

REGIERUNGSKOMMISSION

# Deutscher Corporate Governance Kodex

## **Rationale German Corporate Governance Code as resolved by the Commission 16 December 2019 (Convenience Translation)**

### **Part 1: General disclosures**

#### **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 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 into 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

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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.

Rights Directive (Second SRD)<sup>3</sup> not only results in new regulations regarding “Say on Pay” by the General Meeting (section 120a of the German Stock Corporation Act – “AktG”) and extended requirements to the reporting on Management Board remuneration (section 162 of the AktG), but also leads to new requirements for the remuneration systems (section 87a of the AktG).

- (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. 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 to which neither enterprises nor investors or other stakeholders attach value. The readability shall be supported by a Code structure that is based on Management Board and Supervisory Board duties.

## **II. Material changes**

### **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 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,

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<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.

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.

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 a due consideration. The 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 may help in this context, but cannot replace exercising due discretion on the part of shareholder representatives.

The Commission supports the view that, in order to determine an appropriate number of independent shareholder representatives and to appoint 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 specific target total remuneration, the proportion of (i) fixed remuneration and (ii) short-term and long-term variable remuneration in the target total remuneration, and the correlation between the targets agreed upon beforehand, together with 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 sustainable and long-term corporate development, cf. section 87 (1) sentence 2 and section 87a (1) sentence 2 no. 2 of the AktG.

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). Target total 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, on a market- and task-specific basis, as to what share the variable remuneration should have in the total remuneration.

Variable remuneration is the key material incentive for pursuing the objectives of company policy. It acts as motivation and reward for specific actions, for operating performance, for a strategic orientation that promotes the sustainable and long-term development of the company, and for responsible behaviour. While the achievement of the targets does not necessarily have to be measured precisely, it must be verifiable in any event. The correlation between achieving targets and variable remuneration must therefore be determined beforehand, and must not be changed subsequently.

Operational 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 variable remuneration amounts of Management Board members shall be predominately invested in company shares by the specific Management Board member, or shall be granted by the company as share-based remuneration, accordingly.

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

A 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 parallel existence (now obsolete) 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 German Commercial Code (“HGB”) did not contribute to clarity and comprehensibility of corporate governance reporting. Several companies have therefore started to combine the Corporate Governance Report and the Corporate Governance Statement.

Principle 22 of the GCGC comprises the corresponding solution: “Management Board and Supervisory 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 recommendation regarding the 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 HGB, relevant disclosures regarding corporate governance standards applied in the respective entities above and beyond legal requirements are to be taken up in the Corporate Government Statements. 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 delete quotes of 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, reduced updating of the Code will be necessary to track changes of less significant legal requirements.

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

The GCGC 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. For the sake of readability, the Code is 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 issues 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.

## **Part 2: Single Explanatory Statements**

### **Foreword**

**Regarding Paragraph 2** Paragraph 2 highlights the corporate social responsibility of the companies and their governing bodies, the importance of social and environmental factors for the company's success, and the requirement to consider risks and opportunities in the strategy. Corporate social responsibility also comprises taking into consideration the acceptance of Management Board remuneration in the general public. Pursuant to section 289c (2) of the HGB, stock corporations are obliged to disclose information on environmental, employee and social aspects, on the respect for human rights, and the fight against corruption and bribery in their Non-financial Statement.

**Regarding Paragraph 8** Sentence 2 clarifies that, in the event of Code recommendations counteracting specific legal regulations, no deviation needs to be explained pursuant to section 161 of the AktG. 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**

**Regarding A.1** 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.

**Regarding Principle 4** 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 used here comprises the internal control and risk management system as well as internal audit.

#### **II. Supervision tasks of the Supervisory Board**

**Regarding Principle 6** Paragraph 3 takes into account the new regime of related-party transactions based on sections 111a to 111c of the AktG, waiving reference to the disclosure obligation and a rendition of the statutory thresholds or exceptions and other details in implementation of section 9c of the Second SRD.

### III. Function of the General Meeting

**Regarding Principle 8** 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.

In individual cases, a vote by the General Meeting can also be binding if it lowers the determined maximum remuneration pursuant to section 87a (1) sentence 2 no. 1 of the AktG.

**Regarding A.4** This suggestion strengthens the position of the Chair in order to enable him/her to ensure an adequate timing of the General Meeting and to avoid the unnecessary escalation of debates.

### B. Appointments to the Management Board

**Regarding B.1** 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.

**Regarding B.3** 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 of three years.

### C. Composition of the Supervisory Board

#### I. General requirements

**Regarding Principle 10** 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 not do this, but 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 Participation Act (Dritteteiligungsgesetz) 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. Companies can therefore also choose to implement 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.

**Regarding C.1** 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.

**Regarding C.3** The Code does not provide any statement in relation to the cap for length of membership in the Supervisory Board and, in the restated version, also desists from recommending a corresponding regular limit 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 the rationale on recommendation C.7 for details regarding the length of membership as an indicator for the lack of independence.

**Regarding C.4** 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 high-lighted. 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.

**Regarding C.5** The workload associated with being the Chair of the Supervisory Board of a listed company or a comparable function is normally not manageable together with the membership in a Management Board of a listed company.

## **II. Independence of Supervisory Board members**

**Regarding C.6** 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.

**Regarding  
C.7**

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 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 that are suitable to negate the independence of Supervisory Board members, but cannot 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 the definition, close family members of a person are family members who may be expected to influence, or be influenced by, that person [when executing transactions with the enterprises]; 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 duration of Supervisory Board membership is widely accepted as a criterion for independence.

**Regarding  
C.8**

If independence is not given in individual cases, a decision has to be made by the shareholder representatives on the Supervisory Board based on due discretion, taking into account the criteria set out in recommendation C.7. 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 on a discretionary decision.

There may well be justified reasons to confirm independence although one or, under particular circumstances, even several indicators included in recommendation C.7 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.

**Regarding  
C.10**

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.

## **D. Supervisory Board Procedures**

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

**Regarding  
D.1**

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**

(no explanatory statements)

## 2. Supervisory Board committees

**Regarding D.3** In accordance with section 7.1.2 sentence 2 of the GCGC 2017, financial information shall be discussed by the Management Board with 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, 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”.

## 3. Provision of information

**Regarding Principle 15** 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.

## 4. Meetings and adoption of resolutions

**Regarding D.7** In accordance with section 3.6 (2) of the GCGC 2017, the Supervisory Board shall meet with-out the Management Board, if necessary. In order to fulfil its monitoring authority, the Su-pervisory Board meetings are regularly held without the Management Board.

**Regarding D.8** Pursuant to section 5.4.7 of the GCGC 2017, the report of the Supervisory Board shall dis-close 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

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

**Regarding D.11** The Audit Committee is also responsible for monitoring the audit pursuant to section 107 (3) 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

(no explanatory statements)

### V. Self-assessment

**Regarding D.13** 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

**Regarding E.1** 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.

**Regarding  
E.2**

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.

## **F. Transparency and external reporting**

**Regarding  
Principle 22**

As explained in section II.4. 'General Disclosures', 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 pursuant to section 289f of the HGB into the core instrument of corporate governance reporting.

**Regarding  
F.4**

This applies inter alia to credit institutions and insurance undertakings.

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

### **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.

**Regarding  
Principle 23**

Principle 23 (1) 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.

In individual cases, a vote by the General Meeting can also be binding if it lowers the determined maximum remuneration pursuant to section 87a (1) sentence 2 no. 1 of the AktG.

Principle 23 (3) corresponds to section 87 (1) sentence 2 and section 87a (1) sentence 2 no. 2 of the AktG. The focus of the remuneration structure on a sustainable company development shall be understood in a way that the Supervisory Board “shall also consider social and ecological aspects.”<sup>4</sup>

**1. Determining the remuneration system**

**Regarding  
G.1**

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

The concept for the target total remuneration and the maximum remuneration is introduced in indent one. The target remuneration is the sum of all remuneration amounts of one year (including service cost) pursuant to IAS 19. Target total remuneration is the total remuneration in case of full target achievement (100 per cent).

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.

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

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<sup>4</sup> Resolution recommendation and report by the Committee on Legal Affairs and Consumer Protection, German Bundestag printed matter no. 19/15153, p. 62 (in German).

- (1) Establish a remuneration system the content of which corresponds to section 87a (1) sentence 2 of the AktG; the remuneration system is subject to approval by the General Meeting pursuant to section 120a of the AktG;
- (2) establish the individual specific target 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.

## **2. Determining total remuneration**

**Regarding G.2** Referring to the forthcoming financial year, the Supervisory Board determines, for each Management Board member, the remuneration components available in the form of target 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.

**Regarding G.3** 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.

**Regarding G.4** The Supervisory Board determines how to distinguish the senior management and the relevant workforce, and how to compare the respective remuneration systems.

**Regarding G.5** 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 expert, and that the enterprise changes experts from time to time.

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

**Regarding G.6** Since the remuneration system has to be focused on a long-term company development, it is recommended that, in the case of full target achievement, the variable remuneration aiming at the pursuit of long-term oriented targets comprises the major part of variable remuneration.

- Regarding G.7** It is the Supervisory Board's responsibility to assess, and describe in the remuneration report, which performance indicators are suitable to promote the sustainable and long-term development of the company.
- Regarding G.9** 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.
- Regarding G.10** The company may lay down the obligation to invest (net) granted variable remuneration components in company shares in a share ownership guideline.
- Regarding G.11** The variable remuneration structure shall reflect extraordinary developments appropriately. This may result in an increase or a decrease of the 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.

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

- Regarding G.12** In order to maintain the long-term nature of variable remuneration components, the termination of Management Board member contracts (except in the event of death or invalidity) must not affect the measurement and maturity of variable remuneration.
- Regarding G.13** 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.
- Regarding G.14** 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, 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

**Regarding G.15** The remuneration for being a member of an intra-group Supervisory Board shall be offset against the fixed remuneration.

**Regarding G.16** 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

**Regarding G.17** 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.

## III. Reporting

**Regarding Principle 25** 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 AktG now provides for a meaningful and comprehensible remuneration report. The disclosures to be provided in the remuneration report pursuant to section 162 of the 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 AktG). The Commission does not see any need to recommend further content to be included in the remuneration report; furthermore, the Commission does not consider the development of any recommendations on the reporting format regarding Management Board or Supervisory Board remuneration to be within its duties, referring to the guidelines for the remuneration report to be prepared by the EU Commission pursuant to section 9b (6) of the Second SRD.