

# Deutscher Corporate Governance Kodex

## German Corporate Governance Code as resolved by the Commission, 9 May 2019

### (Convenience Translation)

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## General explanatory notes

### **I. Objective for the revision of the Code**

- (1) One of the objectives of the German Corporate Governance Code “is to make the German corporate governance system transparent and understandable. It aims to promote confidence in the management and supervision of German listed companies by international and national investors, customers, employees and the general public.”<sup>1</sup> The Code is intended to make the often less-familiar German dual board management system – according to which the management (Management Board) and supervision (Supervisory Board) of an entity are institutionally separate duties – more understandable to international investors, along with the co-determination of employees represented on the Supervisory Board.
- (2) Moreover, it is the Code’s objective to present internationally and nationally accepted standards of good and responsible governance<sup>2</sup> as recommendations and suggestions, and to (further) improve the quality of corporate governance of German enterprises by incorporating best practices in-to the set of corporate governance rules.
- (3) Institutional investors – whether passively managed index funds, active investors or so-called activist investors – are showing increasing interest in corporate governance specifically implemented in the enterprises. Such investors recognise the benefit of standards for good and responsible corporate governance for the performance of their investments; they establish dedicated own ideas regarding corporate governance, and use these as the basis for their voting behaviour in the General Meeting.
- (4) Management Board remuneration is something that particularly and consistently attracts the attention of investors and the general public. The amended Shareholder Rights Directive (Second SRD)<sup>3</sup> not only results in new rules regarding “Say on Pay” by the General Meeting (section 120a of the Draft Amended German Stock Corporation Act (“Draft AktG”)) and extended reporting requirements for Management Board remuneration (section 162 of the Draft AktG), but also leads to new requirements for the remuneration systems (section 87a of the Draft AktG).<sup>4</sup>
- (5) To date, the Code did not determine a positive or negative definition of the independence of Supervisory Board members as well as criteria for the assessment of independence.

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<sup>1</sup> Foreword, section 1 of the GCGC 2017 = Foreword, section 3 of the GCGC.

<sup>2</sup> Foreword, section 1 of the GCGC 2017 = Foreword, section 4 of the GCGC.

<sup>3</sup> Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, OJ L 132 dated 20/05/2017, p. 1.

<sup>4</sup> The “Draft AktG” denotes the bill to implement the Second Shareholder Rights Directive (“ARUG II”) dated 20 March 2019 (government bill), Drs. 19/9739.

However, the Code now contains indicators to identify a lack of independence, which shall be used to assess the independence of shareholder representatives.

- (6) In addition, the readability of the Code shall be improved by not making references to detailed legal requirements that are not fundamental to the understanding of the German corporate governance system, and (as repeatedly done in the past) by omitting recommendations that are of high priority neither to enterprises nor to investors or other stakeholders. The readability shall be supported by a Code structure that is based on Management Board and Supervisory Board duties.
- (7) The timing for a reform of the Code must be in line with the schedule for the transposition of the Second Shareholder Rights Directive into German law. This requires that the amended Code becomes effective at around the same time that the German implementing act ("ARUG II")<sup>5</sup> enters into force.

## **II. Material amendments**

### **1. Introducing the 'principle' category**

Besides recommendations and suggestions, the new Code comprises principles which are used to inform investors, other stakeholders, as well as the general public, about material legal requirements on responsible corporate governance. Moreover, these principles form the basis to derive recommendations and suggestions.

### **2. Specification of the independence requirement regarding shareholder representatives in the Supervisory Board**

The Supervisory Board shall include what it considers to be an appropriate number of independent members (section 5.4.2 of the GCGC 2017). This is intended to ensure that supervision is based on the enterprise's best interests. The number of Supervisory Board members that are subject to a potential conflict of interest – where there is the risk of a loyalty or role conflict – shall be limited.

Potential conflicts of interest for Supervisory Board members may result from the proximity to the company or its Management Board, from own interests (e.g. as customer, supplier, lender, or by virtue of a close personal relationship), from the position as controlling shareholder, or by reference to the term of Supervisory Board membership. In this respect, independence is only an issue for the shareholder representatives, since only the shareholder representatives are elected by the General Meeting upon the proposal of the Supervisory Board. Therefore, recommendation C.6 of the GCGC, which corresponds to section 5.4.2 sentence 1 of the GCGC 2017, only applies to shareholder representatives.

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<sup>5</sup> Cf. footnote 4.

It is common practice internationally to link the definition of independence with a catalogue of specific circumstances which rule out independence, that represent a rebuttable presumption or that merely represent indicators for the lack of independence which are subject to due consideration. The Regierungskommission (furthermore, "Commission") Commission prefers the indicator-based solution, since evaluation of the independence of Supervisory Board members is necessarily a subjective assessment which requires an overall view. The criteria in recommendation C.7 of the GCGC may help in this context, but cannot replace exercising due discretion by shareholder representatives.

The Commission supports the view that, in determining an appropriate number of independent shareholder representatives and in the appointment of candidates for various Supervisory Board functions, it has to be considered whether the issue evolves around the independence of the company and its Management Board, or the independence of the controlling shareholder.

### **3. Restatement of the rules regarding Management Board remuneration**

The objective of Management Board remuneration is to create the right incentives for the actions of the Management Board, to pay adequate remuneration for the performance rendered, to respect social acceptance and to explain clearly and understandably how much the individual Management Board member receives, and for what performance the remuneration is paid. A remuneration system should therefore define the individual total remuneration target, the relative share of fixed and variable remuneration components, and the correlation between the targets agreed upon beforehand, and the variable remuneration to be paid in this respect. Also, long-term variable remuneration should be variable at the time it is granted, and should mainly be an incentive to implement strategic measures in order to support long-term corporate development. This is in line with the requirement set out in section 87a (1) sentence 2 no.1 of the Draft AktG, pursuant to which the remuneration contributes to the promotion of the business strategy and of the company's long-term development.

The concept provided for in chapter G. of the Code follows a top-down approach. The target total remuneration comprises all remuneration components, and represents the amount granted in case of full target achievement. The target total remuneration is supplemented by a maximum remuneration (cap). Total target remuneration and maximum remuneration should be communicable overall in comparison to the remuneration of other senior managers and the employees, and should be explainable to the general public.

In general, total remuneration comprises fixed and variable performance-related components. The fixed components include in particular the fixed salary, pension contributions as well as fringe benefits. The performance-related components comprise short-term (bonus) programmes and long-term variable remuneration. It is the task of the Supervisory Board to decide in each single case, with specific reference to the market- and area of responsibility, as to what share of the total remuneration should be variable.

Variable remuneration is the key material incentive for pursuing the objectives of business policy. It acts as the motivation and reward for specific actions, for operating performance, for a strategic orientation that promotes the long-term development of the company, and for

responsible behaviour. While the achievement of the objectives does not necessarily have to be measured precisely, it must be verifiable in any event. The correlation between achieving objectives and variable remuneration must therefore be determined beforehand, and must not be changed subsequently.

Operating metrics in particular are the focal point concerning short-term variable remuneration, whereas long-term variable remuneration is mainly based on successful implementation of the corporate strategy. The long-term variable remuneration amounts of Management Board members shall be largely invested in company shares by the respective Management Board member, or shall be granted by the company as share-based remuneration.

#### **4. Simplification of corporate governance reporting**

Full, true, fair and understandable corporate governance reporting is a prerequisite to strengthen the trust of shareholders and other stakeholders in the management and supervision of the enterprise.

The long-standing coexistence of the Corporate Governance Report pursuant to section 3.10 of the GCGC 2017 and the Corporate Governance Statement in the management report in accordance with section 289f of the HGB did not contribute to clarity and comprehensibility of corporate governance reporting. Numerous companies have started to combine the Corporate Governance Report and the Corporate Governance Statement.

Principle 22 of the GCGC comprises the corresponding solution: "Supervisory Board and Management Board provide information about the company's corporate governance in their Corporate Governance Statement, on an annual basis". The objective of this principle is to abolish the previous Corporate Governance Report pursuant to section 3.10 of the GCGC 2017 and to turn the Corporate Governance Statement into the core instrument of corporate governance reporting.

The Commission is aware of the fact that the Corporate Governance Statement as part of the management report is primarily the responsibility of the Management Board. The distribution of responsibilities between Management Board and Supervisory Board may be maintained by preparing a Corporate Governance Statement that is issued jointly by both governing bodies, provided that each governing body is responsible for its own components of the report.

According to section 289f (2) no. 2 of the German Commercial Code (Handelsgesetzbuch – "HGB"), in their Corporate Governance Statements companies are obliged to provide relevant disclosures regarding corporate governance standards applied at the respective entities above and beyond legal requirements. Furthermore, some Code recommendations already comprise dedicated transparency recommendations. In the new Code, the list of Code recommendations comprising dedicated transparency recommendations has been extended. For instance, according to recommendation D.13 the Supervisory Board shall report if and how the self-assessment was conducted. However, it was considered unnecessary to include in the new Code a specific recommendation requiring the Management Board and the Supervisory Board

to describe – in the Corporate Governance Statement – how the recommendations followed by the company were applied.

#### **5. No references to legal requirements that do not have the quality of principles**

Many interested parties recommended to eliminate references to legal requirements in the Code. This does not have to be detrimental to the informational function of the Code when, as suggested here, the most important legal requirements are highlighted as principles. In contrast, the Code will become more clearly structured and more concise. An argument for this proposal is that in future, fewer updates of the Code will be necessary to track changes of less important legal requirements.

#### **6. Structure of the Code based on the functions of Management Board and Supervisory Board**

The Code has previously been structured in its core elements based on Management Board and Supervisory Board. This is supplemented by chapters on shareholders and the General Meeting, the cooperation between Management Board and Supervisory Board, transparency, accounting and auditing. In the interest of readability, the Code has to be structured from a task perspective going forward. The core elements are the tasks of management and supervision, supplemented by the no less important topics of appointment of candidates to the Management Board, composition of the Supervisory Board, Supervisory Board procedures, conflicts of interest, transparency and external reporting as well as the remuneration for the members of the Management Board and the Supervisory Board. The new structure is set to improve readability, clarity and comprehensibility of the Code.

## Code including rationale<sup>6</sup>

### Foreword

Corporate Governance is understood as the legal and factual regulatory framework for the management and supervision of an enterprise. The German Corporate Governance Code (the “Code”) contains principles, recommendations and suggestions for the Management Board and the Supervisory Board that are intended to ensure that the company is managed in the enterprise’s best interests. The Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise’s workforce and the other groups related to the enterprise (stakeholders), to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise’s best interests). These principles not only require compliance with the law, but also ethically sound and responsible behaviour (the “reputable businessperson” concept, *Leitbild des Ehrbaren Kaufmanns*).

By their actions, the company and its governing bodies must be aware of the enterprise’s role in the community and its societal responsibility. Social and environmental factors influence the enterprise’s success. In the enterprise’s best interests, Management Board and Supervisory Board ensure that the potential impact from these factors on company strategy and operating decisions is identified and addressed.

*Paragraph 2 highlights the societal responsibility of companies and their governing bodies, the importance of social and environmental factors for the company’s success, and the requirement to consider the respective risks and opportunities in the strategy. Such responsibility also comprises taking into consideration the acceptance of Management Board remuneration in the general public. Pursuant to section 289c (2) of the HGB, share capital companies are obliged to cover, in their non-financial statements, environmental, employee and social matters, respect for human rights, anti-corruption and bribery matters.*

The objective of the **Code** is to make the dual German corporate governance system transparent and understandable. The Code includes principles, recommendations and suggestions governing the management and monitoring of German listed companies that are accepted nationally and internationally as standards of good and responsible corporate governance. It aims to promote confidence in the management and supervision

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<sup>6</sup> The rationale appears indented and in italics and is not part of the text of the Code.

of German listed companies by investors, customers, employees and the general public.

The **principles** reflect material legal requirements for responsible governance, and are used here to inform investors and other stakeholders. **Recommendations** of the Code are indicated in the text by using the word “**shall**”. Companies may depart from recommendations, but in this case they are obliged to disclose and explain any departures each year (“comply or explain”). This enables companies to take into account sector- or company-specific special characteristics. Well-justified departures from recommendations of the Code may be in the best interests of good corporate governance. Finally, the Code contains **suggestions** from which companies may depart without disclosure; suggestions are indicated in the text by using the word “**should**”.

Code stipulations covering not only the listed company itself but also its group entities use the word “enterprise” rather than “company”.

Shareholders regularly exercise their membership rights before or at the General Meeting. **Institutional investors** are of particular importance to enterprises. They are expected to exercise their ownership rights actively and responsibly, in accordance with transparent principles that also respect the concept of sustainability.

The Code is addressed to listed companies and companies with access to capital markets pursuant to section 161 (1) sentence 2 of the German Stock Corporation Act. **Non-publicly-traded companies** may use the Code’s recommendations and suggestions as guidelines.

**Listed credit institutions and insurance** undertakings are subject to the applicable prudential requirements, which are not reflected in the Code. Code recommendations apply to the extent that they do not contradict any legal stipulations.

*Sentence 1 clarifies that no deviation explanation pursuant to section 161 of the German Stock Corporation Act (AktG) is required in the case of Code recommendations that contradict special legal regulations. However, according to recommendation F.4, companies shall specify, in the Corporate Governance Statement, what Code recommendations were not applied due to overriding legal stipulations.*



## A. Management and supervision

### I. Governance tasks of the Management Board

**Principle 1** The Management Board is responsible for managing the enterprise in the enterprise's best interests. Its members are jointly accountable for managing the enterprise. The Chair or Spokesperson of the Management Board coordinates the work of the Management Board members.

**Principle 2** The Management Board develops the enterprise strategy, coordinates it with the Supervisory Board and ensures its implementation.

**Principle 3** The Management Board stipulates target values for the share of women in the two management levels below the Management Board.

#### Recommendation:

**A.1** When making appointments to executive positions, the Management Boards shall consider diversity.

*In line with section 289f (2) no. 6 of the HGB, diversity is defined by age, gender, the educational or professional background, as well as internationality.*

**Principle 4** A responsible management of risks arising from business activities requires an appropriate and effective internal control and risk management system.

*This principle corresponds to the requirements with regard to audit committees set out in section 107 (3) sentence 2 of the AktG. As stated in section 171 (1) sentence 2 of the AktG, the term "internal control and risk management system" also comprises internal audit.*

**Principle 5** The Management Board ensures that all provisions of law and internal policies are complied with, and endeavours to achieve their compliance by the enterprise.

#### Recommendations and suggestion:

**A.2** The Management Board shall institute an appropriate compliance management system reflecting the enterprise's risk situation, and disclose the main features of this system. Employees shall be given the opportunity to

report, in a protected manner, suspected breaches of the law within the enterprise; third parties should also be given this opportunity.

## II. Supervision tasks of the Supervisory Board

**Principle 6** The Supervisory Board appoints and discharges or dismisses the members of the Management Board; it supervises and advises the Management Board in the management of the enterprise and has to be involved in decisions of fundamental importance to the enterprise.

The Articles of Association and/or the Supervisory Board stipulate that transactions of fundamental importance are subject to approval.

Furthermore, transactions with related parties<sup>7</sup> may be subject to prior approval by the Supervisory Board according to the applicable legal regulations.

*Paragraph 3 takes into consideration the new so-called “Related Party Transactions” regime in sections 111a to c of the Draft AktG. However, no reference is made to the disclosure requirements or the statutory thresholds, including any exceptions or further details, resulting from the implementation of Art. 9c of the Second Shareholder Rights Directive.*

**Principle 7** The Supervisory Board Chair is elected by the Supervisory Board from among its members. The Chair coordinates the activities of the Supervisory Board and represents the interests of the Supervisory Board externally.

### Suggestion:

**A.3** The Supervisory Board Chair should be available – within reasonable limits – to discuss Supervisory Board-related issues with investors.

## III. Function of the General Meeting

**Principle 8** Shareholders regularly exercise their membership rights at the General Meeting. The General Meeting adopts resolutions in particular on the appropriation of net profit, approves the actions of the Management Board and the Supervisory Board by way of discharge, and elects the shareholder representatives to the Supervisory Board as well as the external auditors. The General Meeting also adopts resolutions on the

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<sup>7</sup> Related parties within the meaning of sections 111a to c of the Draft AktG.

company's legal principles, including, but not limited to, amendments to the Articles of Association, corporate actions, inter-company agreements and transformations. The General Meeting adopts advisory resolutions on the approval of the remuneration system for the Management Board members prepared by the Supervisory Board, on the specific remuneration of the Supervisory Board, as well as advisory resolutions on the approval of the remuneration report for the preceding financial year.<sup>8</sup>

*Principle 8 addresses the function of the General Meeting, and also comprises the material statements that were previously included in section 2.2.1 of the GCGC 2017.*

#### **Suggestions:**

- A.4** The Chair of the General Meeting should be aware that the General Meeting should be completed within four to six hours.

*This suggestion strengthens the position of the Chair in order to enable him/her to ensure that the General Meeting is conducted within reasonable time.*

- A.5** In the event of a takeover offer, the Management Board should convene an Extraordinary General Meeting at which shareholders will discuss the takeover offer and, if appropriate, decide on corporate actions.

#### **B. Appointments to the Management Board**

**Principle 9** The Supervisory Board determines, within legal and statutory provisions, the number of Management Board members, the required qualifications as well as the appointment of suitable candidates to individual positions. The Supervisory Board stipulates target values for the share of female Management Board members.

#### **Recommendations:**

- B.1** When appointing Management Board members, the Supervisory Board shall take diversity into account.

*In line with section 289f (2) no. 6 of the HGB, diversity is defined through age, gender, the educational or professional background as well as internationality.*

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<sup>8</sup> This paragraph reflects the status of the ARUG II government bill.

- B.2** Together with the Management Board, the Supervisory Board shall ensure that there is long-term succession planning. The approach shall be described in the Corporate Governance Statement.
- B.3** The first-time appointment of Management Board members shall be for a period of not more than three years.
- While section 5.1.2 (2) sentence 1 of the GCGC 2017 merely included the suggestion that the maximum term of office of five years in the case of first-time appointments of Management Board members should not become the rule, the Code now recommends, in line with common practice, a limitation for first-time appointments by three years.*
- B.4** Any re-appointment prior to one year before the end of an appointment period at the same time as termination of the current appointment shall only happen if special circumstances apply.
- B.5** An age limit shall be specified for members of the Management Board and disclosed in the Corporate Governance Statement.

## C. Composition of the Supervisory Board

### I. General requirements

- Principle 10** The Supervisory Board consists of shareholder representatives, and of employee representatives if applicable. Shareholder representatives are usually elected by the General Meeting. The applicable co-determination acts stipulate – depending on the number of employees and the respective industry sector – if and how many Supervisory Board members must be elected by employees. Shareholder representatives and employee representatives are obliged in equal measure to act in the best interests of the enterprise.

*Principle 10 replaces paragraph 7 of the Foreword to the GCGC 2017. The previous version of the Code comprised relatively detailed descriptions of legal co-determination rights. Principle 10 does without and instead clarifies that the composition of the Supervisory Board is determined, on the one hand, by the General Meeting and on the other hand by co-determination rules. Since the Code uses the wording “co-determination acts”, it makes a reference to the German Co-determination Act (Mitbestimmungsgesetz), the One-third Par-*

*ticipation Act (Drittbeteiligungsgesetz) and the Co-determination Act for the Mining and the Iron and Steel Producing Industries (Montan-Mitbestimmungsgesetz).*

*Pursuant to section 102 (1) of the AktG, the maximum length of term of office for Supervisory Board members is five years. Hence, companies may opt for shorter terms of office. A shorter term of office increases the flexibility in order to better meet a developing profile of skills and expertise, and to take into consideration changes in the ownership structure.*

**Principle 11**     **The composition of the Supervisory Board must ensure that it is comprised of members who collectively have the required knowledge, skills, and professional expertise to properly perform their duties; furthermore, the legal gender quota must be considered.**

**Recommendations:**

**C.1**             The Supervisory Board shall determine concrete objectives regarding its composition, and shall prepare a profile of skills and expertise for the entire Board, while taking diversity into account. Proposals by the Supervisory Board to the General Meeting shall take these objectives into account, while simultaneously aiming at fulfilling the overall profile of required skills and expertise of the Supervisory Board. The implementation status shall be published in the Corporate Governance Statement. This statement shall also provide information about what the Supervisory Board regards as the appropriate number of independent Supervisory Board members representing shareholders, and the names of these members.

*In line with section 289f (2) no. 6 of the HGB, diversity is defined through age, gender, the educational or professional background as well as internationality.*

**C.2**             Age limits shall be established for Supervisory Board members, and disclosed in the Corporate Governance Statement.

**C.3**             The term of Supervisory Board membership shall be disclosed.

*The Code does not provide any statement in relation to the limit for length of membership in the Supervisory Board and, in the restated version, also desists from recommending a corresponding regular limit to terms of office provided for in section 5.4.2 (2) of the GCGC 2017. Instead, it is recommended to disclose the length of membership in the Supervisory Board.*

*Please refer to recommendation C.7 for details regarding the length of membership as an indicator for a lack of independence.*

**Principle 12** Each Supervisory Board member ensures that they have sufficient time available to discharge their duties.

**Recommendations:**

- C.4** A Supervisory Board member who is not a member of any Management Board of a listed company shall not accept more than five Supervisory Board mandates at non-group listed companies or comparable functions, with an appointment as Chair of the Supervisory Board being counted twice.

*In accordance with section 5.4.1 (5) of the GCGC 2017, when making its proposals concerning the election of new members to the Supervisory Board, the Supervisory Board should satisfy itself that the respective candidates are able to devote the expected amount of time required. The reason given for this recommendation is that the workloads of the individual mandates and other offices and the personal situation of the candidate might be very different. In contrast, the administrative efforts of this individual solution were highlighted. Above all, the individual solution did not succeed in providing a convincing protection against so-called "overboarding". Instead, the Code now recommends a limitation of five (respectively, two) mandates, taking into account the mandate of Supervisory Board chairs. The limitation of the maximum number of Supervisory Board mandates set out in section 100 (2) no. 1 of the AktG of ten mandates per person, and in section 5.4.5 (1) of the GCGC 2017 of three mandates for members of the Management Board, does not meet today's requirements in relation to Supervisory Board activities.*

- C.5** Members of the Management Board of a listed company shall not have, in aggregate, more than two Supervisory Board mandates in non-group listed companies or comparable functions, and shall not accept the Chairmanship of a Supervisory Board of a non-group listed company.

*The workload associated with being the Chair of the Supervisory Board of a listed company or a comparable function is normally not manageable in combination with the membership in a Management Board of a listed company.*

## II. Independence of Supervisory Board members

### Recommendations:

**C.6** The Supervisory Board shall include what it considers to be an appropriate number of independent members from the group of shareholder representatives, thereby taking into account the shareholder structure.

Within the meaning of this recommendation, a Supervisory Board member is considered independent if he/she is independent from the company and its Management Board, and independent from any controlling shareholder.

*Paragraph 1 corresponds to section 5.4.2 1st half-sentence of the GCGC 2017, however it is supplemented by the insertion "from the group of shareholder representatives". The recommendation regarding the reporting of the number and the names of the independent members of the shareholders (section 5.4.1 (4) sentence 3 of the GCGC 2017), as amended in 2017, already clarified that the requirement of independent members was limited to the group of shareholder representatives, since the employee representatives are not proposed by the Supervisory Board.*

*Regarding independence, the Commission adheres to the two-pronged approach. Firstly, Supervisory Board members shall be independent from the Management Board and the company, in order to be able to properly exercise their supervisory tasks. Secondly, the shareholder structure shall be considered in the independence assessment, while a specific number of Supervisory Board Members shall be independent from the controlling shareholder. The controlling shareholder shall be permitted to be properly represented on the Supervisory Board; however, the number of Supervisory Board members attributable to the controlling shareholder shall be limited in order to protect minority interests. Therefore, the Supervisory Board shall define a specific number of members that are independent from the Management Board and the company, and a specific number of members that are independent from the controlling shareholder. According to the Commission, control is exercised when the company has entered into a control agreement with the shareholder, or when the shareholder has the absolute majority of votes, or at least a sustainable voting majority at the General Meeting.*

**C.7** More than half of the shareholder representatives shall be independent from the company and the Management Board. Supervisory Board members are to be considered independent from the company and its Man-

agement Board if they have no personal or business relationship with the company or its Management Board that may cause a substantial – and not merely temporary – conflict of interest.

When assessing the independence of Supervisory Board members from the company and its Management Board, shareholder representatives shall particularly take into consideration whether the respective Supervisory Board member – or a close family member:

- was a member of the company's Management Board in the two years prior to appointment,
- is currently maintaining (or has maintained) a material business relationship with the company or one of the entities dependent upon the company (e.g. as customer, supplier, lender or advisor) in the year up to his/her appointment, directly or as a shareholder, or in a leading position of a non-group entity,
- is a close family member of a Management Board member; or,
- has been a member of the Supervisory Board for more than twelve years.

*Recommendation C.7 is addressed to shareholder representatives, as can be deduced from recommendation C.6. Sections 107 (3) sentence 3, 111c (2) of the Draft AktG remain unaffected. Sentence 2 includes a positive definition of independence that is strongly based on section 5.4.2 sentence 2 of the GCGC 2017. Paragraph 2 includes a list of criteria suitable to negate the independence of Supervisory Board members, but which do not necessarily rule out independence.*

*The definition of “close family members” follows the definition provided in IAS 24.9; the same definition is used for the implementation of the Shareholder Rights Directive regarding related party transactions. According to IAS 24.9, this includes family members of a person who may be expected to influence, or be influenced by, that person [...]; this includes: a) that person’s children and spouse or domestic partner; b) children of that person’s spouse or domestic partner; and c) dependants of that person or that person’s spouse or domestic partner.*

*The composition of the Management Board in the two years prior to the appointment as Supervisory Board member should take into account of the so-called two-year cooling-off period between an individual’s Management Board membership and Supervisory Board membership (section 100 (2) no. 4 of the AktG). Business and personal relationships are also set out in section 5.4.2 sentence 2 of the GCGC 2017, but are specified in recommendation C.7.*

*Internationally, the length of Supervisory Board membership is widely accepted as a criterion for independence.*



**C.8** If one or more of the indicators set out in recommendation C.7 are met and the Supervisory Board member concerned is still considered independent, the reasons for this shall be given in the Corporate Governance Statement.

*If independence is not given in individual cases, a decision has to be made by the shareholder representatives in the Supervisory Board based on due discretion, taking into account the criteria set out in recommendation C.7 of the GCGC. If independence is confirmed despite one or more of the indicators set out above indicating otherwise, reasons for this shall be given in the Corporate Governance Statement. This is about transparency about a discretionary decision.*

*There may well be justified reasons to confirm independence although one – or more, under particular circumstances – indicators included in recommendation C.7 of the GCGC are met. Such reasons should be taken into account in the decision concerning independence in individual cases, and should be made transparent in the reasons provided to confirm independence.*

**C.9** If the company has a controlling shareholder, and the Supervisory Board comprises more than six members, at least two shareholder representatives shall be independent from the controlling shareholder. If the Supervisory Board comprises six members or less, at least one shareholder representative shall be independent from the controlling shareholder.

A Supervisory Board member is considered independent from the controlling shareholder if he/she, or a close family member, is neither a controlling shareholder nor a member of the executive governing body of the controlling shareholder, and does not have a personal or business relationship with the controlling shareholder that may cause a substantial – and not merely temporary – conflict of interest.

**C.10** The Chair of the Supervisory Board, the Chair of the Audit Committee, as well as the Chair of the committee that addresses Management Board remuneration, shall be independent from the company and the Management Board. The Chair of the Audit Committee shall also be independent from the controlling shareholder.

*The Commission supports the view that, in the determination of an appropriate number of independent shareholder representatives and in the appointment of candidates for various Supervisory Board functions, it has to be considered whether the issue evolves around the independence of the company and its Management Board, or the independence of the controlling shareholder.*

- C.11** No more than two former members of the Management Board shall be members of the Supervisory Board.
- C.12** Supervisory Board members shall not be members of governing bodies of, or exercise advisory functions at, significant competitors of the enterprise, and shall not hold any personal relationships with a significant competitor.

### **III. Elections to the Supervisory Board**

#### **Recommendations:**

- C.13** In its election proposals to the General Meeting, the Supervisory Board shall disclose the personal and business relationships of every candidate with the company, the governing bodies of the company, and any shareholders with a material interest in the company. The disclosure recommendation is limited to information and circumstances that, in the opinion of the Supervisory Board, an objectively judging shareholder would consider decisive for their election decision. A material interest in the meaning of this recommendation refers to shareholders who directly or indirectly hold more than 10% of the voting shares of the company.
- C.14** The proposal for a candidate shall be accompanied by a curriculum vitae, providing information on the candidate's relevant knowledge, skills and professional experience; it shall be supplemented by an overview of the candidate's material activities in addition to the Supervisory Board mandate, and shall be updated annually for all Supervisory Board members and published on the company's website.
- C.15** Shareholder representatives shall be elected individually. Where an application is made for the appointment of a Supervisory Board member – representing shareholders – by the Court, the term of that member shall be limited until the next General Meeting.

### **D. Supervisory Board Procedures**

#### **I. Rules of Procedure**

##### **Recommendation**

- D.1** The Supervisory Board shall adopt its own rules of procedure and shall publish these on the company's website.

*The publication of the rules of procedure of the Supervisory Board on the company's website corresponds to a justified interest on the part of many investors, and has become common practice in the meantime. In contrast, a corresponding recommendation for the rules of procedure of the Management Board is not required since, in this context, any checks and balances already exist due to the primary competence of the Supervisory Board for implementing rules of procedure of the Management Board.*

## II. Cooperation within the Supervisory Board and with the Management Board

### 1. General requirements

**Principle 13** The Management Board and the Supervisory Board cooperate on a trust basis to the benefit of the enterprise. Good corporate governance requires an open dialogue between the Management Board and Supervisory Board, as well as between the members of these individual Boards. Comprehensive observance of confidentiality is of paramount importance in this regard.

### 2. Supervisory Board committees

**Principle 14** The establishment of committees generally supports the effectiveness of the Supervisory Board's work for larger companies.

#### Recommendations:

**D.2** Depending on the specific circumstances of the enterprise and the number of Supervisory Board members, the Supervisory Board shall form committees of members with relevant specialist expertise. The respective committee members and the committee chairs shall be provided in the Corporate Governance Statement.

**D.3** The Supervisory Board shall establish an Audit Committee that – provided no other committee or the plenary meeting of the Supervisory Board has been entrusted with this work – addresses in particular the review of the accounting, the monitoring of the accounting process, the effectiveness of the internal control system, the risk management system, the internal audit system, the audit of the financial statements and compliance. The accounting particularly comprises the consolidated financial statements and the group management report (including CSR reporting), interim financial information and the single-entity financial statements in accordance with the German Commercial Code (*Handelsgesetzbuch, HGB*).

*In accordance with section 7.1.2 sentence 2 of the GCGC 2017, financial information shall be discussed by the Management Board and the Supervisory Board or its Audit Committee before being published. This recommendation is already included in section 5.3.2 (1) of the GCGC 2017 = recommendation D.3 sentence 1 of the GCGC, when the term "accounting" also comprises interim financial information and the single-entity financial statements pursuant to the German Commercial Code, which is made clear in recommendation D.3 sentence 2. Accounting moreover comprises the non-financial statement in the (group) management report or the separate non-financial report (sections 289b, c, 315b, c of the HGB), which are required to be reviewed by the Supervisory Board pursuant to section 171 (1) sentence 1 or sentence 4 of the AktG, and which are summarised in recommendation D.3 under the heading of "CSR Reporting".*

- D.4** The Chair of the Audit Committee shall have specific knowledge and experience in applying accounting principles and internal control procedures, shall be familiar with audits, and shall be independent. The Chair of the Supervisory Board shall not chair the Audit Committee.
- D.5** The Supervisory Board shall form a Nomination Committee, composed exclusively of shareholder representatives, which names suitable candidates to the Supervisory Board for its proposals to the General Meeting.

### 3. Provision of information

- Principle 15** The Management Board is responsible for keeping the Supervisory Board informed. Nevertheless, the Supervisory Board must itself ensure that it obtains sufficient information. The Management Board informs the Supervisory Board regularly, without delay and comprehensively about all issues that are relevant to the enterprise, in particular regarding strategy, planning, business development, the risk situation, risk management and compliance. The Management Board addresses departures in the current business development from its existing projections and agreed targets, indicating the reasons for any such departures. The Supervisory Board may at any time require the Management Board to provide additional information.

*Principle 15 reflects the basic rules of informing the Supervisory Board pursuant to section 90 of the AktG, which were laid down in section 3.4.1 (2) of the GCGC 2017. A possible information policy – based on the authorities set out in the rules of*

*procedure – can have benefits. However, there is no need for a corresponding Code recommendation.*

**Principle 16** The Management Board Chair or Spokesperson informs the Supervisory Board Chair without undue delay of major events that are of material importance for the assessment of the enterprise’s status and performance, and for the management of the enterprise. The Supervisory Board Chair subsequently has to inform the Supervisory Board and, if required, convenes an extraordinary Supervisory Board meeting.

**Recommendation:**

**D.6** Between meetings, the Supervisory Board Chair shall be in regular contact with the Management Board – in particular, the Management Board Chair or Spokesperson, in order to discuss with them issues of strategy, planning, business development, the risk situation, risk management and compliance of the enterprise.

**4. Meetings and adoption of resolutions**

**Recommendations and suggestion:**

**D.7** The Supervisory Board shall also meet on a regular basis without the Management Board.

*In accordance with section 3.6 (2) of the GCGC 2017, the Supervisory Board shall meet without the Management Board, if necessary. In order to fulfil its monitoring authority, the Supervisory Board meetings are regularly held without the Management Board.*

**D.8** It shall be noted in the report of the Supervisory Board how many meetings of the Supervisory Board, and of the committees, the individual members attended in each case. Participation by telephone or video conference also counts as attendance, but this should not be the rule.

*Pursuant to section 5.4.7 of the GCGC 2017, the report of the Supervisory Board shall disclose when a Supervisory Board member attended less than half of its respective meetings. As an incentive to a meeting attendance of considerably more than 50%, and for the purpose of providing comprehensive information concerning the attendance at Supervisory Board meetings for the shareholders, a comprehensive disclosure of*

*individual meeting attendance is more suitable than the use of a transparency threshold.*

### III. Cooperation with the external auditors

**Principle 17** The external auditors support the Supervisory Board and – where applicable – the Audit Committee in monitoring the management, particularly in relation to the review of the accounting and the monitoring of the accounting-related control and risk management systems. The external auditors' audit opinion informs the capital market about the compliance of financial reporting with generally accepted accounting principles.

*Principle 17 sets out the basic functions of the audit, i.e. supporting the monitoring of the management and providing information to the capital market about the outcome of the audit.*

#### Recommendations:

**D.9** The Supervisory Board shall arrange for the external auditors to inform the Supervisory Board, without undue delay, about all findings and issues of importance for its tasks which come to the knowledge of the external auditors during the performance of the audit.

**D.10** The Supervisory Board shall arrange for the external auditors to inform it and note in the long-form audit report if, during the performance of the audit, the external auditors identify any facts that indicate an inaccuracy in the Declaration of Compliance regarding the recommendations of the Code issued by the Management Board and Supervisory Board.

**D.11** The Audit Committee shall conduct an evaluation of the quality of the audit on a regular basis.

*The Audit Committee is also responsible for monitoring the audit pursuant to section 107 (2) sentence 2 of the AktG. The Supervisory Board, or the Audit Committee, may exercise its monitoring authority only if it gets a picture of the audit effectiveness before the actual audit begins – hence if it concerns itself with the effectiveness of previous audits. The term 'quality of the audit' clarifies that the assessment of previous audits by the monitoring authority is limited to the assessment of objectively assessable indicators (so-called Audit Quality Indicators) and, if applicable, to the inspection results.*

#### IV. Training and professional development

**Principle 18** The members of the Supervisory Board take responsibility for undertaking any training or professional development measures necessary to fulfil their duties.

##### Recommendations:

**D.12** The company shall support Supervisory Board members sufficiently upon their appointment and during training and professional development measures, and shall disclose any such measures in the report of the Supervisory Board.

#### V. Self-assessment

##### Recommendations:

**D.13** The Supervisory Board shall assess, at regular intervals, how effective the Supervisory Board as a whole and its committees fulfil their tasks. The Supervisory Board shall report in the Corporate Governance Statement if and how the self-assessment was conducted.

*The recommendation included in section 5.6. of the GCGC 2017 regarding the so-called efficiency review is amended to the extent that the term “efficiency review” (which can be misunderstood) is replaced and the recommendation now refers to self-assessment of effectiveness of the Supervisory Board’s work, while self-assessment expressly extends to committee work.*

*It is in the Supervisory Board’s discretion to report on the self-assessment conducted during the financial year under review – including the fact if (and how) the self-assessment was conducted, and whether and how external support was provided. The self-assessment results are confidential.*

#### E. Conflicts of interest

**Principle 19** The members of the Management Board and Supervisory Board are bound to observe the enterprise’s best interests. In all their decisions, they must neither pursue personal interests nor exploit for themselves business opportunities to which the enterprise is entitled. Management Board members are subject to comprehensive non-compete clauses throughout the duration of their appointment.

**Recommendations:**

- E.1** Each member of the Supervisory Board shall inform the Chair of the Supervisory Board of any conflicts of interest without undue delay. In its report, the Supervisory Board shall inform the General Meeting of any conflicts of interest that have arisen and how they were addressed. Material conflicts of interest involving a member of the Supervisory Board that are not merely temporary shall result in the termination of that member's Supervisory Board mandate.

*The recommendation set out in section 5.5.2 of the GCGC 2017 already clarified that the Chair of the Supervisory Board is the person to contact in the case of a disclosure of conflicts of interest in relation to Supervisory Board members; the Chair then informs the entire Supervisory Board. Hence, in practice, such conflicts of interest are de facto rightly disclosed to the Chair of the Supervisory Board. It should be self-evident that conflicts of interest must be disclosed without delay; a corresponding obligation regarding the Management Board was already included in section 4.3.3 sentence 1 of the GCGC 2017.*

- E.2** Each Management Board member shall disclose conflicts of interest to the Chair of the Supervisory Board and to the Chair or Spokesperson of the Management Board without undue delay, and shall inform the other members of the Management Board.

*Likewise, the recommendation set out in section 4.3.3 sentence 1 of the GCGC 2017 was clearly based on the view that the Chair of the Supervisory Board is the person to contact in the case of a disclosure of conflicts of interest in relation to Management Board members; the Chair then decides whether and when other Supervisory Board members have to be informed. In terms of providing information to other members of the Management Board, it would appear appropriate, but at the same time sufficient, that the Chair or Spokesperson of the Management Board (like the Chair of the Supervisory Board) is informed and that he/she decides, exercising his/her due discretion, whether and when other Management Board members have to be informed.*

- E.3** Members of the Management Board shall only assume side activities, especially Supervisory Board mandates outside the enterprise, with the approval of the Supervisory Board.



## F. Transparency and external reporting

**Principle 20** All other things being equal, the company will ensure equal treatment of all shareholders in respect of information.

**Principle 21** Shareholders and third parties are kept informed by the consolidated financial statements and the group management report (including CSR reporting), as well as by interim financial information.

### Recommendations:

**F.1** The company shall disclose to shareholders, without undue delay, all material new facts made available to financial analysts and similar addressees.

**F.2** The consolidated financial statements and the group management report shall be made publicly accessible within 90 days from the end of the financial year, while mandatory interim financial information shall be made publicly accessible within 45 days from the end of the reporting period.

**F.3** If the company is not required to publish quarterly statements, it shall still inform shareholders during the course of the year in an appropriate way – in addition to the half-year financial report – about business developments, and in particular about material changes to the business outlook and the risk situation.

**Principle 22** Management Board and Supervisory Board provide information about the company's corporate governance in their Corporate Governance Statement, on an annual basis.

*As explained in section II.4. 'General disclosures', the objective of this principle is to abolish the previous Corporate Governance Re-port pursuant to section 3.10 of the GCGC 2017, and to turn the Corporate Governance Statement pursuant to section 289f of the HGB into the core instrument of corporate governance reporting.*

### Recommendations:

**F.4** The Supervisory Board and Management Board of listed companies subject to special legal regulations shall specify, in the Corporate Governance Statement, what Code recommendations were not applied due to overriding legal stipulations.

*This applies inter alia to credit institutions and insurance undertakings.*

- F.5** The company shall keep previous Corporate Governance Statements and Declarations of Compliance regarding the recommendations of the Code available on its website for a period of at least five years.

## **G. Remuneration of the Management Board and the Supervisory Board**

### **I. Remuneration of the Management Board**

*The principles, recommendations and suggestions in relation to Management Board remuneration in section G. of the Code have been revised to a large degree. Specifically, the new legal requirements brought about by the Act Implementing the Second Shareholder Rights Directive (Umsetzungsgesetz der zweiten Aktionärsrechterichtlinie – “ARUG II”) had to be taken into account. The objective of this revision, as well as its focus in terms of content, are explained in sections I. (4) and II.3 ‘General disclosures’. In addition, the following rationale is provided.*

*Amendments to the Code need not be taken into account in current Management Board contracts. To the extent that the recommendations in this section are followed, related amendments to existing employment contracts are required only after the revised version of the Code has entered into force.*

- Principle 23** The Supervisory Board decides on a clear and comprehensible system on the remuneration for the Management Board members and, on this basis, determines the actual remuneration for each Management Board member.

*The General Meeting adopts advisory resolutions on the approval of the remuneration system for the Management Board members prepared by the Supervisory Board, as well as proposing resolutions on the approval of the remuneration report for the preceding financial year.<sup>9</sup>*

The remuneration of Management Board members must promote the corporate strategy and support the long-term development of the company.

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<sup>9</sup> This paragraph reflects the status of the ARUG II government bill.

*Principle 23 describes the two remuneration-related tasks of the Supervisory Board; i.e. decide on the remuneration system, and determine the actual Management Board remuneration on this basis.*

*The remuneration system has to be clear and comprehensible, enabling shareholders, other stakeholders as well as the general public to comprehend the rules of Management Board remuneration.*

*Principle 23 (3) corresponds to section 87 (1) sentence 2 of the Draft AktG, according to which the remuneration structure shall be oriented towards the long-term development of the company, and section 87a (1) sentence 2 no. 1 of the Draft AktG, according to which the Management Board remuneration shall promote the corporate strategy and support the long-term development of the company.*

## **1. Determining the remuneration system**

### **Recommendation:**

#### **G.1**

The remuneration system shall define in particular:

- how the target and the maximum total remuneration is determined for each Management Board member;
- the relative share in the target total remuneration of fixed remuneration on the one hand, and short-term variable and long-term variable remuneration components on the other hand;
- which financial and non-financial performance criteria are relevant for the granting of variable remuneration components;
- what kind of relationship exists between achieving previously-agreed performance criteria and variable remuneration; and
- when and in what form Management Board members have access to granted variable remuneration components.

*Recommendation G.1 describes the key elements of the remuneration system.*

*The concept for the target and the maximum total remuneration is introduced in indent one. The target remuneration is the sum of all remuneration amounts of one year (including pension benefit contributions and fringe benefits) in the case of full target achievement. The maximum total remuneration corresponds to the highest possible expenses of the company resulting from the sum of all re-muneration elements for the respective year.*

*The purpose of establishing the ratio between fixed remuneration and variable remuneration components (indent two) is to allow the Supervisory Board to establish the right incentive level. This ratio might be identical for all Management Board members, or may vary between them.*

*The role of the enterprises in society, which is mentioned in paragraph 2 of the Foreword, requires that the social acceptance of Management Board remuneration is duly accounted for. Hence, sustainability targets are integrated in the performance criteria.*

*The Management Board remuneration recommendations are based on the following three-stage approach:*

- (1) Establish a remuneration system the content of which is geared to section 87a (1) sentence 2 of the Draft AktG; the remuneration system is subject to approval by the General Meeting according to section 120a of the Draft AktG;*
- (2) establish the individual specific target and maximum total remuneration applicable to the coming financial year;*
- (3) determine the amount of variable remuneration components and thus of the actual total remuneration for the financial year under review.*

*The target and maximum remuneration of individual Management Board members (including the assessment of whether the remuneration is appropriate and in line with usual levels) is not part of the remuneration system.*

*To the extent that the content of recommendation G.1 overlaps with section 87a (1) sentence 2 nos. 2 to 9 of the Draft AktG, it shall be noted that the legal regulations represent minimum standards that must be included in the remuneration system (provided the respective remuneration components actually apply), whereas recommendation G.1 recommends inclusion of the listed items in the remuneration system.*

## **2. Determining total remuneration**

### **Recommendations:**

- G.2** The Supervisory Board shall establish the specific target and maximum total remuneration for each Management Board member on the basis of the remuneration system, which shall be appropriate to the corresponding Management Board member's tasks and performance as well as to

the enterprise's overall situation and performance, and shall not exceed the usual level of remuneration without specific reasons.

*Referring to the coming financial year, the Supervisory Board determines, for each Management Board member, the total remuneration amount available in the form of target and maximum total remuneration. After the end of every financial year, the Supervisory Board establishes the amount of individual variable remuneration to be granted, depending on target achievement (see recommendation G.9). Any and all remuneration components, including the target and grant amounts, are disclosed in the remuneration report (reference to section 162 (1) sentence 2 no. 1 of the Draft AktG).*

- G.3** In order to assess whether the specific total remuneration of Management Board members is in line with usual levels compared to other enterprises, the Supervisory Board shall use an appropriate peer group of other third-party entities, and shall disclose the composition of such group. The peer-group comparison shall be applied with a sense of perspective, in order to prevent an automatic upward trend.

*The decisive factor for the peer-group comparison is the market position of the enterprises (primarily in terms of industry, size, and country). Sentence 2 shall be considered as clarification for the implementation of the recommendation to use appropriate peer groups.*

- G.4** In order to determine whether remuneration is in line with usual levels within the enterprise, the Supervisory Board shall take into account the relationship between Management Board remuneration and the remuneration of senior managers and the workforce as a whole, and how remuneration has developed over time.

*The Supervisory Board determines how to distinguish the senior management and the relevant workforce, and how to compare the respective remuneration systems (reference to section 162 (1) sentence 2 no. 2 of the Draft AktG (ARUG II)).*

- G.5** If the Supervisory Board calls upon an external remuneration expert to develop the remuneration system and to evaluate the appropriateness of the remuneration, it should ensure that the expert is independent from the Management Board and the enterprise.

*Ensuring the independence of the remuneration expert means that the Chair of the Supervisory Board – or the chair of the*

*competent Supervisory Board committee – grants a mandate to the remuneration expert, and that the enterprise changes experts from time to time.*

### 3. Determining the total amount of variable remuneration components

#### Recommendations:

**G.6** The share of long-term variable remuneration shall exceed the share of short-term variable remuneration.

*Since the remuneration system has to be focused on a long-term company development, it is recommended that the long-term variable remuneration exceeds the short-term variable remuneration in the case of full target achievement.*

**G.7** Referring to the coming financial year, the Supervisory Board shall establish the performance criteria for each Management Board member covering all variable remuneration components; besides operating targets, the performance criteria shall be geared mainly to strategic goals. The Supervisory Board shall determine to what extent individual targets for each Management Board member – or targets for the entire Management Board as a whole – are decisive for the variable remuneration components.

*Regarding long-term variable remuneration, performance indicators for both the grant amounts – as well as the subsequent disbursement amounts of share-based instruments – typically include*

- *long-term financial success (profitability and growth with multiple-year measurement basis);*
- *non-financial success as prerequisite for subsequent financial success (e.g. market share, innovation success, ESG performance);*
- *implementation of the corporate strategy (e.g. measures to enter and develop additional regional markets, restructuring of product portfolio); and*
- *indicators to measure the shareholder return in absolute and relative terms*

*It is the Supervisory Board's responsibility to assess, and describe in the remuneration report, to what extent the chosen performance indicators are suitable to promote the long-term development of the company.*

**G.8** Subsequent changes to the targets or comparison parameters shall be ruled out.

**G.9** After the end of every financial year, the Supervisory Board shall establish the amount of individual variable remuneration to be granted, depending on target achievement. The target achievement shall be comprehensible in terms of both its rationale and amount.

*Likewise, the target achievement must be comprehensible for shareholders, other stakeholders, and the general public (in line with the scope of recipients stipulated by the law). It is sufficient to disclose the target values determined by the Supervisory Board on an ex-post basis.*

**G.10** The long-term variable remuneration amounts of Management Board members shall be largely invested in company shares by the respective Management Board member, or shall be granted as share-based remuneration. Granted long-term variable remuneration components shall be accessible to Management Board members only after a period of four years. If the company disburses granted benefits to Management Board members in a subsequent year, this shall be disclosed in the remuneration report in a suitable form.

*The company may lay down the obligation to invest granted variable remuneration components in company shares in a share ownership guideline.*

*The Code no longer comprises model tables according to section 4.2.5 of the GCGC 2017 given that section 162 of the Draft AktG now provides for a comprehensive remuneration report (see the rationale of principle 25). Given that the disclosures in the remuneration report are limited to the “granted and owed remuneration” (section 162 (1) of the Draft AktG), it seems necessary to recommend to companies that the disbursement of granted benefits in subsequent years be (additionally) disclosed in a suitable form.*

**G.11** The Supervisory Board shall have the possibility to account for extraordinary developments to an appropriate extent. It shall be permitted to retain or reclaim variable remuneration if justified.

*The variable remuneration structure shall reflect extraordinary developments appropriately. This may result in an increase or a decrease of the short or long-term variable remuneration that would have been determined otherwise. This discretionary element takes into consideration special situations that were not sufficiently captured in the pre-determined targets (as opposed to unfavourable general market*

*developments, for example); reasons must be stated specifically for such a discretionary element in the remuneration report.*

*In addition, the Supervisory Board may be obliged to agree in the employment contracts that it may retain or reclaim variable remuneration components (clawback) if justified. The enterprise makes the corresponding clauses – as well as their utilisation – transparent (cf. section 87a (1) sentence 2 no. 4 of the Draft AktG).*

#### **4. Benefits granted at contract termination**

##### **Recommendations and suggestion:**

**G.12** If the contract of a Management Board member is terminated, the disbursement of any remaining variable remuneration components, which are attributable to the period until contract termination, shall be based on the originally agreed targets and comparison parameters, and on the due dates or holding periods stipulated in the contract.

*In order to maintain the long-term nature of variable remuneration components, the termination of Management Board member contracts must not affect the measurement or maturity of variable remuneration.*

**G.13** Payments made to a Management Board member due to early termination of their Management Board activity shall not exceed twice the annual remuneration (severance cap), and shall not constitute remuneration for more than the remaining term of the employment contract. If post-contractual non-compete clauses apply, the severance payments shall be taken into account in the calculation of any compensation payments.

*The calculation of the severance cap is based on the total remuneration paid for the previous financial year and, if appropriate, also takes into account the expected total remuneration for the current financial year.*

*The objective of the recommendation in sentence 2 is to clarify that a compensation for any post-contractual non-compete clauses for the period for which the retired Management Board member receives a severance is already settled by such severance.*



- G.14** Benefit commitments made in connection with the early termination of a Management Board member contract by the Management Board member due to a change of control should not be agreed upon.

*The recommendation of a cap on benefit commitments made in connection with the early termination of a Management Board member's activity as a result of a change of control in accordance with section 4.2.3 (5) of the GCGC 2017 was widely mistaken for the recommendation to promise such benefits. In fact, this was never the purpose. In suggestion G.14 of the GCGC, the Commission supports the view that such benefits should not be agreed upon. Accordingly, there is no recommendation regarding the maximum amount.*

## 5. Other Provisions

### Recommendations:

- G.15** If Management Board members have intra-group Supervisory Board mandates, the remuneration shall be offset against.

*The remuneration for being a member of an intra-group Supervisory Board shall be offset against the fixed remuneration.*

- G.16** If Supervisory Board mandates are assumed at non-group entities, the Supervisory Board shall decide whether and to what extent the remuneration shall be taken into account.

*If a Management Board member is a member of a non-group Supervisory Board, it is for the Supervisory Board to decide whether this activity is primarily in the interest of the enterprise or of the Management Board member, and to what extent the corresponding remuneration has to be taken into account in the remuneration for Management Board activities.*

## II. Remuneration of the Supervisory Board

- Principle 24** The members of the Supervisory Board receive remuneration that is appropriate to their tasks and the situation of the company. Remuneration is specified by resolution of the General Meeting, or in the Articles of Association, if applicable.

## Recommendations and Suggestion:

- G.17** The remuneration of Supervisory Board members shall take into account, in an appropriate manner, the higher time commitment of the Chair and the Deputy Chair of the Supervisory Board, as well as of the Chair and the members of committees.

*Recommendation G.17 clarifies, in comparison with section 5.4.6 (1) sentence 2 of the GCGC 2017, that the differentiation of the remuneration for special functions in the Supervisory Board depends upon the different time commitment.*

- G.18** Supervisory Board remuneration should be fixed remuneration. If members of the Supervisory Board are granted performance-related remuneration, it shall be geared to the long-term development of the company.

**Principle 25** **The Management Board and the Supervisory Board prepare an annual remuneration report, in accordance with legal provisions.**

*The Code no longer comprises dedicated recommendations regarding the disclosure of Management Board and Supervisory Board remuneration, including sample tables according to section 4.2.5 (3) of the GCGC 2017, given that section 162 of the Draft AktG now provides for a comprehensive remuneration report. The disclosures to be provided in the remuneration report pursuant to section 162 of the Draft AktG are more comprehensive than the Code sample tables. For instance, companies will disclose how the performance indicators were applied to each Management Board member going forward (section 162 (1) sentence 2 no. 1 of the Draft AktG). The Commission does not see any need to recommend further content to be included in the remuneration report; furthermore, the Commission did not consider the development of any recommendations on the reporting format regarding Management Board or Supervisory Board remuneration to be within its duties. Therefore, reference is made to the guidelines prepared by the EU Commission in the draft version dated 1 March 2019.*