



# Remuneration of Works Council/Staff Council and Remuneration of Supervisory Board – Update 2023

# Introduction

# Speakers

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# Outline

- I. Update Remuneration of the Supervisory Board
- II. Remuneration of the Works Council and Staff Council: Initial guiding principles
- III. "Hypothetical exceptional career as a manager" and the BGH's infidelity ruling - an obituary?!
- IV. Infidelity judgement of the BGH and Business/Legal Judgement Rule
- V. Needs and opportunities for action in sound compensation practice
- VI. Questions & Answers



# Update Remuneration of the Supervisory Board

# Update Remuneration of the Supervisory Board

## Selected aspects of the remuneration of the Supervisory Board



### The remuneration of the Supervisory Board

01

#### Scope

- Supervisory Board of AG, KGaA, SE (dualistic and monistic)
- GmbH, if co-determined
- GmbH, if voluntary supervisory board and no deviating provision in the articles of association
- Also Board of Directors at AöR

02

#### Entitlement to remuneration

- Entitlement only if regulated in the **articles of association** or by **resolution of the Annual General Meeting**, Sec. 113 (1) s. 2 AktG
- No remuneration by law
- Protection of creditors and shareholders due to transparency and protection of internal order (controlled board of directors does not decide whether and how much)

03

#### Principle of equal treatment

- Treat all members of the Supervisory Board equally, regardless of group, who/how appointed/elected, ...
- Except: unequal treatment objectively justified (otherwise void):
  - Permissible: functional differentiation: supervisory board chairmanship, deputy supervisory board chairmanship, committee chairmanship, committee membership, cf. also GCGC: G.17
  - Inadmissible: Qualification, length of service
- Obligation of employee members to pay part of their remuneration: permissible

# Update Remuneration of the Supervisory Board

## Selected aspects of the remuneration of the Supervisory Board



### The remuneration of the Supervisory Board

04

#### Amount and components of remuneration

- Level must be **appropriate**: horizontal comparison: peer: esp. sector and size (sales, total assets, number of employees, annual result if applicable)
- Components
  - Fixed remuneration (GCGC: G.18 sentence 1)
  - Variable compensation (GCGC: G.18 sentence 2 - if then long-term), but risk of lack of independence; orientation to stock market price?
  - No options
  - Attendance allowance (depending on concrete form and amount)
  - D+O insurance?
  - Pensions
  - Reimbursement of expenses: no remuneration, even without a basis in the articles of association; P: appropriateness and who decides on it
  - Costs of continuing education: DCGK: D.11, Section 25d (4) KWG

05

#### Reporting and resolution obligations (in the case of stock exchange listing)

- Every 4 years **decision of the Annual General Meeting** on remuneration and remuneration system, Sections 113 (3), 87a (1) s. 2 AktG.
- Annual **remuneration report** with individual compensation statement: to be audited and approved by AGM, Sections 162, 120a (4) AktG

06

#### Third party payment

- Permissible?

# Update Remuneration of the Supervisory Board

## Selected aspects of the remuneration of the Supervisory Board



### The remuneration of the Supervisory Board

07

#### Sales tax

- If only fixed remuneration: no remuneration risk => no VAT on remuneration
- If only variable remuneration: remuneration risk => VAT on remuneration
- If (i) fixed + variable remuneration and (ii) variable remuneration at least 10% of total remuneration => VAT on remuneration
  - Variable remuneration:
    - also meeting fees, even if not paid for lack of attendance,
    - No travel expenses
- To be dealt with separately for each Supervisory Board mandate

08

#### Special conditions for employee-representatives?

- Equal remuneration law
- Duty to pay remuneration/meeting fees permissible
- Duty to charge meeting fees?
- Entitlement to time off for Supervisory Board meeting?

# **Update Remuneration of the Works Council and Staff Council: Initial Guiding Principles**

# Update Remuneration of the Works Council and Staff Council

## Voluntary principle and loss of wages principle



### Output guidelines

01

#### Voluntary principle

- Member for official duties (as such) **without separate remuneration**
- In particular: No separate remuneration for meetings ./ other committee-related activities of the works council (**no "attendance fee"**, no separate remuneration as member of the conciliation committee).
- Reimbursement of office-related expenses

02

#### Loss of wages principle

- Member is to **be released from** his operational professional activity for the employer **without reduction of remuneration for office duties**
  - Anchor point: member's discretion to assess the necessity of the specific office-related duties
- The remuneration to be granted by the employer for the period of office shall include all remuneration components which the works council/staff council member would have received if he/she had performed his/her operational professional activity during this period
  - Starting point: fixed remuneration for relevant period
  - Variable remuneration components, if applicable, based on estimate (Section 287 (2) ZPO)
  - **Hypothetical approach**: Office-duty-related allocation of the individual remuneration component required

# Update Remuneration of the Works Council and Staff Council

## Prohibitions of discrimination and favoritism



### Output guidelines

03

#### Prohibition of discrimination

- The member's remuneration may not be set lower than the remuneration of **employees comparable to the member and who have developed professionally in the same way as the member.**
  - Comparable employees I: Relevant time of **assumption of office duties**
  - Comparable Employees II: **Objective Assessment Standard** with person- and duty-related criteria
  - Customary professional development: "mainstream" and special further and advanced training measures of the member, which are also related to the member's operational professional activity (especially in case of a successful application by the member for a vacant job during the official activity, which the member rejects solely with reference to official duties (most recently, for example, *judgement of the German Federal Labour Court (Bundesarbeitsgericht, BAG) dated 22.01.2020 (7 AZR 222/19): "adaptation to professional development"*))
- **Commercial** approach
- Applies in particular to **exempt members: fictitious tracing of professional development** (and remuneration development)

04

#### Prohibition of favoritism

- As a prohibition of betterment and/or granting of advantages, which is **causally connected with** the official duties and is not carried out for factual (= legally permissible) reasons
- Causal connection implies **causality** between the official duties and the concrete betterment.

**"Hypothetical exceptional career as a manager" and  
the BGH's infidelity ruling - an obituary?!**

# "Hypothetical exceptional career as a manager" and the BGH's infidelity judgement

Initial considerations and their assessment by the Federal Court of Justice: 'Digital cut' of the criteria that can be taken into account?



01

## Hypothetical exceptional career as a manager

- Starting point: **Limits** of the guiding principle of determining the comparison group of the relevant employees for the customary professional development in case of - exempt - members
  - with leave of absence already **for several election decades** (especially if term of office with leave of absence accounts for a far disproportionate share of the total duration of the employment relationship)
  - whose **original operational activity**/original comparative profile no longer exists in the company and/or, in particular, the comparative employees performing the original activity have already left the company as a comparative group
  - whose **professional and management activities** within the scope of the **exercise of office** differ significantly from the qualification profile of the original operational activity
- Exceptionally, consideration of the - **hypothetical - professional development (opportunities)** of the member during the term of office?
  - with regard to special practically acquired qualifications and/or special (especially management-related) professional experience of the member from the office duties
  - with regard to professional training measures which the member carries out during the term of office - sometimes also 'on his own account' - and which (in any case) also have a reference to the original operational activity

# "Hypothetical exceptional career as a manager" and the BGH's infidelity judgement

Initial considerations and their assessment by the Federal Court of Justice: 'Digital cut' of the criteria that can be taken into account?



02

## **BGH in infidelity judgement: assumption of office as delimitation date for (criteria for) determining the peer group**

- **'Digital argument'**: Any consideration of skills and/or qualifications acquired during the term of office is impermissibly linked to the assessment of works council activity as such and finds no support in the German Works Constitution Act (*Betriebsverfassungsgesetz, BetrVG*)
- **Exceptionally taking into account qualifications acquired in the works council office that also have a reference to the operational work activity?**
  - In particular, in relation to acquired knowledge and qualifications of the member, which allow application to higher-level activities during or even after office?
  - In particular, in relation to the principle of selection of the best among public employers?

# Infidelity judgement of the BGH and Business/Legal Judgement Rule

# Infidelity ruling of the BGH and Business/Judgement Rule

## Initial Guiding Principles - and their Sharpening by the BGH



01

### Output guidance sentences

- Methodological starting point anchored in Section 93 (1) S. 2 AktG: No liability of the Executive Board member if, on the basis of an entrepreneurial decision, he or she could reasonably assume that he or she was acting for the benefit of the Company on the basis of appropriate information:
  - **Entrepreneurial decision:** due to its future-oriented nature, it is characterized by forecasts and non-justiciable assessments and therefore involves a certain risk/can only be made under uncertainty
  - **Uncertainty of the decision:** resulting from economic uncertainty due to several commercial options for action (*Business Judgement Rule*) ↔ legal uncertainty due to unresolved legal situation (*Legal Judgement Rule*)
  - Decision based on **adequate information:** In the specific decision-making situation, management has exhausted all available sources of information of a factual and legal nature in order to carefully assess the advantages and disadvantages of the existing options for action on this basis and to take account of the identifiable risks

02

### BGH in infidelity judgement: Business and Legal Judgement Rule reshaped

- Re-sharpening of information gathering and **holistic assessment of available** information:
  - **Holistic critical appraisal**, in particular of legal opinions as a basis for decision-making for legal appraisal, if the specific legal issue is disputed and/or controversial in the professional community
  - "**Paper trail**": documentation of the lawyer's expert opinion must contain a comprehensive appraisal of the legal situation and must also deal with all relevant arguments in the expert opinion

# Needs and opportunities for action in sound compensation practice

# Needs and opportunities for action in sound compensation practice

Review and further development of the remuneration system of the works council/staff council in line with requirements



01

## Review of the content of the remuneration system and the existing documentation

- **Review of the company's internal remuneration system** for works/staff council members for
  - Catalogue of comparison criteria for determining the comparison groups (quantitative and qualitative)
  - Catalogue of profiles of individual employees (including documentation of job profiles)

02

## Further development of the remuneration system in line with requirements and creation of additional "flanks"

- **Concretization** of the catalog of comparison criteria (for the formation of comparison groups)
- **Generalization** of originally existing operational activities of individual members that no longer exist
- **Expansion of accompanying documentation** by recording all employees eligible for the comparison group (at the time of assumption of office)
  - Effectiveness limit: Actual corridor of hypothetical consideration (see most recently *ArbG Hamburg judgment dated 10 May 2022 - 3 Ca 74/21*).

# Questions & Answers

**Thank you for your attention!**

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