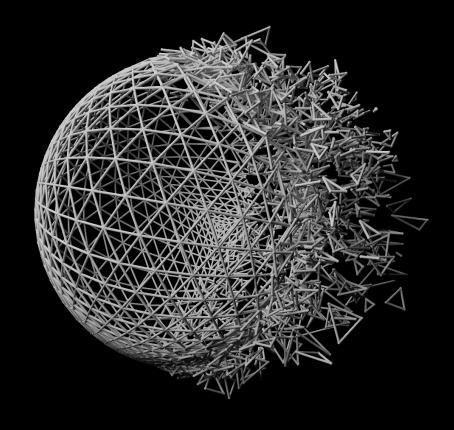
# **Deloitte.** Legal



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



# Introduction

## **Speakers**



**Dr. Lars Hinrichs, LL.M.**Employment & Pensions
Attorney at law, specialist attorney for labor law

Tel.: +49 40 3785 3828 E-mail: lhinrichs@deloitte.de



Dr. Volker Schulenburg
Corporate/M&A
Attorney at law, specialist in commercial and corporate law

Tel.: +49 40 3785 3824

E-mail: vschulenburg@deloitte.de



Elisa Ultsch Employment & Pensions Attorney at Law

Tel.: +49 40 3785 3822 E-mail: eultsch@deloitte.de

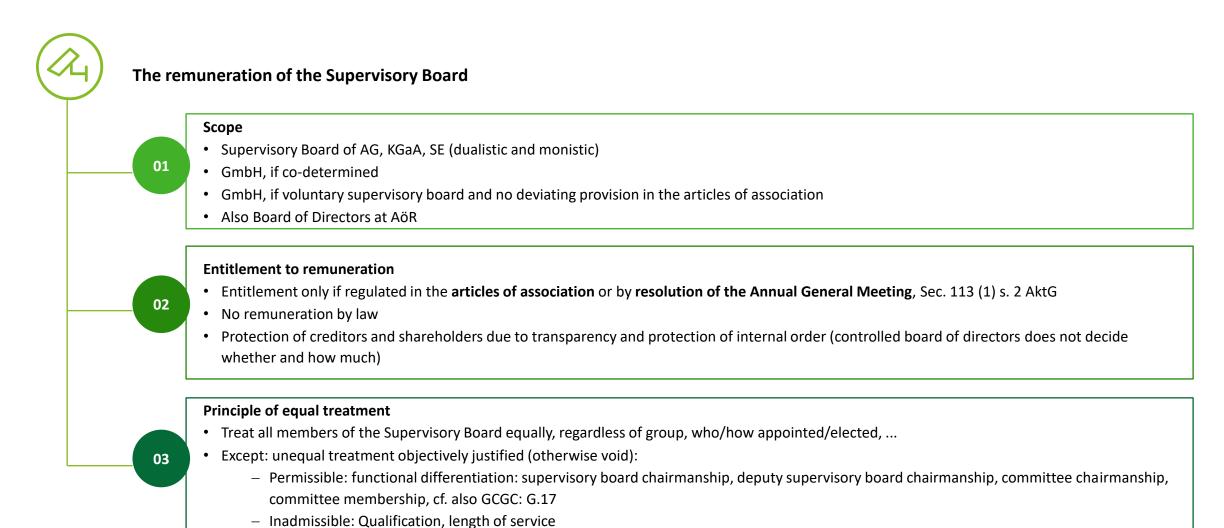
#### Outline

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



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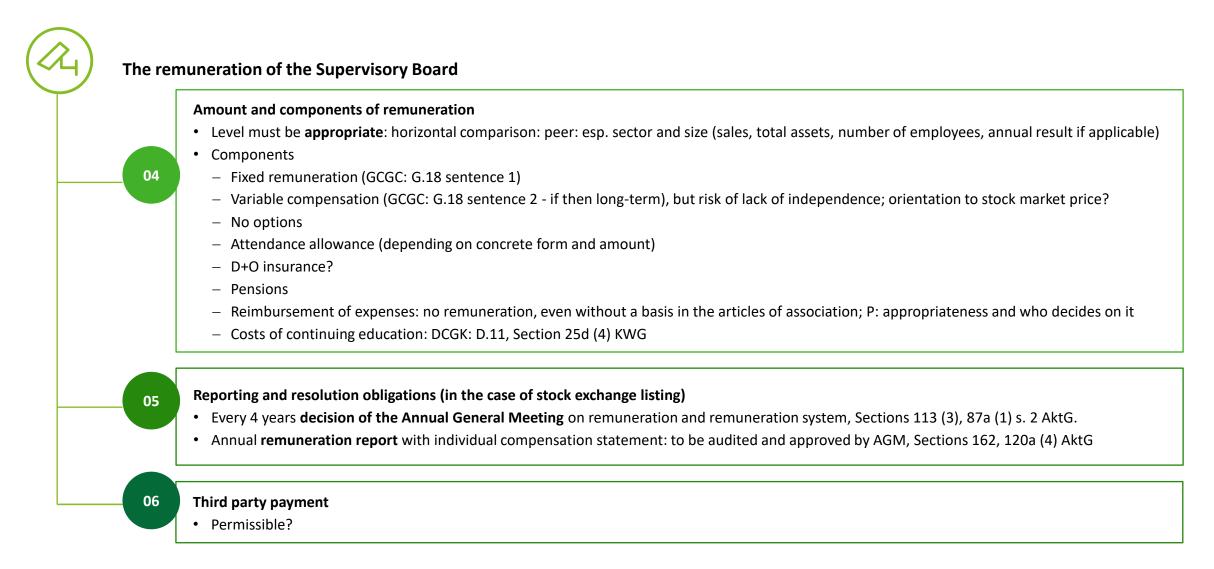
Selected aspects of the remuneration of the Supervisory Board



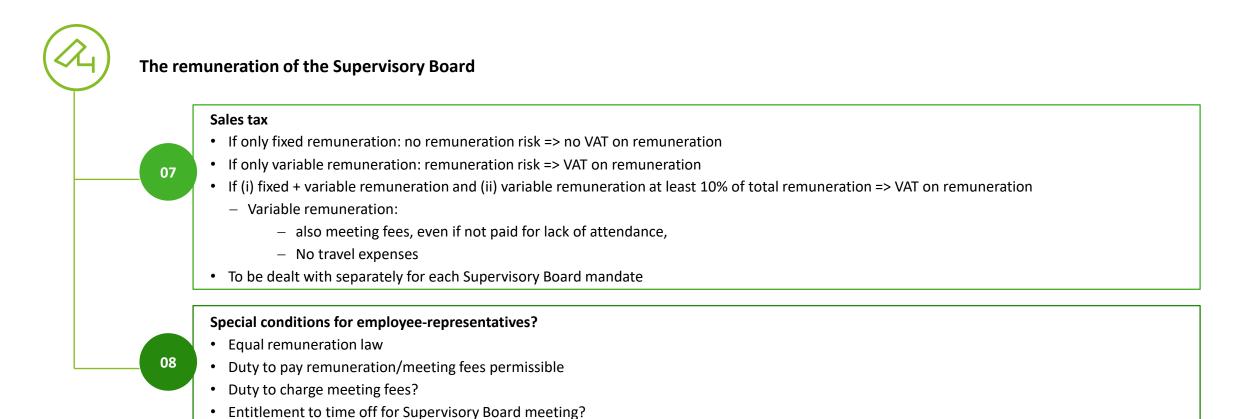
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Obligation of employee members to pay part of their remuneration: permissible

Selected aspects of the remuneration of the Supervisory Board



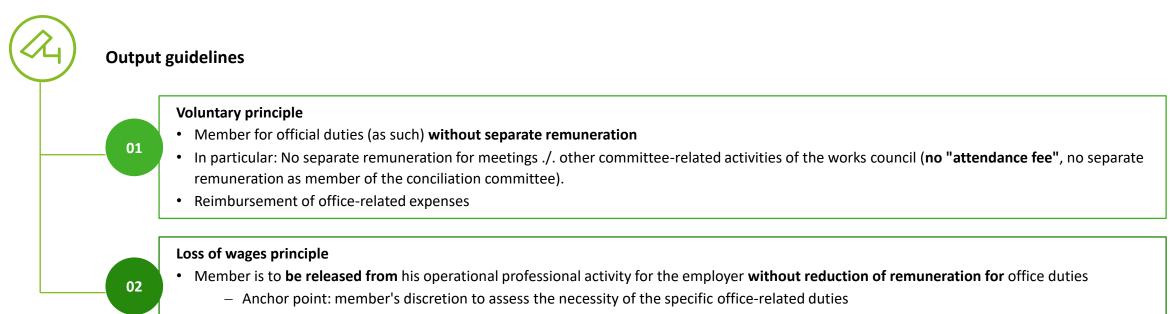
Selected aspects of the remuneration of the Supervisory Board



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

## Update Remuneration of the Works Council and Staff Council

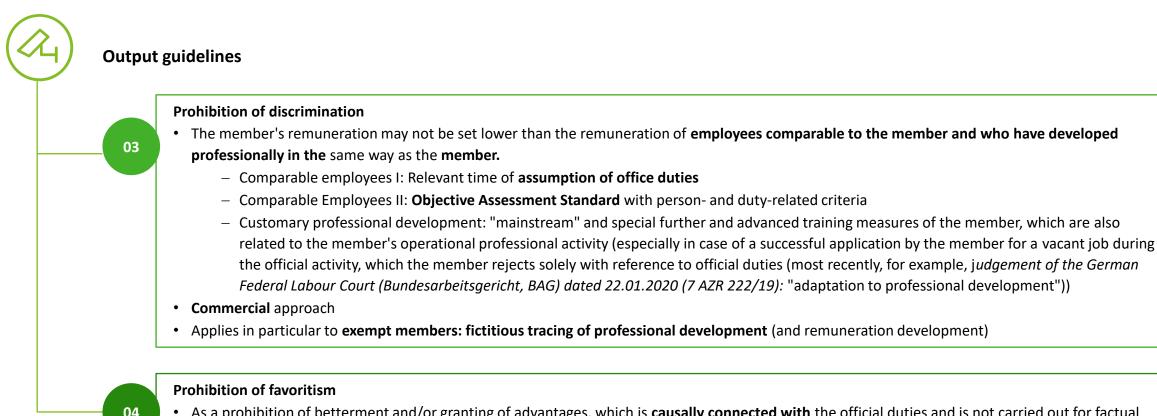
Voluntary principle and loss of wages principle



- The remuneration to be granted by the employer for the period of office shall include all remuneration components which the works council/staff council member would have received if he/she had performed his/her operational professional activity during this period
  - Starting point: fixed remuneration for relevant period
  - Variable remuneration components, if applicable, based on estimate (Section 287 (2) ZPO)
  - Hypothetical approach: Office-duty-related allocation of the individual remuneration component required

## Update Remuneration of the Works Council and Staff Council

Prohibitions of discrimination and favoritism



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

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

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

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



#### Hypothetical exceptional career as a manager

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

01

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

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



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

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

02

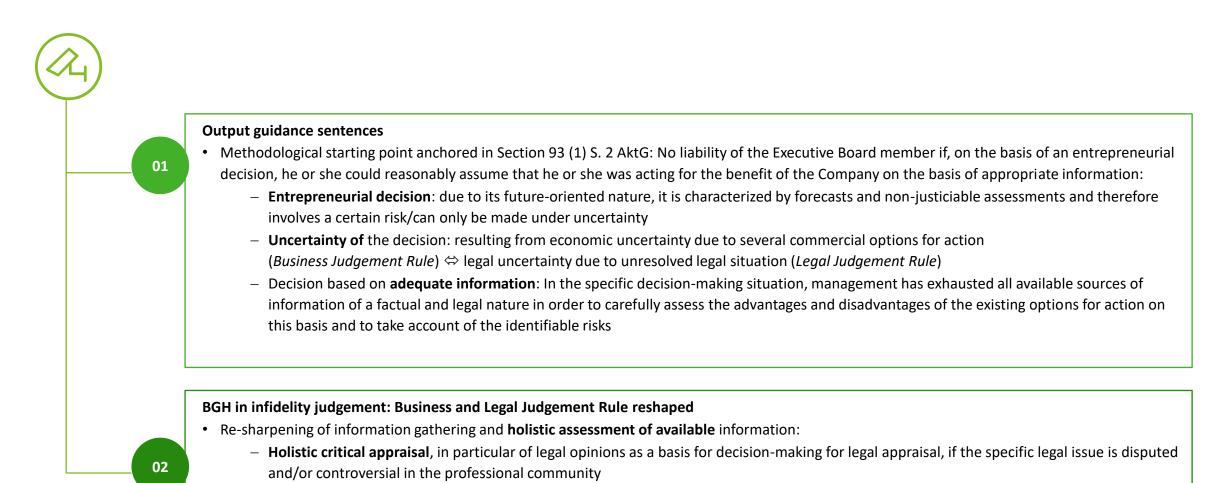
Infidelity jdudgement of the BGH and Business/Legal Judgement Rule

## Infidelity ruling of the BGH and Business/Judgement Rule

with all relevant arguments in the expert opinion

Initial Guiding Principles - and their Sharpening by the BGH

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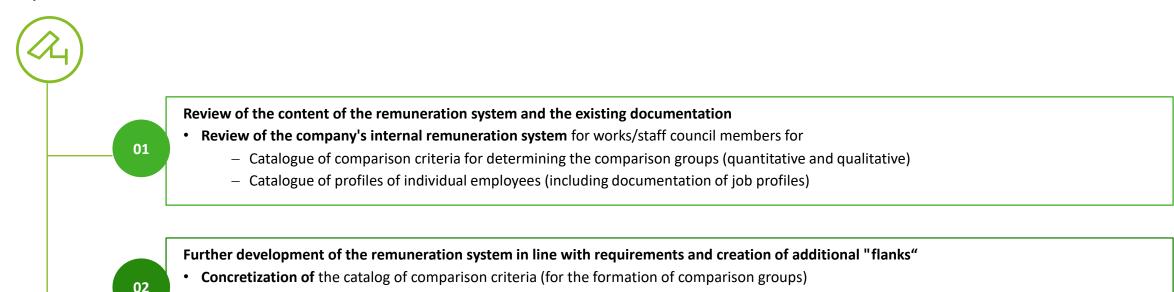
- "Paper trail": documentation of the lawyer's expert opinion must contain a comprehensive appraisal of the legal situation and must also deal

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Needs and opportunities for action in sound compensation practice

## Needs and opportunities for action in sound compensation practice

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



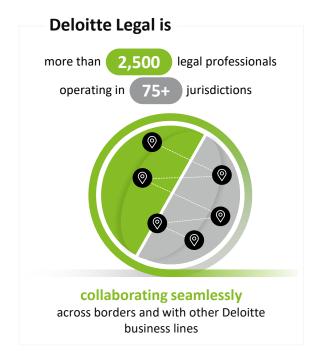
- Generalization of originally existing operational activities of individual members that no longer exist
- Expansion of accompanying documentation by recording all employees eligible for the comparison group (at the time of assumption of office)
  - Effectiveness limit: Actual corridor of hypothetical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

# **Questions & Answers**

Thank you for your attention!

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