Germany

GLASS LEWIS

2025 Benchmark Policy Guidelines

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Guidelines Introduction

These guidelines are intended to supplement Glass Lewis' *Continental Europe Benchmark Policy Guidelines* by highlighting the key policies that we apply specifically to companies listed in Germany and the relevant regulatory background to which German companies are subject, where they differ from Europe as a whole. The *Continental Europe Benchmark Policy Guidelines* describe the underlying principles, definitions and global policies that Glass Lewis uses when analysing German companies in accordance with best practice standards for Germany.

Where a topic is not addressed in these guidelines, but is addressed in the *Continental Europe Benchmark Policy Guidelines*, we consider our policy approach and the relevant regulations and recommendations to be substantially the same in Germany as in continental Europe. Wherever our policy deviates from the *Continental Europe Benchmark Policy Guidelines*, we will clearly state this.

Corporate Governance Background

The German Stock Corporations Act (Aktiengesetz) provides the primary legislative framework for German corporate governance. Best practices are centered on the recommendations contained in the German Corporate Governance Code (Kodex) that operates on a comply or explain basis, whereby the management and supervisory boards of all publicly-listed companies are required to make annual statements detailing their adherence to the Kodex.

Corporate governance principles in Germany are generally less prescriptive than in many other European countries, with a strong emphasis on corporate flexibility. The Kodex contains very general provisions, which are much less specific in nature than the recommendations contained in corporate governance codes of most other European markets. The government commission responsible for the Kodex states that the aim of the country's distinct governance code is increased transparency and comprehensibility for stakeholders in order to strengthen their confidence in management and supervision of German listed companies. The Kodex, initially adopted on February 26, 2002, was most recently updated on April 28, 2022.

We have updated the guidelines to reflect the latest formulations of the Stock Corporations Act and/or the Kodex.

Regulatory Updates

In December 2023, the German legislator adopted the Future Financing Act ("Zukunftsfinanzierungsgesetz"), which provides updates to some key legal provisions aimed at increasing the German capital market's attractiveness.

The revised law enables companies to float on a German stock exchange while retaining a multi-class share structure for a period of ten years; this practice had been forbidden since 1998. The implementation of a multi-class share structure requires unanimous approval of all shareholders. Following the initial ten-year period (sunset clause), companies can decide to retain the multi-class share structure for ten more years, again subject to unanimous approval by all shareholders.

In addition, the new law contains provisions allowing companies more flexibility when issuing new shares. In particular, the limit for share issuances without preemptive rights against cash contributions was increased from 10% to 20% of a company's issued share capital, while the limit for share issuances through conditional capital pools has been increased from 50% to 60% of the issued share capital. Moreover, the limit for issuances to employees and management board members has been increased from 10% to 20% of issued share capital to facilitate and promote employee share ownership. Further, the revised law includes a change of the applicable record date for participation in the general meeting, from the beginning of the 21st day prior to the meeting to the close of business on the 22nd day prior to the meeting.

Finally, among other minor amendments, the new law allows for shares to be issued in the form of electronic securities with effect from November 1, 2025.

Summary of Changes for 2025

Glass Lewis evaluates these guidelines on an ongoing basis and formally updates them on an annual basis. This year we've made noteworthy revisions in the following areas, which are summarized below but discussed in greater detail in the relevant sections of this document:

CEO Pay Ratio

We have expanded the "Management Board Remuneration Report" section of these guidelines to clarify the views of the benchmark policy on the formats in which German companies disclose the five-year development of CEO pay and average employee pay, as mandated by SRD II. In particular, disclosure in the format of ratio or monetary amounts is considered more meaningful for shareholders than disclosure in terms of year-on-year percentage changes in the respective values.

Supervisory Board Remuneration

In line with our *Continental Europe Benchmark Policy Guidelines,* we have expanded the "Supervisory Board Remuneration" section of these guidelines to clarify that the benchmark policy may recommend shareholders to oppose substantial increases to fees for non-executive directors when compelling rationale has not been provided, particularly in cases where the current or proposed fees exceed those paid to market peers.

Conditional Capital Authorities

We have updated the "Conditional Capital" section of these guidelines to reflect legal changes reflecting the adoption of the Future Financing Act ("Zukunftsfinanzierungsgesetz"). In particular, we have clarified that the limit for share issuances without preemptive rights against cash contributions was increased from 10% to 20% of a company's issued share capital, while the limit for share increases through conditional capital pools was increased from 50% to 60% of issued share capital.

A Supervisory Board that Serves the Interests of Shareholders

Election of Supervisory Board Members

Under German law, companies are governed by a two-tier board system, with the supervisory board presiding over the management board. The supervisory board[1] consists entirely of non-executive directors, while the management board[2] is composed entirely of executive directors. The management board is responsible for the day-to-day operation of the business,[3] whereas the supervisory board is responsible for appointing and monitoring the management board.[4] Alternatively, German companies may elect to incorporate under European Company (Societas Europaea, or S.E.) law and such companies may be governed by either a single-tier or two-tier board system.[5]

Unless otherwise specified by these guidelines, provisions will apply to companies with a two-tiered board.[6]

Independence

In Germany, we categorise supervisory board members based on an examination of the type of relationship they have with the company:

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[1] Article 105(1) of the German Stock Corporations Act (Aktiengesetz, or AktG), a legally-binding document that was first introduced September 6, 1965.

[2] Article 76 AktG.

[3] Article 76(1) AktG and Principle 1 of the German Corporate Governance Code (Kodex).

[4] Article 111 AktG and Principle 6 of the Kodex.

[5] Council Regulation (EC) 2157/2001 of 8 October 2001, on the Statute for a European Company.

[6] Though more German companies make use of the European Company form than in any other country, the one-tier board option has not been widely utilised by German companies incorporated under European Company law.

Independent Supervisory Board Member — An independent supervisory board member has no material[7] financial, familial[8] or other current relationships with the company,[9] its independent auditor, executives, or other board members, except for board service and standard fees paid for that service.

Affiliated Supervisory Board Member — An affiliated supervisory board member has a material financial, familial or other relationship with the company, its independent auditor, or its executives, but is not an employee of the company. This may include supervisory board members whose employers have a material relationship with the company or its subsidiaries or major shareholders. We will typically consider supervisory board members affiliated if they:

- Have been employed by the company within the past five years;[10]
- Have — or have had within the past three years — a material business relationship with the company;
- Own or control 10% or more of the company's share capital or voting rights;[11]

[7] "Material" as used herein means a relationship in which the value exceeds: (i) €50,000, or the equivalent (or 50% of the total compensation paid to a board member, or where no amount is disclosed) for board members who personally receive compensation for a professional or other service they have agreed to perform for the company, outside of their service as board members. This limit would also apply to cases in which a consulting firm that is owned by or appears to be owned by a board member receives fees directly; (ii) €100,000, or where no amount is disclosed, for those board members employed by a professional services firm such as a law firm, investment bank or large consulting firm where the firm is paid for services but the individual is not directly compensated. This limit would also apply to charitable contributions to schools where a board member is a professor, or charities where a board member serves on the board or is an executive, or any other commercial dealings between the company and the director or the director's firm; (iii) 1% of either company's consolidated gross revenue for other business relationships (e.g., where the supervisory board member is an executive officer of a company that provides services or products to or receives services or products from the company); (iv) 10% of shareholders' equity and 5% of total assets for financing transactions; or (v) the total annual fees paid to a supervisory board member for a personal loan not granted on normal market terms, or where no information regarding the terms of a loan have been provided.

[8] Per Glass Lewis' *Continental Europe Benchmark Policy Guidelines*, familial relationships include a person's spouse, parents, children, siblings, grandparents, uncles, aunts, cousins, nieces, nephews, in-laws, and anyone (other than domestic employees) who shares such person's home. A director is an affiliate if the director has a family member who is employed by the company.

[9] A company includes any parent or subsidiary in a group with the company or any entity that merged with, was acquired by, or acquired the company.

[10] In our view, a five-year standard is appropriate because we believe that the unwinding of conflicting relationships between former management and supervisory board members is more likely to be complete and final after five years. However, Glass Lewis generally applies an exception for supervisory board members who have previously served as executives of the company on an interim basis for less than one year. Article 100(2.4) AktG prohibits a member of the management board from serving on the supervisory board within two years of the end of the employment mandate, unless requested by a shareholder owning more than 25% of a company's total voting rights.

[11] C.13 of the Kodex recommends that companies disclose the personal and business relationships of supervisory board nominees with shareholders who directly or indirectly hold in excess of 10% of the company's voting rights.

- Have served on the supervisory board[12] for more than 12 years;[13] or
- Have close family ties with any of the company's advisers, board members or employees.

Inside Supervisory Board Member — An inside supervisory board member is a shareholder representative that simultaneously serves as a supervisory board member and as an employee of the company. This category may include a board chair who acts as an employee of the company or is paid as an employee of the company. In Germany, supervisory board members may not legally serve simultaneously as members of the management board, representatives of management and/or officers of the company.[14] As a result, insiders are very rare on German supervisory boards. However, the law allows a member of the supervisory board to serve on the management board for a transitional period, not to exceed one year, under exceptional circumstances.[15]

Employee Representatives — Due to German co-determination laws, employees are entitled to have representation on the supervisory board of all public companies with at least 500 employees[16] and may constitute up to half of the seats on a company's supervisory board. Glass Lewis does not take employee representatives into account when analysing the independence of German supervisory boards given that these individuals are neither elected by, nor intended to directly represent, the company's shareholders.

Voting Recommendations on the Basis of Supervisory Board Independence

Glass Lewis believes a supervisory board will be most effective in protecting shareholders' interests when at least a majority[17] of the shareholder-elected members are independent. Where 50% or more of the supervisory

[12] Recommendation C.7 of the Kodex. In certain cases, we will also consider supervisory board members to be affiliates when they have served fewer than 12 years on the supervisory board if they previously served on the management board and did not have a material break in service between their resignation from the management board and their election to the supervisory board.

[13] While Glass Lewis makes every effort to obtain relevant information regarding supervisory board members' terms of office, this information is not always provided by microcap German companies. As such, we will only affiliate supervisory board members for this reason when the information is provided. Otherwise, we will note that the company has not provided the relevant information. Additionally, while we will classify board members as affiliates in accordance with this standard, we will evaluate voting recommendations based on this issue on a case-by-case basis. When a board or committee does not meet the independence standards set forth in these guidelines solely as a result of a nominee's length of service on the board, we may refrain from recommending a vote against the nominee if the board or relevant committee is otherwise sufficiently independent and there is evidence of regular board refreshment.

[14] Article 105(1) AktG.

[15] Article 105(2) AktG. During such a transitional period, individuals may not engage in supervisory board duties.

[16] Companies that regularly have between 500 and 1,999 employees are subject to the German Law on One-Third Participation (Drittelbeteiligungsgesetz, or DrittelbG), Article 4(1) of which requires one-third of the supervisory board to be composed of employee representatives. Companies regularly employing 2,000 or more individuals are subject to the German Co-Determination Act (Mitbestimmungsgesetz or MitbestG), which requires equal representation of employees and shareholders on the supervisory board.

[17] We note that while C.7 of the Kodex recommends that the majority of shareholder representatives shall be independent from the company and the management board, the Kodex provides no specific recommendations on independence from major shareholders for non-controlled companies. For companies with a controlling shareholder, C.9 of the Kodex

board members are either affiliated or inside members, we typically[18] recommend voting against some of the inside and/or affiliated members in order to satisfy the majority threshold. However, we generally accept the presence of representatives of significant shareholders in proportion to their equity or voting stake in the company.

We refrain from recommending to vote against any supervisory board members on the basis of lengthy tenure alone. However, we may recommend voting against certain long-tenured directors when lack of board refreshment may have contributed to poor financial performance, lax risk oversight, misaligned remuneration practices, lack of shareholder responsiveness, diminution of shareholder rights or other concerns. In conducting such analysis, we will consider lengthy average board tenure (e.g., more than 9 years), evidence of planned or recent board refreshment, and other concerns with the board's independence or structure.

Voting Recommendations on the Basis of Committee Independence

We generally believe that the majority of shareholder-elected supervisory board members serving on a company's audit and remuneration committees should be independent of the company and its significant shareholders. However, given that the audit and remuneration committees of companies subject to codetermination laws often consist of an even number of shareholder representatives, we will generally accept 50% independence of the audit and remuneration committees as long as the committee chair is an independent shareholder representative.

Further, we believe that at least 50% of a company's audit committee should be comprised of shareholder-elect supervisory board members.[19] Given the amount and importance of the work of the audit committee, shareholders' interests should be at least equally represented in proportion to employees. We will recommend voting against any audit committee chair who: (i) is also the supervisory board chair, unless a cogent reason is given;[20] (ii) is not independent of the company;[21] or (iii) is a recent former member of the company's management board.[22]

While the formation of a remuneration committee is established market practice in Germany, we are mindful that the Kodex does not contain a specific recommendation in this regard. The Kodex does, however, recommend that if a remuneration committee is established, the chair be independent.[23]

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recommends that at least two supervisory board members should be independent from this shareholder (or at least one where the supervisory board consists of six or fewer members).

18 With a staggered board, if the affiliates who we believe should not be on the board are not up for election, we will express our concern regarding those board members, but we will not necessarily recommend voting against the affiliates who are up for election just to achieve the majority independence threshold.

19 We will recommend voting against the board chair when 75% or more of the audit committee is composed of employee representatives. When employee representatives comprise 50 to 75% of the audit committee, we will note our concern.

20 Recommendation D.3 of the Kodex.

21 Recommendation C.10 of the Kodex.

22 While the Kodex only recommends that a two-year look-back period be applied to this situation, Glass Lewis believes that a five-year look-back period is more appropriate in order to protect the interests of all shareholders.

23 Recommendation C.10 of the Kodex.

With respect to the composition of a company's nominating committee, the Kodex recommends that such a committee be comprised solely of shareholder-elected members.[24] Glass Lewis believes that a majority of these members should be independent of company management and other related parties. However, we accept the presence of representatives of significant shareholders on this committee in proportion to their equity or voting stake in the company.

Other Considerations for Individual Board Members

Our policies with regard to performance, experience and conflict-of-interest issues are not materially different from our *Continental Europe Benchmark Policy Guidelines*. The following are clarifications regarding best practice recommendations in Germany.

External Commitments

In accordance with our *Continental Europe Benchmark Policy Guidelines*, we typically recommend shareholders vote against a director who:

- Serves as an executive officer[25] of any public company while serving on more than one additional external public company board;[26] or
- Serves as a 'full-time' or executive member of the board[27] of any public company while serving on more than two additional external public company boards; or
- Serves as a non-executive director on more than five public company boards in total.[28]

We will count non-executive board chair positions at European companies as two board seats given the increased time commitment generally associated with these roles.

Further, as executive directors will presumably devote their attention to the company where they serve as an executive, we will generally not recommend that shareholders vote against the election of a potentially overcommitted director at the company where they serve in an executive function. Similarly, we will generally not recommend that shareholders vote against the election of a potentially overcommitted director at a company where they hold the board chair position, except where the director:

- Serves as an executive officer of another public company; or
- Holds board chair positions at three or more public companies; or

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[24] Recommendation D.4 of the Kodex.
[25] This policy applies to directors that serve in the top executive team of a publicly-listed company (i.e., executive committee, management board, etc.).
[26] Pursuant to Recommendation C.5 of the Kodex, a supervisory board member who serves as an executive officer or management board member of any public company should not serve on more than two public company boards.
[27] This policy applies to directors that serve on a board in a 'full-time' or executive capacity without further defined responsibilities within the executive team (e.g., executive chair that is not a member of the executive committee, or a non-executive chair that serves in the role in a full-time capacity).
[28] Recommendation C.4 of the Kodex.

- Is being proposed for initial election as board chair at the company.

Nevertheless, we adopt a case-by-case approach on this issue, as described in our *Continental Europe Benchmark Policy Guidelines*.

Board Structure and Composition

Our policies with regard to board-level risk management, oversight and board diversity are not materially different from our *Continental Europe Benchmark Policy Guidelines*. In deviation from our *Continental Europe Benchmark Policy Guidelines*, we apply different standards for the election of former management board chairs to the supervisory board and board size.

Separation of the Roles of Management and Supervisory Boards

By law, members of the supervisory board cannot simultaneously serve as management board members, authorised representatives of the management board or company, or officers of the company,[29] except for a one-year transitional period under extraordinary circumstances.[30] Moreover, German law stipulates that former members of the management board may only serve as members of the supervisory board within two years after the end of their appointment if they are appointed by a motion presented by shareholders holding more than 25% of the voting rights in the company.[31] Lastly, in accordance with best practice standards in Germany, no more than two former members of a company's management board should serve on the supervisory board.[32]

Despite statements in German law and the Kodex cautioning against crossover between the management and supervisory boards, it was common practice until recently for German companies to appoint former management board members or executives to the role of supervisory board chair. Given that the purpose of the supervisory board is to provide oversight of the management board,[33] we strongly believe that an independent chair can better oversee executives and set a pro-shareholder agenda without the management conflicts that a former CEO, executive, or management board member often faces. Such oversight allows for a more proactive and effective supervisory board that is better able to protect the interests of shareholders.

We do not recommend that shareholders vote against former CEOs, executives or management board members who serve on or chair the supervisory board, unless the board is not sufficiently independent. However, we typically apply extra scrutiny to former executives who are proposed as candidates for election to the supervisory board. In line with best practice standards in Germany, we will generally recommend voting against the election of a current or recent[34] member of the management board to the supervisory board unless one of

[29] Article 105(1) AktG.

[30] Article 105(2) AktG. During such a transitional period, individuals may not engage in supervisory board duties.

[31] Article 100(2.4) AktG.

[32] Recommendation C.11 of the Kodex.

[33] Principle 6 of the Kodex. Pursuant to recommendation C.10 of the Kodex, the supervisory board chair should be independent from the company and its management board.

[34] In line with the legal provisions, we will consider any individual serving on the management board within the past two years as "recent" in the context of this policy.

the following criteria are fulfilled: (i) the company states that the nominee will not serve as chair; or (ii) the company provides a compelling rationale for why the nominee's service as supervisory board chair will support shareholder value creation, and the board is otherwise sufficiently independent. We generally encourage our clients to support the appointment of an independent chair whenever that question is posed in a proxy.

Size of the Supervisory Board

While we do not believe there is a universally applicable optimum board size, we do believe boards should have at least six supervisory board members (or three supervisory board members in the event of small-cap companies) to ensure sufficient diversity in decision-making and to enable the formation of key board committees with independent supervisory board members. Under German law, the maximum supervisory board size is 21 members,[35] which we believe to be reasonable.

Board Diversity

In December 2022, the EU Directive on Gender Balance on Corporate Boards[36] came into force and must be transposed by Member States into national law by December 2024. Member States are required to subject publicly-listed companies to the objective that at least 40% of non-executive positions, or 33% of an aggregate of executive and non-executive positions, be held by the underrepresented gender by June 30, 2026.

In line with our *Continental Europe Benchmark Policy Guidelines,* we generally expect the supervisory boards of all main market, CDAX-listed German companies to not be solely composed of directors of the same gender. Further, we expect the supervisory boards of all DAX and MDAX companies to be composed of at least 30% of gender diverse directors.[37] Where a proposed board election does not align with these targets, we will generally recommend that shareholders vote against the chair of the nominating committee (or equivalent); when director nomination decisions are taken at full-board level, we will instead generally recommend that shareholders vote against the re-election of the board chair or Lead Independent Director. In the case of a by-election, we will consider recommending that shareholders vote against the election of the new board nominee(s) of the overrepresented gender.

We will generally provide exceptions to these policies to supervisory boards consisting of four or fewer members where a company provides compelling disclosure as to why it has failed to ensure gender balance on the supervisory board. Further, we will take into account recent progress made to improve supervisory board diversity while maintaining the required balance of board skills and refreshment, when accompanied by a commitment to address the gender gap in upcoming election cycles.

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[35] Article 95 AktG stipulates that supervisory boards consist of between three and 21 supervisory board members, including employee representatives. The law further specifies the maximum number of supervisory board members allowable as follows: (i) a maximum of nine supervisory board members for a company with a nominal share capital of up to €1,500,000, (ii) a maximum of 15 supervisory board members for a company with a nominal share capital of up to €10,000,000, and (iii) a maximum of 21 supervisory board members for a company with a nominal share capital of more than €10,000,000.

[36] Directive 2022/2381 of the European Parliament and Council.

[37] Women, and directors that identify with a gender other than male or female.

Supervisory Board Gender Quota

Since January 1, 2016, German publicly-listed companies with 2,000 or more employees have been required to ensure that at least 30% of supervisory board seats are held by directors of each gender.[38]

In principle, this quota is intended to apply to the composition of the supervisory board as a whole. However, the shareholder representatives and the employee representatives on a company's supervisory board are permitted to lodge an objection to this overall compliance provision in advance of an election, subsequent to a resolution adopted by the majority of either group.[39] Should this occur, the shareholder representatives and employee representatives will be required to each meet the quota separately. When companies subject to this legislation are proposing elections to the supervisory board, they are required to disclose in the notice of meeting the minimum number of supervisory board seats that must be filled by directors of each gender in order to comply with the legislation as well as whether an objection has been lodged to meet separate quotas for shareholder and employee representatives.[40]

Given the consequences of board seats initially remaining empty if companies subject to the 30% quota fail to comply with the legislation, Glass Lewis may recommend voting against the nominating committee chair if forthcoming elections appear to contravene the gender quota provisions and no compelling justification is provided.

Management Board Gender Quota

Following a revision of the law, since August 2022, German publicly-listed companies with 2,000 or more employees and with a management board comprising more than three members are required to ensure the representation of at least one male and one female on the management board.[41] Companies subject to this legislation are not required to immediately comply with the requirement; current ongoing management board mandates can be continued until their scheduled end.[42]

Management and Supervisory Board Diversity Targets

The supervisory boards of German publicly-listed companies – regardless of size or employee headcount – are required to set target levels for the participation of women in both the supervisory board and management board.[43] While companies are afforded a large degree of flexibility in setting these targets, they are prohibited from setting targets for the proportion of women on each board that are lower than the current composition

[38] Article 96(2) AktG. Elections or appointments to the supervisory board that are not in compliance with this legislation will be legally invalid and the positions will remain vacant ("Fragen und Antworten zu dem Gesetz für die gleichberechtigte Teilhabe von Frauen und Männern an Führungspositionen in der Privatwirtschaft und im öffentlichen Dienst." Bundesministerium für Familie, Senioren, Frauen und Jugend). Empty seats due to non-compliance with the legislation are to be filled through a by-election or through an appointment by way of court order.

[39] Article 96(2) AktG.

[40] Article 124(2) AktG.

[41] Article 76(3a) AktG.

[42] Article 26l of the Introductory Act to the Stock Corporations Act (Einführungsgesetz zum Aktiengesetz).

[43] Pursuant to Article 222(5) AktG, companies that are already subject to a binding target for gender representation on either the supervisory board or management board are not required to set additional target values for the respective board.

unless women already account for at least 30% of the members of the respective board. Companies are required to report on the targets set on an annual basis and to disclose whether the targets were met.[44] Since July 2021, companies opting to set a target level of 0% for female representation for either board are required to provide a rationale for this decision.[45]

We will evaluate the sufficiency of a company's disclosure on a case-by-case basis and, in the event that we find the disclosure particularly lacking, especially in cases where the supervisory board comprises only male members and targets have not been met or are set at 0%, may recommend shareholders vote against the chair of the nominating committee (or equivalent) on this basis.

Board Oversight of Environmental & Social Issues

Glass Lewis believes that companies should ensure that boards maintain clear oversight of material risks to their operations, including those that are environmental and social in nature.[46] Accordingly, for large-cap companies and in instances where we identify material oversight concerns, Glass Lewis will review a company's overall governance practices and identify which non-executive directors or supervisory board-level committees have been charged with oversight of environmental and/or social issues.

We will generally recommend voting against the governance committee chair (or equivalent) of companies listed on the DAX index that fail to provide explicit disclosure concerning the supervisory board's role in overseeing material environmental and social issues.

Supervisory Board Committees

German public companies are required to establish an audit committee and are recommended to establish a nominating committee.[47] In Germany, planned amendments to the composition of key board committees are often not disclosed until after the supervisory board's initial meeting following the general meeting. Where the board has clearly disclosed its intentions with regard to post-AGM committee composition, we will take this into consideration in our analysis of the supervisory board.

Our policies with regard to committee performance are not materially different from our *Continental Europe Benchmark Policy Guidelines*. In deviation from our *Continental Europe Benchmark Policy Guidelines*, we make an exception in Germany for supervisory boards that do not form remuneration committees.

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[44] Article 111(5) AktG. Furthermore, pursuant to Article 76(4), the management boards of all German publicly- listed companies will be required to set target levels for the participation of women in the two tiers of management directly below the management board.
[45] *Ibid*.
[46] Principle 6 of the Kodex stipulates that the supervisory board's oversight of the management board includes sustainability issues.
[47] Principle 14 and recommendation D.4 of the Kodex and Article 107(4) AktG. Companies with supervisory boards consisting of three or fewer directors are not required to form a separate audit committee.

The Role of a Committee Chair

Glass Lewis believes that a designated committee chair maintains primary responsibility for the actions of their respective committee. As such, many of our committee-specific voting recommendations – as outlined in these guidelines and in further detail in our *Continental Europe Benchmark Policy Guidelines* -- are against the applicable committee chair rather than the entire committee (depending on the seriousness of the issue). In cases where the committee chair is not up for election due to a staggered board, and where we have identified substantial or multiple concerns, we will generally recommend voting against a long-serving committee member that is up for election, on a case-by-case basis. In cases where we would ordinarily recommend voting against a committee chair but the chair is not specified, we apply the following general rules, which apply throughout our guidelines:

- If there is no committee chair, we recommend voting against the longest-serving committee member or, if the longest-serving committee member cannot be determined, the longest-serving board member serving on the committee (i.e., in either case, the “senior director”); and
- If there is no committee chair, but multiple senior directors serving on the committee, we recommend voting against both (or all) such senior directors.

Audit Committee

For an audit committee to function effectively on investors’ behalf, it must include members with sufficient knowledge to diligently carry out their responsibilities. We believe that companies should clearly outline the skills and experience of the members of the audit committee, and that shareholders should be wary of audit committees that include members that lack the requisite expertise.

The Kodex recommends that the audit committee chair should be independent from the company, its management and, if applicable, the controlling shareholder. In addition, the audit committee chair should not also chair the supervisory board and should have "specific knowledge and experience" of accounting principles and the internal control process.[48] Further, it is required that at least one supervisory board member has expertise in financial accounting, and a separate supervisory board member has expertise in auditing.[49] When we have been unable to determine the representation of financial accounting and auditing expertise on the audit committee, or the supervisory board as a whole, through the director biographies and disclosure provided by a company, we may recommend that shareholders vote against the re-election of the audit committee chair and/or other committee members standing for re-election.

Remuneration Committee

While the formation of a remuneration committee is established market practice in Germany, we are mindful that the Kodex does not specifically recommend the formation of a remuneration committee and clarifies the

[48] Recommendations C.10 and D.3 of the Kodex.
[49] Article 100(5) AktG.

responsibility of the supervisory board as a whole for a company's remuneration practices.[50] As such, when assessing the performance of the supervisory board with regard to remuneration policy oversight, a vote against the supervisory board chair may be merited due to failure to comply with best practice in Germany (please see “Management Board Remuneration” section). If, however, a company forms a remuneration committee that bears more responsibility for remuneration oversight than the supervisory board as a whole, we believe that a higher level of accountability for remuneration issues should be attributed to the remuneration committee chair.

Election Procedures

Our policies with regard to election procedures are not materially different from our *Continental Europe Benchmark Policy Guidelines*. The following are clarifications regarding best practice recommendations in Germany.

Classified Supervisory Boards and Term Lengths

Under German law, supervisory board members may be elected for a maximum term of five years.[51] German companies have historically broadly proposed the election of supervisory board members for the maximum term permissible under German law. Further, companies may propose the (re)-election of all supervisory board members at the same time for concurrent terms or on a staggered basis.

Glass Lewis believes that shareholder representatives on the supervisory board that are required to regularly stand for re-election are more accountable to the shareholders they represent. While we recognise historic market practice in Germany, we note that German companies are increasingly nominating supervisory board members for terms shorter than the legal maximum, with most DAX and MDAX companies now proposing election terms of four years or fewer.

Given the evolution in local market practice, we generally believe that German companies should provide shareholders with compelling rationale when proposing the election or re-election of supervisory board members for five-year terms. Where a DAX or MDAX company is proposing supervisory board elections for five-year terms without providing compelling rationale for doing so, we will generally recommend that shareholders vote against the re-election of the nominating committee chair. Where any other CDAX company is proposing the same without compelling rationale, we will note a concern and may recommend that shareholders vote

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[50] Recommendation C.10 of the Kodex acknowledges the fact that a number of German supervisory boards have established committees that addresses management board remuneration, and calls for the chair of such committees to be independent of the company and management. However, Principle 23 of the Kodex and Article 87 AktG clarify that the entire supervisory board is responsible for designing a clear and comprehensible management board remuneration system and determining the actual remuneration of each management board member.

[51] Article 102(1) AktG. The maximum election term for supervisory board members may not exceed the general meeting that decides on the ratification of board acts for the fourth fiscal year following the year in which the appointment is made (in practice, generally the fifth annual meeting following the appointment).

against the re-election of the nominating committee chair should we have further concerns with the composition or performance of the nominating committee.

In line with our *Continental Europe Benchmark Policy Guidelines*, when we have serious concerns regarding the actions of the supervisory board and none of its members is up for election, we may recommend that shareholders hold the board accountable through a vote against the ratification of supervisory board acts.

Election of Supervisory Board Members as a Slate

German companies are recommended to elect supervisory board members individually.[52] Given that most companies comply with this best practice, we recommend voting against any election that is clearly proposed as a slate.

Announcement of Supervisory Board Chair Candidate

In cases where the supervisory board chair is due to leave the board at an annual meeting, German companies will generally disclose which of the nominees or incumbent board members is to take over the supervisory board chair position.[53]

However, where a candidate to take over this position has not been disclosed, we will analyse supervisory board nominees under the assumption that each nominee is a potential candidate for the supervisory board chair position. This may, in particular, affect our analysis and recommendations of nominees that held a recent position on the Company's management board or who have a number of additional commitments at other publicly-listed companies. As such, in cases where a former executive of a company is being proposed for election to the supervisory board, we believe that shareholders can reasonably expect clear disclosure from the supervisory board regarding this individual's intended role on the board.

Partnership Limited by Shares (Kommanditgesellschaft auf Aktien, or KGaA)

Under German law, a publicly-traded company may be both a limited partnership and a stock corporation. This unique hybrid company structure, the *Kommanditgesellschaft auf Aktien*, or KGaA, is utilised infrequently in comparison with the more common German public stock corporation (Aktiengesellschaft, or AG) structure. In general, Glass Lewis believes that the KGaA company form is not conducive to promoting accountability to shareholders or best practices for corporate governance. The structure of a KGaA creates the possibility for management, through the limited partnership, to exercise disproportionate control over a company's governance structure. Specifically, the supervisory board of a KGaA does not have the power to hire or fire

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[52] Recommendation C.15 of the Kodex.

[53] Article 5.4.3 of the 2017 version of the Kodex recommended that "candidates for the Supervisory Board Chair shall be announced to shareholders". However, the 2022 version of the Kodex no longer contains a comparable recommendation.

management, in contrast with the supervisory board of an AG. The supervisory board's role at a KGaA is to consult with management on issues related to shareholders' interests. Given the substantially reduced supervisory board authority under the KGaA company form, Glass Lewis generally does not support proposals to transform a company from an AG, or other comparable legal form, to a KGaA.

Notwithstanding our unfavourable view of the KGaA from a shareholder rights' perspective, we believe that most shareholders of a KGaA both understand and accept that the structure's legal form of company differs from that of an AG, or any comparable legal form. As such, we will not apply the same independence standards to the supervisory board or committees of a KGaA that we apply to companies incorporated in a more typical stock corporation form, such as an AG. Given the varying capital structure possibilities of a KGaA, we approach each KGaA on a case-by-case basis. However, we generally believe that the supervisory board of a KGaA should reflect the company's shareholder structure. In addition, we note that the supervisory board of a KGaA is not responsible for oversight of the company's financial reporting,[54] thereby rendering the formation of an audit committee less relevant. As such, we will exempt companies incorporated in the form of a KGaA from the requirement that they form an audit committee of the supervisory board if the company has an adequately independent committee responsible for overseeing the audit of the company's financial statements within another governing body of the company. If a KGaA chooses to form an audit committee of the supervisory board, we will evaluate its composition based on the responsibilities assigned to the committee.

Supervisory Board Composition and Candidate Disclosure

In accordance with recommendation C.14 of the Kodex, the vast majority of German listed companies publish biographical details about new nominees to the supervisory board prior to the general meeting, including statements on any relationships between a nominee and a major shareholder. This information should be updated annually and available on the company's website.

Furthermore, the supervisory board is recommended to prepare a profile of skills and expertise (*Kompetenzprofil*) for the entire supervisory board. Pursuant to the updated Kodex, the profile of skills and expertise should be disclosed in the format of a qualification matrix and include "sustainability" as an area of expertise.[55]

Given the substantial improvements to the information provided around supervisory board elections in Germany, we may consider recommending against the reelection of the nominating committee chair in cases where there are supervisory board elections and shareholders have not been provided with meaningful

[54] Article 286(1) AktG.
[55] Recommendation C.1 of the Kodex.

information on the supervisory board's skills and expertise profile and an independence classification of incumbent supervisory board members.[56]

We may also recommend that shareholders vote against the reelection of the nominating committee chair if disclosure of the backgrounds and relevant qualifications of incumbent and proposed supervisory board members is substantially below best practice. This shall apply in particular in cases where the board fails to maintain current and detailed curriculum vitae of its incumbent and proposed members, or fails to disclose personal and business relationships between board candidates and a company's corporate bodies and/or shareholders with a material interest.[57]

We will provide an explicit assessment of skills and experience of shareholder representatives and nominees to the supervisory board for DAX companies with board elections. The purpose of this assessment is to provide further insight into the board refreshment process and allow for a more in-depth assessment of the composition of the supervisory board. While no specific voting recommendation policies are linked to the outcome of this assessment, we may utilise potential skills gaps to underline specific concerns with board or company performance and to assist case-by-case decisions when applying supervisory board election policies.

[56] This policy will generally be applied to constituents of the DAX, MDAX, and SDAX indices only. For boards without a nominating committee, we will generally attribute accountability to the supervisory board chair or the chair of an additional board committee which appears to hold a substantial level of responsibility for the composition of the board.

[57] Recommendation C.13 of the Kodex recommends the disclosure of personal and business relationships of every candidate with the company, the governing bodies of the corporation and any shareholders with a direct or indirect stake of more than 10% of a company's voting rights.

Transparency and Integrity in Financial Reporting

In Germany, shareholders are presented with the audited financial statements for the past fiscal year and are asked to vote on the appointment of the statutory auditor and the allocation of profits on an annual basis.[58] While we have outlined the principal characteristics of these types of proposals that we encounter in Germany below, our policies regarding these issues are not materially different from our *Continental Europe Benchmark Policy Guidelines*.

Accounts and Reports

In Germany, a company's audited consolidated and non-consolidated financial statements and the non-financial statements must be approved by the supervisory board and subsequently presented to the management board within two months of the receipt of the independent auditor's report.[59] Following approval by the management and supervisory boards, the audited financial and non-financial statements are presented to shareholders at the annual meeting, which must be held within eight months of the close of the fiscal year.[60] However, shareholders will be asked to approve the submitted financial statements under the following three circumstances: (i) when the management and supervisory boards cannot agree on the approval of the financial statements; (ii) when the management and supervisory boards decide, for any reason, that the annual meeting will have the final authority to approve the financial statements;[61] or (iii) if the company's legal form is a partnership limited by shares (KGaA).[62]

Allocation of Profits/Dividends

In accordance with German law, companies may choose to allocate their profits to one or more of the following categories, subject to shareholder approval: (i) a dividend paid to shareholders; (ii) revenue reserves; (iii) retained earnings; or (iv) unappropriated net profits.[63] In any case, not more than half of a company's annual profits may be allocated to revenue reserves without explicit shareholder approval.[64] Additionally, a German company's articles may contain provisions that allow management to make an advance dividend payment based on annual financial statements, up to half of the company's reported net profits, with the approval of the supervisory board.[65]

[58] Article 119 AktG.
[59] Article 171 AktG. Exemptions for non-financial reporting requirements apply to companies which are not part of the regulated market (§289b HGB and §264d HGB).
[60] Article 175(1) AktG.
[61] Articles 172 and 173(1) AktG.
[62] Article 286(1) AktG.
[63] Article 170(2) AktG.
[64] Article 58(2) AktG.
[65] Article 59 AktG.

The Link Between Pay and Performance

Following the implementation of Shareholder Rights Directive II (SRD II) into German law, finalised on December 12, 2019, and the entry into force of the revised Kodex, companies are mandated to seek shareholder approval of the remuneration policy at least every four years (or upon implementation of material amendments) and of the remuneration report every year. Both votes are advisory;[66] however, should the remuneration policy not receive the support of a majority of votes cast, companies are required to review the policy and present it for another shareholder vote at the following annual meeting at the latest.[67]

Votes on Remuneration (Say-on-Pay)

The remuneration policy and report must cover remuneration arrangements for both executive and non-executive directors. While companies may present a single remuneration policy vote to the general meeting, we generally believe that providing separate proposals for approval of the remuneration policy for the management board and for the supervisory board allows for a more meaningful vote. Where a company seeks approval of the policies in a single proposal and we have identified substantial concerns with the proposed remuneration policy for either the management board or the supervisory board, we will generally recommend that shareholders vote against the proposal.

In addition, shareholders of German companies are regularly asked to approve changes to supervisory board fee policies and equity remuneration plans for employees. Our policies regarding these matters do not differ materially from our *Continental Europe Benchmark Policy Guidelines*.

Our policies regarding the terms of an executive pay system and report do not differ materially from our *Continental Europe Benchmark Policy Guidelines*. However, we do account for a company's compliance with legal requirements and best practice in Germany, as described below, when evaluating these proposals.

Management Board Remuneration Policy

Glass Lewis's analysis and recommendation of a remuneration policy proposal are focused on the structure of the pay package, as detailed in our *Continental Europe Benchmark Policy Guidelines*. Furthermore, when assessing a remuneration structure, its disclosure and any related amendments, we will focus our recommendation on the overall effect of structural changes, as well as on any improvement or deterioration in disclosure, taking into consideration the general "direction of travel" in the proposed policy.

Some of the issues we will consider when analysing remuneration policies that may contribute to a negative recommendation are as follows:

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[66] Article 120a(1, 4) AktG. Principle 24 of the Kodex. Pursuant to Article 120a(5) of the AktG, small- and medium-size companies as defined by Article 267(1-2) of the German Commercial Code may opt to present the remuneration report to the general meeting as discussion item, rather than voting item.

[67] Article 120a(3) AktG.

- Variable remuneration components are not based on the achievement of operating and strategic performance targets, which may be financial and non-financial in nature, as well as company-wide or individual, as defined by the supervisory board in the remuneration policy;[68]
- Financial and non-financial performance criteria, the selection process and vesting mechanisms thereof, are not sufficiently disclosed;[69]
- The remuneration policy is not suitably linked to the company's strategic priorities and oriented to long-term performance and sustainability;[70]
- According to the targeted pay mix, the relative weight of fixed and short-term remuneration elements significantly exceeds the weight of long-term variable elements and no compelling rationale is provided for such imbalance;[71]
- The maximum payout opportunity for each management board member is not adequately disclosed;[72]
- Severance agreements are capped at more than twice the management board member's total annual remuneration or the remaining term of their contract, do not account for additional non-competition payments,[73] or allow for payments exceeding the aforementioned cap if stipulated under special termination rights linked to a change in control;[74]
- The supervisory board does not retain discretion to reduce, withhold or reclaim management board members' remuneration to account for extraordinary developments;[75]
- The supervisory board retains discretion to allocate extraordinary awards outside the regular incentive plans and outside the deviations allowed by law to safeguard the long-term wellbeing of the company;[76]
- The remuneration policy does not include disclosure detailing the terms of any deferral periods, recovery provisions, vesting restrictions on share-based awards, annual pension contributions, severance agreements and treatment of outstanding long-term awards upon termination;[77]
- Substantial increases in target and/or maximum pay opportunity are attributed solely to benchmarking exercises without further discussion or rationale;[78]
- The remuneration policy does not include disclosure detailing how the system was amended and how shareholder feedback on the system was taken into account;[79]

[68] Recommendations G.1 and G.7 of the Kodex.
[69] Article 87a(4) AktG.
[70] Article 87a(1) AktG and Recommendation G.6 of the Kodex. Additionally, in July 2018 a group of German Corporate Governance experts published "Guidelines for Sustainable Management Board Remuneration Systems", highlighting the importance of linking executive pay to long-term sustainability.
[71] Recommendation G.6 of the Kodex.
[72] Article 87a(1) AktG and Recommendation G.1 of the Kodex.
[73] Recommendation G.13 of the Kodex.
[74] Recommendation G.14 of the Kodex.
[75] Recommendation G.11 of the Kodex.
[76] Article 87a(2) AktG.
[77] Article 87a (5-8) AktG.
[78] Recommendations G.2 and G.3 of the Kodex.
[79] Article 87a(11) AktG.

- The remuneration policy does not include disclosure detailing how the remuneration of the company's wider workforce was taken into consideration when setting the levels of management board members' pay;[80] and
- Material shareholder dissent on the remuneration system is not sufficiently addressed.

Since members of German management boards are appointed for multi-year terms of up to five years, some companies opt to implement a newly approved remuneration policy only upon the renewal of the executive's contract. In light of this common market practice and the binding nature of ongoing contracts, we will not recommend shareholders to vote against a remuneration policy proposal on this basis alone. However, we believe implementing a new or amended remuneration policy for all management board members at the same time generally fosters transparency and accountability, avoiding the creation of a complex incentive system with overlapping structures, and thereby facilitating shareholders' understanding of the system being applied in each given year. Furthermore, if the new policy is being proposed in response to structural concerns previously expressed by shareholders, a partial or staggered implementation of it could result in shareholders' concerns being only partially addressed in the immediate future, while some executives continue being granted the same pay elements that had been criticised by shareholders for the remaining duration of the current mandates.

In light of these considerations, we expect companies that opt for a staggered implementation of their new remuneration policy to disclose: (i) which amendments were implemented and for which management board members;[81] (ii) which amendments were not implemented and why; and (iii) the timeline of implementation of pending amendments for the relevant management board members. Additionally, should the new policy represent a direct response to investors' dissent, we believe companies should explicitly take this issue into account in their disclosures, for example by detailing the feedback received by top free-float shareholders on this matter or providing a cogent rationale for the supervisory board's decision.

Severance Policy

While we recognise that neither the law nor the Kodex provide a specific definition of the elements comprised in the severance cap of two times "total annual remuneration", we believe shareholders can reasonably expect companies to disclose if and what fixed and variable pay elements can be included in the determination of such amount.

Some companies allow for full vesting of outstanding long-term awards after an executive's termination. In line with international best practice, the size of long-term awards granted prior to termination and not yet vested should be reduced proportionately to the time served until termination. Post-vesting or post-termination holding periods imposed on the remaining portion of a grant may serve to ensure the executive's interests remain aligned with those of the company's shareholders for a time following their termination.

Further, as outlined in our *Continental Europe Benchmark Policy Guidelines*, severance payments should generally be limited to two years fixed salary and not be paid in the event of inadequate performance or voluntary departure. While we apply local best practice standards and recommendations when analysing

[80] Article 87a(9) AktG and Recommendation G.4 of the Kodex.
[81] Article 162(1)1 AktG.

severance payments and provisions, we believe substantial deviations from the above cap should be justified by supporting disclosure.

Finally, we believe shareholders can reasonably expect companies to differentiate their severance policies based on the possible circumstances of a management board member's departure (i.e., resignation with or without good cause, termination by mutual agreement, termination with or without good cause) and to provide clear disclosure of the particular severance provisions in each of these scenarios.

Management Board Remuneration Report

Glass Lewis's analysis and recommendation of a remuneration report proposal are focused on the implementation of the remuneration structure during the preceding fiscal year and on the disclosure thereof, as detailed in our *Continental Europe Benchmark Policy Guidelines*. Additionally, according to German law, a remuneration report must be clear and understandable, and include the remuneration granted and paid during the past fiscal year to each current and former member of the supervisory board and management board of the company and its subsidiaries.[82]

Some of the issues we will consider when analysing remuneration reports that may contribute to a negative recommendation are as follows:

- The remuneration report does not contain clear disclosure detailing how target, maximum and actual remuneration amounts for each management board member were determined;[83]
- The remuneration report does not contain disclosure detailing the relative weight of each component of the pay package[84] and how each component supports the company's strategy and long-term development;[85]
- The relationship between granted and vested remuneration, the underlying levels of target performance achievement and the final size of vested awards are not comprehensible;[86]
- Performance goals were lowered during the performance period;[87]
- The supervisory board approves excessive and/or egregious termination payments, i.e., severance payments exceeding two years of total annual remuneration or large severance payments which fall within the aforementioned limit but are accompanied by full vesting of outstanding long-term awards and/or other compounding concerns (e.g., material reservations regarding a company's executive succession planning, resignation or other termination cause attributable to the departing executive, full vesting of outstanding replacement or sign-on awards granted upon appointment or retention awards).

[82] Articles 87a(1) and 162(1) AktG, Article 285(9) HGB, and Principle 24 of the Kodex. Prior to the revision of the AktG, companies were permitted to seek shareholder approval to omit individual disclosure of management board members' remuneration; this is no longer permissible.

[83] Article 162(1) AktG and Recommendation G.1 of the Kodex.

[84] Articles 87a(1) and 162(1) AktG and Recommendation G.1 of the Kodex.

[85] Article 162(1) AktG and Principle 24 of the Kodex.

[86] Recommendations G.1 and G.9 of the Kodex.

[87] Recommendation G.8 of the Kodex.

In our assessment of the size and circumstances of termination payments, we will consider the rationale and disclosure provided;

- The remuneration report does not include a five-year comparison of annual remuneration for the highest paid management board member, company performance and average full-time equivalent employee pay;[88]
- The remuneration report does not include disclosure detailing any deviations from the management board remuneration policy resolved on by the supervisory board during the preceding fiscal year, including an explanation of why said deviations were deemed necessary.[89]

With regard to the five-year comparison between CEO pay and average employee pay, we recognise that German companies have adopted a variety of disclosure formats, including the practice of solely disclosing the year-on-year percentage increases in pay for the CEO and employees. In line with emerging best practice in Europe and globally, we believe disclosure of the actual ratio or of the respective monetary values represents a more meaningful information for shareholders.

Lastly, in light of local and European best practice, we expect companies to explicitly address any feedback received from shareholders in their remuneration report should a say-on-pay proposal at the previous annual meeting receive significant opposition. In line with our *Continental Europe Benchmark Policy Guidelines*, we will generally consider an against vote greater than 20% of votes cast to be significant, while taking into account the ownership structure and any mitigating circumstances around the specific vote when making this determination.

Disclosure of Earned/Paid Remuneration

The former version of the Kodex provided two templates for the disclosure of individual management board members' annual granted and allocated remuneration, broken down by element and minimum, target and maximum value of awards granted in the relevant fiscal year. This recommendation was removed from the new version of the Kodex; at the same time, the revised Stock Corporations Act does not include alternative disclosure requirements in this regard. Absent an alternative recommended method, we believe continuing to disclose management board remuneration using the Kodex model tables generally facilitates comprehension. Regardless of the template chosen by each company, in line with emerging best market practice, we expect companies to present each table with an explanation of the values included, in particular with regard to the relevant performance period for variable short-term and long-term awards (i.e., whether the reported short- and long-term incentive figures reflect the value of granted, vested or paid out awards, and/or to which performance year(s) each relates).

With regard to *allocated* remuneration, we recognise variable pay entitlements for a fiscal year are often finalised after the end of the reporting period and companies may opt to disclose awards *paid out*[90] -- rather than *earned* (or *vested*) -- in the reporting year. Nonetheless, we believe the disclosure of amounts earned better aligns with international best practice and fosters comparability with a company's international industry

88 Article 162(1)2 AktG.

89 Article 162(1.5) AktG.

90 "Paid out" awards generally relate to awards vested in the fiscal year preceding the fiscal year under review.

peers, while also allowing for a more meaningful assessment of the link between pay and performance in the year under review.

Given that the disclosure of both awards earned and paid, on a voluntary basis, has now evolved as local best practice, should a board decide to omit disclosure of awards earned in favour of awards paid out during the year under review, we would expect the company to explicitly address this issue and provide a compelling explanation of why it has omitted such disclosure, as well as information on the estimated target achievement level of vested awards and a commitment to disclose the exact realised value of the awards in the following year's report. Absent such disclosure, we may consider recommending against the approval of the remuneration report.

Supervisory Board Remuneration

As with the management board remuneration policy, German companies are required to seek shareholder approval of the remuneration policy for the supervisory board at least every four years or whenever material amendments are made. In addition, companies are required to seek annual shareholder approval of the remuneration report, comprising information on supervisory board remuneration.[91] Both votes are of an advisory nature. Prior to the transposition of SRD II, German companies were required to either seek annual approval of the fees to be paid to supervisory board members, or to include the remuneration policy for supervisory board members in their articles of association and seek shareholder approval for any changes. Most German companies continue to include the remuneration policy for supervisory board members in their articles of association. Given the new legal requirement for shareholder approval of the supervisory board remuneration policy, Glass Lewis will generally recommend supporting proposals to remove the supervisory board remuneration policy from a company's articles of association.

The Kodex recommends that supervisory board members should receive fixed remuneration only, but that if performance-related remuneration is granted, it shall be geared to the long-term development of the company.[92] Further, the European Commission cautions that significant additional remuneration, particularly in the form of participation in a share option or any other performance-related pay scheme, is capable of compromising the independence of non-executive directors.[93]

Further, as outlined in our *Continental Europe Benchmark Policy Guidelines*, we believe that the supervisory board should provide a compelling rationale for any substantial increases to the fees of non-executive directors, particularly when the current or proposed fees exceed those paid to market peers.

Our policies regarding the terms of supervisory board remuneration proposals do not differ materially from our *Continental Europe Benchmark Policy Guidelines*. While we generally believe that shareholders are best served when supervisory board members receive fixed remuneration only, in line with the recommendations of the

[91] Article 113 AktG. Exceptions apply to companies not part of the regulated market.
[92] Recommendation G.18 of the Kodex.
[93] European Commission Recommendation 2005/162/EC.

Kodex,[94] we may accept limited performance-based awards, so long as such awards are based on clearly-defined, multi-year performance criteria and geared toward the long-term sustainable development of the company.

[94] Recommendation G.18 of the Kodex.

Governance Structure and the Shareholder Franchise

In Germany, shareholders are asked to approve proposals regarding a company's governance structure, as well as the ratification of management and supervisory board acts and amendments to the articles of association. While we have outlined the principal characteristics of these types of proposals that we encounter in Germany below, our policies regarding these issues are not materially different from our *Continental Europe Benchmark Policy Guidelines*.

Ratification of Supervisory & Management Board Acts

For up to eight months after the end of a fiscal year, German companies may request that shareholders discharge the members of the supervisory board and/or management board from any and all of their actions during the past fiscal year. Shareholders holding at least 10% of a company's share capital, or shares with an aggregate nominal value of at least €1 million, may request that individual members of the supervisory or management boards be discharged separately.[95]

In Germany, ratifying the acts of the management and supervisory boards is primarily a vote of confidence and does not release its members from liability for their actions; directors may still be held liable for any tortious or negligent act committed in the performance of their duties. In accordance with best practice in Germany, we believe the ratification of management and supervisory board acts should be presented as a separate voting item for each individual board member in cases where there are known shareholder concerns regarding a board or individual's performance during the past fiscal year. In cases where we would have recommended that shareholders vote against the ratification of an individual board member, but shareholders are only provided with the opportunity to ratify the board as a whole, we will generally recommend that shareholders oppose ratification for the entire board.

In cases where we believe that ongoing investigations or proceedings may cast significant doubt on the performance of the management or supervisory board in the past fiscal year, but that the potential outcome of such investigations or proceedings is unclear at the time of convocation of the general meeting, we believe that companies should propose that a decision on ratification be postponed until a future general meeting. If shareholders are not provided with this opportunity, we will generally recommend that shareholders abstain from voting on such ratification proposals; in cases where abstain votes are neither counted as valid votes cast nor displayed in the minutes of general meetings, we will generally recommend that shareholders vote against ratification proposals under the aforementioned circumstances.

[95] Article 120(1) AktG.

Absent compelling evidence that the management and supervisory board has failed to satisfactorily perform its duty to shareholders in the past fiscal year, we generally recommend that shareholders approve ratification proposals.[96]

Ownership Reporting Requirements

German law requires that any shareholder whose percentage ownership of outstanding shares or voting rights in a company rises above or falls below the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50%, or 75% disclose their shareholdings within four trading days of the acquisition or sale.[97] The management board is then required to disclose this information to shareholders.

In addition, shareholders who cross the 10% ownership threshold are required to disclose the following information within 20 trading days of the acquisition:[98] (i) whether the acquisition was motivated by a trading profit goal or a strategic investment decision; (ii) whether the shareholder intends to acquire further voting rights in the next 12 months; (iii) whether the shareholder intends to influence the composition of the company's board or management; and (iv) the shareholder's intentions with regard to the company's capital structure, financing and dividend policy. In addition, the shareholder must reveal the source of his or her financing for the acquisition, especially whether the acquisition was financed through debt or equity. Lastly, the shareholder must update the company if any of the four aforementioned intentions change, for as long as the shareholder maintains ownership of at least 10% of the voting rights. The company, in turn, is required to make all of the aforementioned information public.

Exemptions from Ownership Reporting Requirements

In accordance with German law, companies may request an exemption[99] from the increased reporting requirements mentioned above for shareholders who cross the 10% ownership threshold. In general, we believe that exempting certain companies from market-wide disclosure requirements may disadvantage shareholders of the companies that seek such exemptions. We are especially concerned that seeking an exemption from required reporting standards may create the opportunity for management and/or major shareholders to act in their own interests to the exclusion of the interests of minority shareholders. As such, we will generally not support proposals seeking an exemption from reporting requirements, unless management provides a specific and justifiable reason and the exemption will not harm minority shareholders' interests.

[96] Recommendations on the ratification of management and supervisory board acts are taken on a case-by-case basis. The general conditions for recommendation against such proposals are detailed in our *Continental Europe Benchmark Policy Guidelines*.

[97] Article 33(1) of the German Securities Trading Act (Gesetz über den Wertpapierhandel or WpHG).

[98] Article 43(1) WpHG.

[99] Article 43(3) WpHG allows companies to seek an exemption through an amendment to the articles of association approved by shareholders.

Restrictions on Share Registration

Under certain conditions, German companies may impose registration restrictions on shareholders who own shares through an intermediary. Companies may seek shareholder approval to amend the articles of association in order to implement one of the following restrictions:[100] (i) an absolute cap on the number of shares that may be entered into the share register under the name of a deposit institution that is not the direct beneficial owner of the shares; (ii) an absolute cap on voting rights assigned to shares registered in the name of a deposit institution; (iii) a duty to disclose specified identifying information for beneficial owners that exceed a certain threshold; or (iv) a suspension of voting rights for shareholders who do not comply with a company's disclosure requirements. In our view, shareholders should have the right to vote in direct proportion to their holdings. While we believe that shareholders should fully disclose their holdings in accordance with the law, we do not support restricting shareholders' voting rights beyond what is required by law. As such, we will not support proposals that seek to restrict shareholders' voting rights in any way.

Supermajority Vote Requirements

German law requires the support of a supermajority of votes cast on certain voting decisions at shareholder meetings in order for the motion to be passed; however, we will generally recommend voting against any proposal that extends this supermajority requirement to decisions not stipulated by law, except where the relevant provision is designed to protect minority shareholders. German companies can generally establish a lower threshold in their articles of association than is required by law to approve certain voting items. In cases where a company seeks to abolish supermajority voting requirements we will evaluate such proposals on a case-by-case basis. In certain instances, amendments to voting requirements may have a deleterious effect on shareholders rights where a company has a large or controlling shareholder. We will consider a broad range of factors including the company's shareholder structure; quorum requirements; impending transactions — involving the company or a major shareholder — and any internal conflicts within the company.

Disclosure of General Meeting Vote Results

Glass Lewis believes that access to detailed vote results from general meetings is important for shareholders in conducting their stewardship duties. Specifically, we believe that the disclosure of vote results assists shareholders in gaining a better understanding of the outcome of general meetings, establishing engagement priorities, and tracking companies' responses to material (minority) shareholder dissent on any of the agenda items. We believe that the non-disclosure of vote results can serve to disenfranchise minority shareholders, in particular at companies with a multi-class share structure or a controlling shareholder.

In Germany, the disclosure of vote results from a shareholder meeting represents an established best practice. Accordingly, we will note a concern in our analysis of the composition of boards of directors at companies that did not disclose vote results from their previous annual meeting. At DAX and MDAX companies that did not

[100] Article 67 AktG.

disclose vote results from their previous annual meeting, we will generally recommend that shareholders vote against the re-election of the chair of the governance committee or equivalent (i.e., board chair or Lead Independent Director).

Virtual Meetings

German public companies have traditionally held in-person shareholder meetings. Due to the COVID-19 pandemic, Germany established temporary provisions, which allowed companies to hold a virtual AGM until August 2022. In July 2022, the German Stock Corporations Act has been amended to include revised long-term regulations for virtual meetings.

In order to be able to hold virtual-only or hybrid meetings, German companies are required to seek shareholder approval to amend their articles of association and include a provision on virtual meetings, which will either allow the Company to generally hold virtual meetings or the management board to decide on the meeting format. The authorisation will be valid for a maximum of five years, after which the authorisation would need to be renewed.[101]

In particular, companies holding a virtual general meeting have to comply with the following provisions:

- Shareholders must be able to follow the meeting via audio and video transmission;[102]
- Shareholders must be able to exercise their voting rights by means of electronic communication (electronic participation or electronic postal voting) and by granting a power of attorney;[103]
- Shareholders must be able to submit countermotions, election proposals, or other substantive motions by means of video communication;[104]
- A company may decide to limit shareholders' ability to submit questions to the period preceding the meeting instead of allowing questions exclusively during the meeting. In that case, the management board may stipulate that questions have to be submitted no later than three days prior to the meeting; the submitted questions will need to be answered and published no later than one day prior to the meeting.[105] Shareholders must be granted the right to ask follow-up questions to previously submitted questions during the meeting.[106]
- Shareholders must be able to submit comments on the items of the agenda by means of electronic communication no later than five days prior to the meeting. The submitted comments must be made available to all other shareholders no later than four days prior to the general meeting.[107]

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[101] Article 118a(1 and 5) AktG.
[102] Article 118a(1-1) AktG.
[103] Article 118a(1-2) AktG.
[104] Article 118a(1-3) AktG.
[105] Article 118a(1-4) AktG in conjunction with Article 131(1a and 1c) AktG.
[106] Article 131(1d) AktG.
[107] Article 130a(2-3) AktG.

- Shareholders must be granted the right to speak at the general meeting by way of video communication.[108]

While management board members will be required to attend the meeting in-person, companies may ask for shareholder approval to amend the articles of association in order to allow supervisory board members to attend the meeting virtually.[109]

Our policies regarding virtual shareholder meetings do not differ materially from the *Continental Europe Benchmark Policy Guidelines*. However, we are mindful that German law leaves companies the option to set some limitations to shareholders' ability to submit questions before or during the general meeting. As such, we believe companies should proactively provide clear disclosure of the envisaged terms of shareholders' participation in virtual meetings and any restriction thereto when seeking shareholder approval of the relevant article amendments, including a clear indication of when (or until when) shareholders will be able to submit questions and, if time limits are imposed, a rationale for such limits.

Additionally, given the potentially broad scope and lengthy term of the authorisation, we believe shareholders would benefit from additional disclosure clarifying the board's intended usage of virtual meetings over the term of the authority. Similarly, given the concerns raised by some shareholders on virtual meetings, we believe shareholders can reasonably expect companies to disclose the reasons for which the board has elected to hold the meeting in this manner.

Further, as outlined in our *Continental Europe Benchmark Policy Guidelines*, we believe that companies should actively engage with their shareholders on the topic of shareholder meeting format. In egregious cases where a board has failed to address legitimate, publicly disclosed shareholder concerns regarding the manner in which the company is holding its shareholder meetings, we may recommend that shareholders vote against the re-election of accountable directors, or other matters up for a shareholder vote, as appropriate.

Lastly, our policy on the virtual participation of supervisory and management board members at general meetings remains in line with the *Continental Europe Benchmark Policy Guidelines.* As such, we expect companies to explicitly limit this possibility to virtual-only meetings and/or extraordinary circumstances.

[108] Article 130a(5) AktG.
[109] Article 118(3) AktG.

Capital Management

In Germany, shareholders are regularly asked to approve capital proposals, namely increases in authorised and conditional capital, the issuance of convertible debt instruments and the authority to repurchase shares. Such authorities generally extend for five years. Our policies with regard to these matters do not differ materially from our *Continental Europe Benchmark Policy Guidelines*.

Authorised Capital

German companies generally ask shareholders to approve an unallocated pool of authorised but unissued shares, which may be issued with or without preemptive rights.[110] Shares issued pursuant to these authorities may be used for a broad range of corporate purposes, including raising funds for expansion plans, refinancing existing loans, or carrying out mergers and acquisitions. By law, a company's authorised capital may not exceed 50% of a company's issued share capital and is valid for a maximum period of five years.[111] Best practice in Germany, although not specifically stated in any codified recommendations, provides that preemptive rights should be preserved for share issues from authorised capital in excess of 20% of issued share capital at the date of approval. As such, and in line with our *Continental Europe Benchmark Policy Guidelines*, we will generally recommend voting against any authorised capital proposal which does not preserve preemptive rights above 20% of current issued share capital; further, we believe all general authorities to issue shares should have a common cap. Glass Lewis will recommend voting against any proposal that does not explicitly extend a 20% cap on share issues without preemptive rights to authorised and conditional capital authorities previously existing and/or proposed at the meeting, other than those reserved for unique purposes such as equity incentive plans.

Conditional Capital

German companies may ask shareholders to approve "conditional" or "contingent" capital. These capital increases may only be used under certain specifications, such as the issuance of shares to fulfill a company's obligations to holders of convertible debt instruments or stock options.[112] By law, a company's conditional capital may not exceed 60% of a company's issued share capital and is valid for a maximum period of five years.[113] As such, we will evaluate these proposals in conjunction with the proposed authority that allows the company to utilise it. Furthermore, we will apply the same scrutiny to the preservation of preemptive rights as explained above under "Authorised Capital."

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[110] Article 203(2) AktG.

[111] Article 202 AktG. Article 186(3) AktG further limits issuances of shares for cash consideration without preemptive rights to 20% of a company's total share capital.

[112] Article 192(2) AktG.

[113] Article 192(3) AktG. The law further limits issuances of convertible debt instruments for cash consideration without preemptive rights to 20% of a company's total share capital.

Authority to Repurchase Shares

If German companies intend to buy back shares, they are subject to the following conditions: (i) the volume of shares to be repurchased must not exceed 10% of the nominal share capital and only funds that could have otherwise been paid out to shareholders in the form of dividends can be disbursed for repurchase transactions;[114] (ii) the company must not repurchase its shares for the purpose of trading,[115] and (iii) the authority to repurchase shares cannot be granted for a period of time exceeding five years.[116] In addition, banks and financial institutions may seek approval at a general meeting of shareholders to repurchase shares for the purpose of securities trading, within a limit of 5% of the company's share capital. When seeking such an approval, the highest and lowest price must be stated.[117]

Given these legal provisions, we will generally recommend supporting a proposed authority to repurchase and/or trade in shares in Germany.

[114] Article 71(1.8) AktG.
[115] *Ibid*.
[116] *Ibid.*
[117] Article 71(1.7) AktG.

Shareholder Initiatives

In Germany, there are two types of shareholder initiatives that may be included on the agenda of a general shareholders' meeting: shareholder countermotions and shareholder proposals. Shareholder countermotions are much more common than shareholder proposals, as they can be put forward by any shareholder who submits the motion in accordance with the applicable legal requirements.[118] Countermotions must correspond to a voting proposal on the agenda for the general meeting and generally urge shareholders to vote against the proposal put forth by management. However, countermotions may also propose separate voting decisions, including the amendment of a proposal put forth by management. These proposals generally request changes to a company's dividend policy, capital authorities, or supervisory board composition. They may also request that a special audit into management or supervisory board activities be carried out.

Shareholder countermotions may or may not be proposed as separate voting items at the general meeting. In general, Glass Lewis will provide voting recommendations for all shareholder countermotions that are clearly designated as separate voting items.[119] Given the broad range of topics that may be addressed by countermotions, we will analyse each countermotion on a case-by-case basis. In general, however, we will not support countermotions that seek to manage a company's day-to-day business, which we believe is better managed by the management and supervisory boards.

In Germany, shareholders owning at least 5% of a company's share capital, or a nominal value of €500,000 in a company's shares, may request that a separate proposal be included on the agenda of a general meeting of shareholders.[120] Such requests much be submitted at least 30 days prior to the meeting date. Though shareholder proposals are rare in Germany, when submitted, they generally propose the appointment of a special auditor to investigate management or supervisory board actions, the removal of supervisory board members or the election of dissident supervisory board members.

Our policies regarding these matters do not differ materially from our *Continental Europe Benchmark Policy Guidelines*.

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[118] Article 126 AktG.

[119] Countermotions that will be voted on separately at the meeting are generally designated by a letter on the proxy form. Where such a letter is assigned, we will provide voting recommendations. We note that the statutory filing deadline for shareholder countermotions is 14 days before the meeting. As such, we are not always able to provide voting recommendations for all shareholder countermotions in advance of the vote cutoff.

[120] Article 122(2) AktG.

Connect with Glass Lewis

Corporate Website | www.glasslewis.com

Email | info@glasslewis.com

Social | @glasslewis Glass, Lewis & Co.

Global Locations

North America

United States
Headquarters
100 Pine Street, Suite 1925
San Francisco, CA 94111
+1 415 678 4110

New York, NY
+1 646 606 2345

2323 Grand Boulevard
Suite 1125
Kansas City, MO 64108
+1 816 945 4525

Asia Pacific

Australia
CGI Glass Lewis
Suite 5.03, Level 5
255 George Street
Sydney NSW 2000
+61 2 9299 9266

Japan
Shinjuku Mitsui Building
11th floor
2-1-1, Nishi-Shinjuku, Shinjuku-ku,
Tokyo 163-0411, Japan

Europe

Ireland
15 Henry Street
Limerick V94 V9T4
+353 61 534 343

United Kingdom
80 Coleman Street
Suite 4.02
London EC2R 5BJ
+44 20 7653 8800

France
Proxinvest
6 Rue d’Uzès
75002 Paris
+33 ()1 45 51 50 43

Germany
IVOX Glass Lewis
Kaiserallee 23a
76133 Karlsruhe
+49 721 35 49622

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