



european corporate governance institute

Directors' Remuneration in Listed Companies

GERMANY*

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* The information and opinions included in this document are not intended to provide legal advice, and should not be relied on or treated as a substitute for specific advice concerning individual situations. The law, regulation and best practices are stated as they stood at 30 June 2003.

Questionnaire

Answers to this questionnaire should be given from the perspective of provisions included in national laws, regulations and exchange rules, and of best practices as recommended by either official reports or corporate governance codes.

1. General

1.1 Please indicate, as a general reference, the laws, case law, regulations, exchange rules and best practices concerning directors' remuneration in your country with respect to listed companies. Please indicate where these provisions (such as, for example, exchange rules) apply only to domestically-incorporated companies.

- Stock Corporation Act 1965 (*Aktiengesetz – AktG*) published in the Federal Law Gazette Part I 1965 p. 1089. The current version is available on <http://jurcom5.juris.de/bundesrecht/>.
- Securities Trading Act 1994 (*Wertpapierhandelsgesetz – WpHG*) published in the Federal Law Gazette Part I 1994 p. 1749. The current version is available on the site of the Federal Financial Supervisory Authority http://www.bafin.de/gesetze/wphg_e.htm (english version) or <http://www.bafin.de/gesetze/wphg.htm>.
- German Corporate Governance Code, 26 February 2002 (Cromme Code) available on <http://www.ebundesanzeiger.de> (electronic federal gazette, in german) and on www.corporate-governance-code.de/eng/kodex/vorwort.html (english version). The Cromme Code applies only to domestically-incorporated companies as it provides in its foreword that “the Code presents essential statutory regulations for the management and supervision of German listed companies...”
- Commercial Code 1897 (*Handelsgesetzbuch – HGB*) published in the Federal Law Gazette 1897 p. 219. The current version is available on <http://jurcom5.juris.de/bundesrecht>.
- Rules and Regulations Neuer Markt available on <http://deutsche-boerse.com/>.
- Stock Exchange Admission Regulation (*Börsenzulassungsverordnung - BörsZulV*) published in the Federal Law Gazette 1998 Part I, p. 2832, last amendment by act 21st June 2002, Federal Law Gazette 2002 Part I, p. 2010, 2070.
- *BAFin* Circular 5.9.2002 available on www.bafin.de.

1.2 As to best practices, please specify whether they are described in either a private (voluntary or non-statutory) code or other official report, and whether a “comply or explain” principle is applicable to compliance with the relevant provisions by listed companies. Where the “comply or explain” principle applies, please indicate, where such evidence is available, whether companies generally comply with best practices.

The German Corporate Governance Code is an act of self-organization of the German business adopted by the Government Commission on the German Corporate Governance Code, appointed by the Federal Ministry of Justice and chaired by Dr. Gerhard Cromme.

As to the “comply or explain” principle under Article 1 of the Transparency and Disclosure Law 2002 (*Transparenz- und Publizitätsgesetz*), published in the Federal Gazette Part I 2002 p. 2681 and available on <http://217.160.60.235/BGBl/bgbl1f/bgbl102s-2681.pdf>, a new section 161 is added to the Stock Corporation Act which provides that the executive board and the supervisory board of exchange-listed companies shall declare once a year that the

recommendations of the Government Commission on the German Corporate Governance Code have been and are being complied with or which of the Code's recommendations are not being applied. The declaration shall be made permanently accessible to stockholders. See also the governmental explanation to the Transparency and Disclosure Law (BR Drucksache 109/02 p. 51, available on <http://dip.bundestag.de>).

A general "comply or explain" principle is applicable also according to the Cromme Code (1) as it provides that the companies can deviate from the recommendations of the Code marked in the text by use of the word "shall", but are then obliged to disclose this annually. The Code also contains suggestions for which the text uses terms such as "should" or "can" and which can be deviated from without disclosure. On the other hand, the remaining passages of the Code not marked by these terms contain provisions that enterprises are compelled to observe under applicable law. Furthermore the Code (3.10) provides in this case a more specific disclosure requirement as it recommends the management board and the supervisory board to report each year on the enterprise's corporate governance in the annual report, including the explanation of possible deviations from the recommendations of the Code. Comments on the Code's suggestions can also be provided in the annual report.

Despite two other corporate governance codes developed in 2000, ("Code of Best Practice" by the "German Panel on Corporate Governance" and the "German Code of Corporate Governance-GCCG" by the "Berliner Initiativkreis") it doesn't exist any competition between different corporate governance codes or best practices. The tendency of companies who focus on corporate governance is to adopt the German Corporate Governance Code and to add specific rules. Deutsche Bank and Commerzbank adopted own corporate governance principles which are consistent with the recommendations of the German Corporate Governance Code but contain inter alia also a special committee called Chairman's Committee or Presiding Committee ("Präsidialausschuss", see the internet sites of the corporations). The Chairman's Committee or Presiding Committee is common to German practice and has – among others - the functions of a remuneration committee. According to Deutsche Bank Corporate Governance Principles the Chairman's Committee has a consultative function vis-à-vis the management board, prepares the decisions to be taken by the supervisory board and has functional responsibility for concluding, amending and terminating the employment and pension agreements of members of the management board. The Presiding Committee of Commerzbank (corporate governance code of Commerzbank 5.3.1) inter alia deals with the contracts of members of the management board (Corporate Governance Code of Commerzbank 5.2).

Evidence to the corporations' declaration concerning the comply and explain principle is given on the website and, as a part of the disclosure requirements, in the commercial register and the Federal Gazette (Section 161 Stock Corporation Act and section 325 (1) 1 Commercial Code). According to Cromme Code 6.8 information which the company discloses shall also be accessible via the company's website and the publications should also be in english. Although the provisions are not yet linked, it may be of interest that since January 2003 any communication of stock corporations has to be published in the electronic Federal Gazette (ebundesanzeiger.de, see section 25 Stock Corporation Act). Service there will be improved.

Companies generally comply with the Cromme Code but even blue chips (concerning the rules of directors' remuneration inter alia Allianz, Daimler-Chrysler, Deutsche Telekom, HypoVereinsbank) explain why they do not fulfil all provisions (some companies do not only explain why they do not fulfil all recommendations, they also explain why they do not fulfil all suggestions of the German Corporate Governance Code).

1.3 Please describe in summary: the institutional structure for adopting executive remuneration rules or best practice codes; and any major proposals for reform concerning directors' remuneration.

Apart from general rules on executive remuneration provided by the law, on which the code is based (Code's Preface), the institutional structure which adopted the German Corporate Governance Code was the Government Commission on the German Corporate Governance Code, made up of 13 experts from many different areas of German business (directors of various business firms and financial institutions, two academics and a unionist) and appointed by the German Justice Minister. As to the members of the Commission see <http://www.corporate-governance-code.de/eng/mitglieder/index.html>. It is also specified that, as a rule, the Code will be reviewed annually against the background of national and international developments and be adjusted, if necessary (Cromme Code's Foreword). Anyway, change of listing rules is not common and may be not popular after the failure of Neuer Markt.

2. Disclosure

2.1 Are listed companies required to publish a remuneration report, indicating the details of the compensation paid to the members of the Board of Directors? How often must it be published and where is it retrievable?

There are no specific requirements.

2.2 Must these reports be submitted, or are recommended to be, to a Securities Market Regulator or to a public authority responsible for collecting these documents?

There are no specific requirements.

2.3 What information on directors' remuneration, individually and collectively, and on the remuneration committee, must be included, or is recommended to be included as best practice, in the financial reports? Please include in your answer any specific requirements which apply to particular elements of remuneration, such as stock options, bonuses, and termination payments.

In accordance with the directive on the annual accounts (Art 43 (12)) information on directors' remuneration (management board and supervisory board) is included in the notes to the consolidated financial statements.

According to section 285 number 9 Commercial Code the company has to publish the total remuneration (salaries, profit sharing, dividend rights, expense allowances, insurance payments, commissions, and fringe benefits of every kind) of all members of the management board separately from the figure of all members of the supervisory board. Pension payments are disclosed separately for all previous members of the management and supervisory board.

The Cromme Code (7.1.3) provides that the consolidated financial statements shall contain specific information on stock option programs and similar securities-based incentive systems of the company. In particular, as to the members of the management board the Cromme Code (4.2.4) specifies that the compensation reported in the notes shall be subdivided according to fixed, performance-related and long-term incentive components and that the figures shall be individualized. Same information as recommended for the management board shall be published in the notes for the compensation of the members of the supervisory board. The whole remuneration shall be subdivided according to components and regard also the payments made by the enterprise or the advantages extended for services provided individually. These payments and advantages shall be listed separately (Cromme Code 5.4.5).

The most controversial discussed theme in the Cromme Commission were the individual figures of managing board members' remuneration in the financial reports. Even blue chips like Allianz and Daimler-Chrysler will not fulfil this provision. In Germany there was a cultural tradition not to talk about remuneration. Allianz and Daimler-Chrysler explain by publishing the individual remuneration, differentiated remuneration would be levelled or prevented. Daimler-Chrysler also refers to the principle of collective responsibility.

More transparency is required by the listing rules of Neuer Markt. Point 7.1.3 (3) 4 Rules and Regulations Neuer Markt provides that in the quarterly report, the explanatory notes of the company shall contain information about the number of the company's shares held by members of the management and supervisory board as well as any right of such persons to subscribe for such shares, separately for each member of these bodies.

The financial reports are to be submitted to the commercial register and according to Cromme Code 6.8 information disclosed by the company shall also be published on the company's website.

Apart from the information included in the notes the Cromme Code (4.2.3) provides that the salient points of the compensation system and the concrete form of a stock options scheme or comparable instruments for components with long-term incentive effect and risk elements shall be published on the company's website in plainly understandable form and be detailed in the annual report. This shall include information on the value of stock options. In addition, the Chairman of the Supervisory Board shall outline the salient points of the compensation system and any changes thereto to the General Meeting.

2.4 Is timely disclosure required with respect to stock options, their vesting, exercise, and the sale of the relevant shares to third parties?

Section 15a Securities Trading Act provides that transactions (purchase or sale) in securities (even those which assign the right to buy or dispose of shares) of their own company - or of a parent company of the issuer - carried out by members of the management or supervisory board of exchange-listed companies shall be reported to the issuer and the German Financial Supervisory Authority and published without delay. The disclosure requirement applies also to spouses, registered partners and relations in the first degree of the members of the management or supervisory board.

On the other hand, the same section makes an important exception as it provides that the disclosure requirement does not exist if the purchase is carried out on the basis of an employment contract or as part of the remuneration. On this particular point the supervisory authority states that exemptions from the disclosure and publication requirement therefore exist for the purchase of staff shares, e.g. in the context of an equity participation program; that the granting of stock options on the basis of an employment contract such as stock appreciation rights is also exempt from the disclosure requirement. However, the same document provides that their future exercise is in fact subject to the disclosure requirement (*BAFin* Circular 5.9.2002).

This is reflected by the Cromme Code (6.6) which provides that the purchase or sale of shares in the company or of related purchase or sale rights (e.g. options) and of rights directly dependent on the stock market price of the company by members of the management board and supervisory board of the company or its parent company and by related parties shall be reported without delay to the company. However, purchases based on employment contracts, as a compensation component as well as immaterial purchase and sale transactions (EURO25,000 in 30 days) are excepted from the reporting requirement. It is also specified that the company shall then publish the disclosure without delay.

2.5 What are the rules on disclosure of share transactions executed by the company's insiders (such as directors, officers, auditors, etc)?

As to the timely disclosure see question 2.4.

Corresponding information shall be provided in the notes to the consolidated financial statements. In comparison with the first version of the Cromme Code 6.6 and Rules and Regulations of Neuer Markt Point 7.2 (from 2001 to 2002), the current version of Cromme Code 6.6 and the new section 15a Securities Trading Act provide less information. Neither the original version of the Cromme Code 6.6 nor the Rules and Regulations of Neuer Markt Point 7.2 knew an exception for shares and options received as a part of remuneration. This exception was not contained in the first draft of the *4. Finanzmarktförderungsgesetz* which introduced section 15a Securities Trading Act. The governmental draft explains that the selling of shares by members of the management board should not be ruled out (BT-Drucksache 14/8017, available at <http://dip.bundestag.de>). In the light of the introduction of section 15a Securities Trading Act, Rules and Regulations of Neuer Markt 7.2 was deleted.

The Cromme Code (6.6) also provides that the shareholdings, including options and derivatives, held by individual management board and supervisory board members shall be reported if these directly or indirectly exceed 1% of the shares issued by the company. If the entire holdings of all members of the management board and supervisory board exceed 1% of the shares issued by the company, these shall be reported separately according to management board and supervisory board.

2.6 What information on directors' remuneration must be included in public offer prospectuses and listing particulars?

Information on directors' remuneration in public offer prospectuses is subject to section 28 of the Stock Exchange Admission Regulation. The prospectus shall (inter alia) contain the aggregate remuneration (salaries, profit participations, expense allowances, insurance premiums, commissions and fringe benefits of any kind) paid to the members of management and supervisory bodies during the last financial year; such amounts shall be stated separately for each body (section 28 (2) number 2); the total number of the issuer's shares held by members of the management and supervisory bodies in the aggregate and any rights to subscribe for shares granted to such persons (section 28 (2) number 4) and the aggregate amount of any loans granted by the issuers to members of the management or supervisory bodies which have not been repaid, and of any guarantees or other warranties given by the issuer for the benefit of such persons (section 28 (2) number 6).

3. Remuneration of The Board of Directors

3.1 Who fixes the board of directors' remuneration? What are the relevant procedures? (In two-tier systems, please refer to the supervisory board.)

The remuneration of the members of the supervisory board is fixed by the general meeting with the simple majority or in the articles of association (section 113 Stock Corporation Act; Cromme Code 5.4.5). The remuneration of the supervisory board is to be set on the agenda of the general meeting by the management board. As provided for each item that must be resolved by the general meeting, the management board and the supervisory board (only the supervisory board in case of election of members of the supervisory board and auditors) shall make proposals for the text of the resolution in the notice publishing the agenda (section 124 (3) 1 Stock Corporation Act).

If the compensation is fixed in the articles of association it can be decreased by the general meeting with a simple majority. The compensation of the members of the first supervisory board can be fixed only by the general meeting and such resolution may not be adopted until the general meeting resolving on ratification of the acts of the members of the first supervisory board (section 113 Stock Corporation Act).

Besides, discussion on directors' remuneration concerning the supervisory board in the nineties was to improve the payments made by the corporations to find better supervisors: Average payment in the biggest firms was about 17.500 Euro per annum. The traditional low level of supervisory board remuneration is in part due to the German model of codetermination in the supervisory board (codetermination law is available under <http://www.bma.de/download/broschueren/a741.pdf>). Employee members of the supervisory board who are members of an union organized in the German Trade Union Federation (*Deutsche Gewerkschaftsbund - DGB*) are expected and indeed do give their remuneration exceeding DM 6.000 (about Euro 3.000) per annum to a trade union foundation, the Hans Böckler Stiftung (See Prigge, "A Survey of German Corporate Governance" in Hopt/Kanda/Roe/Wymeersch/Prigge (eds.), *Comparative Corporate Governance*, 1998, p. 964, for current data see also http://www.dai.de/internet/dai/dai-2-0.nsf/dai_publicationen.htm).

3.2 Are there provisions and/or practices as to the amount of the remuneration and its distribution (for example, as to whether distribution should be proportionate) among board members? What types of remuneration are allowed?

The compensation of the members of the supervisory board takes into account the duties, responsibilities and scope of tasks of the members of the supervisory board as well as the economic situation and performance of the enterprise (section 113 Stock Corporation Act, Cromme Code 5.4.5). The exercising of the chair and deputy chair positions in the supervisory board as well as the chair and membership in committees shall also be considered (Cromme Code 5.4.5).

Members of the supervisory board shall receive fixed as well as performance-related compensation. Performance-related compensation should also contain components based on the long-term performance of the enterprise (Cromme Code 5.4.5). Although section 192 Stock Corporation Act names only the management board of the company, the allowance of stock options is discussed. The Baums Commission on Corporate Governance stated in accordance with the literature that stock options can't be part of the supervisory board remuneration (see T. Baums (ed.), *Bericht der Regierungskommission Corporate Governance*, p. 104, 236). It is argued for restriction that stock options for members of the supervisory board were discussed before introducing the Supervisory and Transparency Law (*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich - KonTraG*, published in the Federal Gazette 1994, Part I p. 786 and available on http://www.ecgi.org/codes/country_documents/germany/gkontrag.pdf). In the *KonTraG* the members of the management board were added to section 192 Stock Corporation Act, but not – as foreseen in the first draft - the members of the supervisory board. Anyway, the limitation of types of remuneration is not undoubted. It may be of interest that there is no expressis verbis restriction to the remuneration of the members of the supervisory board. Neither section 113 nor section 192 Stock Corporation Act expressly rule out stock options as an element of remuneration of members of the supervisory board. The focus of section 192 is that the corporation may enforce a contingent capital increase only if these stock options are given to the management and the employees or are needed in case of a merger or to issue convertible bonds.

Convertible bonds which contain a credit to the corporation are accepted as a type of remuneration for members of the supervisory board (see Baums (ed), *Bericht der Regierungskommission Corporate Governance*, p. 104). The general question whether a convertible bond requires that a credit of the buyer is converted into a share is not resolved yet. Section 221

Stock Corporation Act defines a convertible bond as a bond which provides holders with a right to convert it into or to subscribe shares. This may support the view that a convertible bond in German stock corporation law does not require an element of lending and may give only an option to buy shares. Anyway, phantom stocks (to be paid in cash) are accepted as a type of remuneration for members of the supervisory board

The remuneration could also be comprised of a profit sharing and in such case the share of the annual profit granted shall be computed on the basis of distributable profit, reduced by an amount of not less than four per cent of the contributions made on the par value of the shares (section 113 Stock Corporation Act).

3.3 Are personal loans to the company's directors and officers allowed?

Yes, they are allowed. According to the Stock Corporation Act (section 115) and the Cromme Code (3.9) the company may extend credit to members of the supervisory board but only with the consent of the supervisory board. Section 115 also provides that a controlling company may extend credit to members of the supervisory board of a controlled enterprise with the consent of its supervisory board and a controlled company, on the other hand, may extend credit to members of the supervisory board of the controlling enterprise with the consent of the supervisory board of the controlling enterprise. Such consent may be granted only for specific credit transactions or kinds of credit transactions, and for not more than three months in advance. The resolution on such consent shall make provision as to the payment of interest on, and repayment of, any loan. If the member of the supervisory board carries on a business as a sole proprietor, such consent shall not be required if the credit is extended to finance the payment of goods which the company supplies to his business (Cromme Code 3.9 does not mention this exception).

Personal loans are also allowed to members of the management board pursuant to a resolution of the supervisory board (section 89 Stock Corporation Act; Cromme Code 3.9).

4. Executive Directors' Remuneration

4.1 Who fixes the executive directors' remuneration? What are the relevant procedures? Are shareholders required to approve directors' remuneration, the remuneration policy, or the remuneration report (see question 2) on an annual or other basis? (In two-tier systems, please refer to the management board)

The remuneration of the members of the management board is fixed by the supervisory board at an appropriate amount based on a performance assessment in considering any payments by group companies. Criteria for determining the appropriateness of compensation are, in particular, the tasks of the respective member of the management board, his personal performance, the performance of the management board as well as the economic situation and the performance and outlook of the enterprise taking into account its peer companies (section 87 Stock Corporation Act; Cromme Code 4.2.2). Nevertheless, if the condition of the company deteriorates to such a substantial extent that continuation of payment of the remuneration originally fixed would constitute a hardship for the company, the supervisory board shall be authorized to make a reasonable reduction. The reduction shall not affect the other terms of the contract of employment (section 87 Stock Corporation Act).

The supervisory board may delegate this issue (not the appointment or the revoke of appointment of the members of the management board, section 107 (3) 2 Stock Corporation Act) to a committee.

According to section 119 (2) Stock Corporation Act the general meeting may decide on matters concerning the management of the company only if requested by the management board. On the other hand, if the management board is to be remunerated in stock options, the general meetings' power to raise capital will have to be taken into account.

4.2 Is the board required, or recommended as best practice, to create a remuneration committee?

The Cromme Code does not expressly require to create a remuneration committee, but indicates that this is good practice for many corporations. Depending on the specifics of the enterprise and the number of its members, the supervisory board shall form committees (5.3.1 Cromme Code) and the subjects which can be delegated to and handled by one or several committees include the compensation of the members of the management board (Cromme Code 5.3.3). Furthermore, the Code (4.2.2) refers to a committee dealing with management board contracts, on which proposal the full supervisory board shall discuss and regularly review the structure of the management board compensation system.

If yes, please specify:

(i) the committee's composition (if independent directors should be appointed to this committee, please give the relevant definition and indicate whether any special procedures apply to the appointment of independent non-executive directors)

All members of the supervisory board are independent according to German law. Independence means that the members of the supervisory board can't be members of the management board. Also former members of the management board or employees may be member of the supervisory board. According to the Cromme Code (5.4.2) not more than two former members of the managing board shall be members of the supervisory board and members of the supervisory board shall not exercise directorship or similar positions or advisory tasks for important competitors of the enterprise.

Besides, committees that handle contracts with members of the management board shall be chaired by the chairman of the supervisory board (Cromme Code 5.2).

(ii) the committee's competences and which company body it reports to

The committee may not appoint or revoke the appointment of members of the management board (section 107 (3) 2 Stock Corporation Act), but the supervisory board may delegate to a committee to prepare the appointment of members of the management board which also determines the conditions of the employment contracts including compensation (Cromme Code 5.1.2). In general, the supervisory board can arrange for committees to prepare supervisory board meetings and to take decisions in place of the supervisory board (Cromme Code 5.3.4).

The Cromme Code (5.3.1) generally provides that the chairman of each committee reports regularly to the supervisory board on the work of the committee.

(iii) how the committee operates

The committee is a part of the supervisory board and the procedure is the same. The single rule providing the way all the committees shall operate refers to the committee chairmen, who are called to report regularly to the supervisory board on the work of the committee (Cromme Code 5.3.1, see also section 107 (3) 3 Stock Corporation Act).

4.3 Which types of remuneration are permitted?

Neither the Cromme Code nor the German Stock Corporation Act expressis verbis restrict the types of remuneration. According to section 87 Stock Corporation Act the aggregate remuneration of any member of the management board comprises salary, profit participation, reimbursement of expenses, insurance premiums, commissions and additional benefits of any kind. In the Cromme Code (4.2.3) it is furthermore specified that the overall compensation of the members of the management board shall be comprised of a fixed salary and variable components. Variable compensation should include one-time and annually-payable components linked to the business performance as well as long-term incentives containing risk elements, and all compensation components must be appropriate, both individually and in total. In particular, company stocks with a multi-year blocking period, stock options or comparable instruments (e.g. phantom stocks) serve as variable compensation components with long-term incentive effect and risk elements. Stock options and comparable instruments shall be related to demanding, relevant comparison parameters. Changing such performance targets or the comparison parameters retroactively shall be excluded. For extraordinary, unforeseen developments a possibility of limitation (Cap) shall be agreed for by the Supervisory Board. Pension payments, ruled in section 87 (1) 2 Stock Corporation Act, are common.

In answering, please consider each of the following:

- (a) bonuses**
Yes (one-time payable components). See Cromme Code 4.2.3. Furthermore, according to section 87 (1) 1 Stock Corporation Act (additional benefits of any kind) different forms of bonuses may be chosen but a critical view is taken to bonuses who refer to the sales of the corporation.
- (b) stock options, including discounted stock options**
Yes. See Cromme Code (4.2.3) and Stock Corporation Act (section 192).
- (c) stock grants**
Yes (stock options or comparable instruments serve as variable compensation components with long-term incentive effect). See Cromme Code 4.2.3. Furthermore, according to section 71 Stock Corporation Act acquisition by the company of company shares is allowed to offer the shares for purchase to persons who are in an employment relationship with the company. The acquisition by the company of company shares is not allowed to offer the shares to members of the management or the supervisory board. Phantom stocks are allowed as a type of remuneration for members of the management and members of the supervisory board.
- (d) profit sharing**
Yes. According to section 87 Stock Corporation Act the aggregate remuneration of any member of the management board includes profit participation. Section 86 Stock Corporation Act providing particular rules on the management's profit participation has been repealed by section 1 of the Transparency and Disclosure Law 2002 (*Transparenz- und Publizitätsgesetz*).
- (e) benefits in kind**
Yes. Section 87 Stock Corporation Act names reimbursement of premiums, insurance premiums, commissions and additional benefits of any kind.

4.4 Are there specific rules, including shareholder approval requirements, as to these different types of remuneration?

Profit sharing: The resolution on the appropriation of distributable profits shall be made by the general meeting (section 119 Stock Corporation Act; Cromme Code 2.2.1) on the proposal submitted by the management board to the supervisory board (section 170 Stock Corporation Act), which shall examine the proposal (together with the annual financial statements and the annual report) and report on the results of its examination to the shareholders' meeting (section 171 Stock Corporation Act).

Stock options: To stock options, there is a special requirement due to the power of the general meeting to raise capital. Section 192 Stock Corporation Act provides that the general meeting may adopt a resolution on a contingent capital increase also to grant rights to employees and members of the management board to new shares. Only in this case the par value of contingent capital may not exceed ten per cent of the share capital as at the date of the adoption of the resolution. In fact, if the purpose of the contingent capital increase was different the par value could not exceed one half of the share capital. Besides, section 193 generally provides that in case of a contingent capital increase the general meeting (majority of not less than three fourths of the share capital represented at the passing of the resolution, although the articles may provide for a larger capital majority and additional requirements) determines the purpose of the contingent capital increase, the persons entitled to subscribe, the issue price on the basis on which such price is to be computed and, if the persons entitled to subscribe are directors, the performance that shall be achieved, the periods in which the options can be granted and exercised and the period of lock up (at least two years).

In case of acquisition by the company of own shares (section 71 Stock Corporation Act) when the acquired shares are then not offered on the stock exchange but sold otherwise and the preemptive rights excluded, the general meeting shall approve the proposal of exclusion with a majority of not less than three fourths of the share capital represented at the passing of the resolution and determine the performance that shall be achieved, the periods in which the options can be granted and exercised and the period of lock up (at least two years). In such case the acquisition of the shares by the company can be made within a period of eighteen months after a shareholders' authorization who are called to determine the minimum and maximum purchase price for the shares and the par value of the share capital (not more than 10%, a percentage that can not be exceeded taking into account the aggregate par value of shares acquired and of any other company shares which the company has already acquired and continues to hold). The management board shall then inform the next shareholders' meeting as to the reasons for and purpose of the acquisition, the number of the shares acquired, their percentage of the share capital and the purchase price for the shares.

The annual financial statement, which is relevant for profit sharing and may be for bonuses, does not have to be established by the general meeting. According to section 172 (1) 1 Stock Corporation Act, if the financial statement is approved by the supervisory board, it will have to be considered as already established unless the management and the supervisory boards have resolved that the annual financial statements are to be established by the general meeting.

4.5 Are there any restrictions on how payments are made?

The provisions of the Stock Corporation Act concerning the management board contain no specific rules on how payments to the members of the management board are to be made. Variable compensation is subject to the power of the general meeting as described in answer 4.4.

4.6 Are there any specific requirements for termination payments made on loss of office, whether through dismissal, retirement, on a takeover, or otherwise?

Section 87 Stock Corporation Act provides that pension payments shall bear a reasonable relationship to the duties of the member of the management board and the condition of the company.

4.7 Are there any specific requirements concerning directors' service contracts with respect to, for example, their duration and disclosure?

The members of the management board shall be appointed for a period not exceeding five years. On the other hand, for first time appointments the maximum possible appointment period of five years should not be the rule (Cromme Code 5.1.2). The appointment may be renewed or the term of office may be extended, provided that the term of each such renewal or extension shall not exceed five years. Such renewal or extension shall require a new resolution of the supervisory board which may be adopted not earlier than one year prior to the expiration of the current term of office, or at least only under special circumstances (Cromme Code 5.1.2). The term of office may be extended without a new resolution of the supervisory board only in the case of an appointment for less than five years, provided that the resulting aggregate term of office does not, as a result of such extension, exceed five years. The foregoing shall apply analogously to the contract of employment; such contract may, however, provide that in the event of an extension of the term of office, the contract shall continue in effect until the expiry of such term (section 84 Stock Corporation Act).

The disclosure is subject to section 285 Commercial Code (see answers above to disclosure).

5. Non-executive Directors' Remuneration

5.1 Are non-executive directors separately paid for their participation in committees of the board of directors? Do any restrictions apply to the payment of non-executive directors' *via* stock options?

According to Section 113 Stock Corporation Act the remuneration shall bear a reasonable relationship to the duties of the members of the supervisory board and to the condition of the company. According to the Cromme Code (5.4.5) the exercising of the chair and membership in committees should also be considered in the determination of the remuneration.

The allowance of stock options is controversy discussed as section 192 Stock Corporation Act which rules the contingent capital increase names only the members of the management board (see above answer 3.2). Phantom stocks and convertible bonds are allowed.

5.2 May a company make payments to non-executive directors, additional to their directors' fees, for services, such as legal or brokerage services, outside the usual scope of directors' duties?

Yes. Both the law (section 114 Stock Corporation Act) and the Cromme Code (5.5.4) provide that advisory and other service agreements and contracts for work (different from the ordinary activity as a member of the supervisory board) between a member of the supervisory board and the company are admitted after a supervisory board's approval. The duty of the supervisory board and its members is to control but also to advise the management board. This and the personal duty to use special knowledge in controlling and advising the management board leads

to difficulties in determining the scope of possible contracts with members of the supervisory board. A contract which is already covered by the duty as a member of the supervisory board is void. Service agreements and contracts for work are remunerated and the payments made by the enterprise or the advantages extended for services provided individually shall be listed separately in the notes to the consolidated financial statements (Cromme Code 5.4.5).