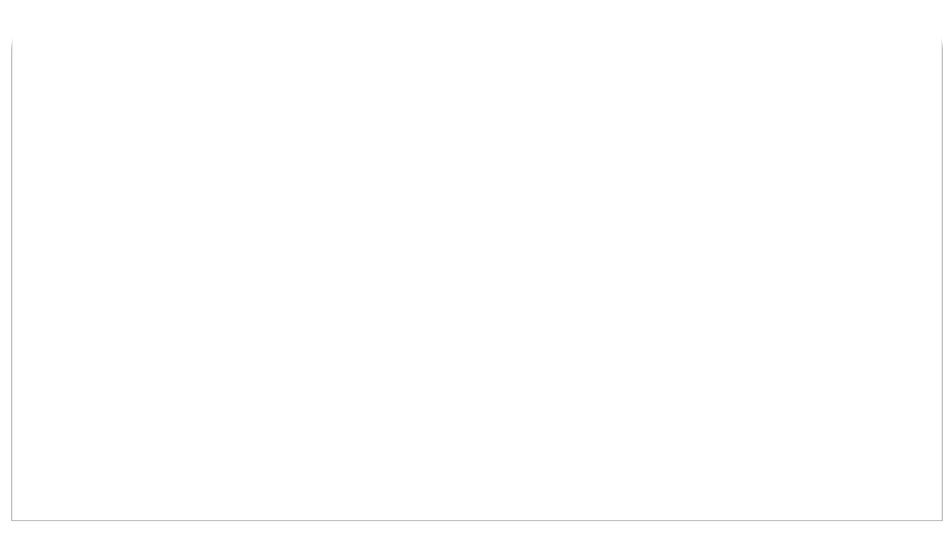
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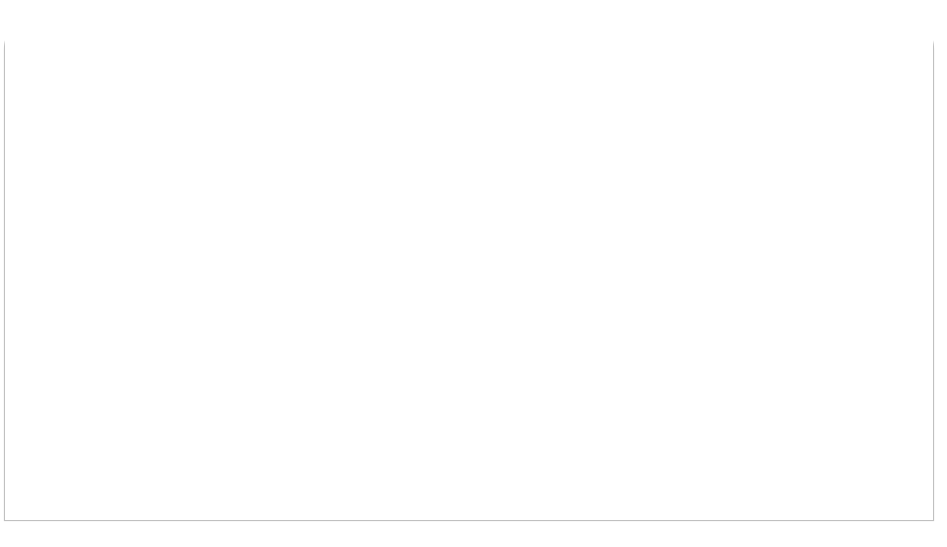


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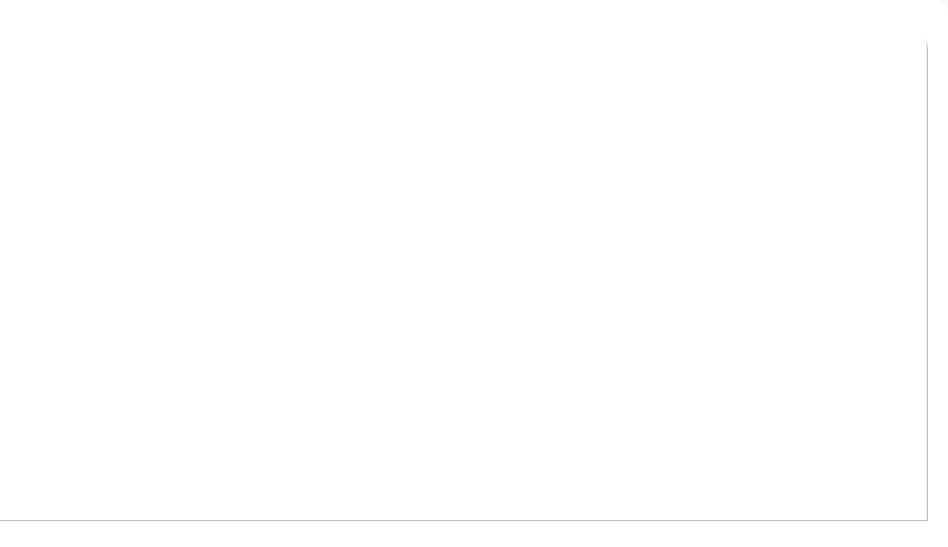


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