

Explanatory comments on the changes proposed by the Code Commission from the plenary meetings held on 9 and 31 January 2013

In its plenary meetings held on 9 and 31 January 2013, the Government Commission of the German Corporate Governance Code agreed on proposals for changes to the German Corporate Governance Code.

The Government Commission of the German Corporate Governance Code set itself the task of revising the German Corporate Governance Code this year with a focus on two main issues. First, it aimed to check whether there was a need to revise the regulations on compensation in view of the discussions of the past few years (see II). Second, it wanted to consider whether, and to what extent, it might be appropriate to trim down the Code (see I).

I. Streamlining/maintaining the Code

The German Corporate Governance Code is exceptionally lean compared with the codes of other EU member states, and so one might think it is not necessary to trim it down any further. However, the Government Commission is keen to look into the issue of trimming down the Code and sees this as part of its "maintenance" duties.

In its deliberations, the Government Commission also took account of the fact that the "comply or explain" principle is expected to be applied more strictly under the EU Commission's 2012 action plan. It is therefore very much in the interests of the German economy to trim down the Code to ensure that it contains no more recommendations (or proposals) than are actually necessary.

The Government Commission is convinced that despite all the efforts to trim it down, the Code must still stand as a document in its own right. It is important that national and international investors, and Supervisory Board members in German listed companies, can use the Code to obtain a good overall understanding of the core aspects of German corporate governance.

An essential part of maintaining the Code is to assess the complete document to ascertain whether individual recommendations (or proposals) and legislation that is cited as an introduction to or in support of the recommendations are still meaningful, or whether significant new developments are to be expected in view of a changing environment in

Germany or Europe, or new best practices have been developed or appear necessary as a result of the changing environment at national level. Other developments may make recommendations (or proposals) obsolete.

Here are the details of the Commission's proposed adjustments to the Code:

Foreword

The first paragraph of the Foreword contains only linguistic adjustments.

The paragraph on the relationship between the dual and single-board systems has been deleted. Of course, both board systems exist side-by-side in Europe.

In the section of the Foreword on accounting standards, the wording has been amended to reflect that of Section 264 (2) of the German Commercial Code (Handelsgesetzbuch, HGB), which forms the basis for this passage of the Foreword.

In the paragraph of the Foreword that deals with different categories of provision in the Code, the last sentence has been amended to make it clear that some explanations contained in the Code are not word-for-word reproductions of legislation; they are often descriptions of legal regulations and explanations.

Section 2.3.2 of previous version

The recommendation on how to send notification of the convening of the General Meeting has been deleted, because a set procedure for issuing invitations has been established with the changes to the legal regulations.

Section 3.4 para. 3

The deletion of the specified documents required for decisions ("in particular, the Annual Financial Statements, the Consolidated Financial Statements and the Auditors' Report") is another example of the Code being trimmed down from a linguistic perspective. It also means there is no longer an implied restriction to the three documents that are listed.

Section 3.5 para. 2

The formulation "staff members they employ" has been replaced with "staff members they appoint to support them". This is intended to make clear that although Board members can and must rely on the support of staff members, they may not delegate their own responsibilities. In this context, in its guidance notice on the monitoring of members of administrative and supervisory bodies in the financial sector, and specifically in relation to the preparation of documents, BaFin (the Federal Financial Supervisory Authority) points out that it is not sufficient for this preparation to be done only by staff members.

Section 3.7 para. 3

This change means that the proposal applies to all cases in which a takeover offer is made.

Section 4.2.2 para. 1

The previous recommendation that an existing committee submits its proposals to the full Supervisory Board has now been redrafted as cited legislation, because this recommendation has become obsolete as a result of the Act on the Appropriateness of Management Board Remuneration (Gesetz zur Angemessenheit der Vorstandsvergütung, VorstAG) and the responsibility of the full Supervisory Board that applies under this Act.

Section 4.2.2 para. 2 to Section 4.2.5 (compensation provisions, see II, page 6 et seq.)

Section 5.2 para. 2

In Section 5.2, the recommendation that the Chairman of the Supervisory Board should also chair the committees that handle the Management Board contracts has been deleted. Although this kind of accumulation of chairmanship positions can make sense, it is not strictly necessary for good corporate governance, and is sometimes advised against, for example in the UK Corporate Governance Code.

Section 5.3.1

The explanatory comment that committees serve to increase the efficiency of the Supervisory Board's work and the handling of complex issues is self-evident and has been deleted.

Section 5.3.2

The risk management system has been added to the list of issues that the Audit Committee deals with. The reference to "risk management" was taken out in the 2012 revision of the Code. This resulted in an unintentional discrepancy between the Code and Section 107 (3) sentence 2 of the German Stock Corporation Act (Aktiengesetz, AktG), which has now been rectified.

Sections 5.3.4 and 5.3.5 of previous version

In the interests of trimming down the Code, this citing of Section 107 (3) AktG on committees has been deleted.

Section 5.4.6 para. 1

It has simply been made clear that a separate resolution is required to set the compensation of members of the Supervisory Board.

The second sentence, which stated that the compensation takes into account the responsibilities and scope of the tasks of the Supervisory Board members and the economic situation and success of the company, has been deleted, because the requirements are largely covered in Section 5.4.6 para. 2.

Sections 6.1 and 6.2 of previous version

This citing of securities trading law regulations has been deleted in the interests of trimming down the Code.

Section 6.4 of previous version

This recommendation was regarded as unnecessary because of the now established practice of using the internet to provide shareholders and investors with timely, consistent information, and was therefore deleted.

Section 6.3 (Section 6.6 of previous version)

Since the Corporate Governance Report stopped being used to publish the shareholdings of Management and Supervisory Board members in 2012, the Code has no longer included a regulation governing the nature and time of the publication. This led to a lack of clarity. Now that the Corporate Governance Report is once again being used to publish this information, it is clarified where and when (generally once a year) the relevant shareholding must be published.

Section 6.8 of previous version

In view of the now-established publication procedure, the recommendations contained in Section 6.8 of the previous version and the corresponding proposal have been deleted.

II. Explanatory comments on the setting of Management Board compensation by the Supervisory Board (Section 4.2.2 para. 2 to Section 4.2.5)

As announced on 14 June 2012, the Commission has looked closely at the issue of whether additions and changes to the Code as regards the setting of Management Board compensation by the Supervisory Board could be appropriate and useful. The proposal that is now submitted and will be used as the basis for the hearing is governed by the following considerations:

- The Commission is not proposing any intervention in the methods and systems for setting Management Board compensation that must be established by individual companies, but is recommending that a cap be placed both on the total amount of individual compensation and on its separate components. The Supervisory Board sets the system-specific and individual caps for each company (see Section 4.2.3 para. 2 sentence 6).
- For the Supervisory Board itself, the transparency and traceability of its decisions should be enhanced by supplementing the criteria that have already been outlined and are to be taken into account. This is one purpose of the recommendation that the Supervisory Board should consider the relationship between the compensation of the Management Board and that of senior management and total staff, also in terms of its development over time (see section 4.2.2 para. 2, sentence 3); this also includes the additional note about the necessity of establishing target levels of provisions and the resulting expenses (see Section 4.2.3 (3)).
- The Supervisory Board should always have certain information to hand and take this into account when it makes its decision; this information must also be published in the compensation report (see Section 4.2.5 para. 3. To ensure comparability over time and with other companies, the Commission suggests using the tables it has produced (see Section 4.2.5 para. 3 sentence 2). The data to be included in the tables are already available within the companies and are already published in one form or another to a large extent. Since compiling the information could initially involve some time and effort, the Commission suggests only implementing the regulation in Section 4.2.5 para. 2 from 2014 onwards.
- The actual allocation from multi-year variable compensation is now reported (Table 2), regardless of its form. The additional information on target, minimum and maximum

values for variable compensation is also new (Table 1).

- The values in the model tables are, in principle, reported in accordance with IFRS or similar values are given (Tables 3a and 3b). Supplementary information, for example relating to IFRS, HGB, DRS or other legal requirements, is published as previously in the notes to the financial statements.

The Commission is grateful for any comments and suggestions.