Articles

"Say On Pay" In Germany: The Regulatory Framework And Empirical Evidence

By Marvin Vesper-Gräske[*]

A. Introduction

A shareholder vote on executive compensation, the so-called "say on pay", has become one of the most prominent corporate governance tools for regulators in their urge to tackle excessive executive remuneration. Its implementation in the United Kingdom in August 2002[1] has triggered–not least because of a Recommendation of 2004 by the European Commission–a broader discussion of this instrument which gradually led to the adoption of related rules throughout Europe.[2] In Germany, a "say on pay" was enacted by

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[1] Now section 439 of the *Companies Act* 2006. See on this Jeffrey N. Gordon, *"Say On Pay": Cautionary Notes on the UK Experience and the Case for Shareholder Opt-In*, 46 HARV. J. ON LEGIS. 323, 340-346 (2009); Jan Lieder & Philipp Fischer, *The Say-on-pay Movement–Evidence from a Comparative Perspective*, 10 ECFR 376, 381-383, 399-402 (2011); Holger Fleischer & Dorothea Bedkowski, *"Say on Pay" im deutschen Aktienrecht: Das neue Vergütungsvotum der Hauptversammlung nach § 120 Abs. 4 AktG* ("Say on Pay" in German corporate law: The new remuneration vote of the shareholders' meeting pursuant to § 120 paragraph 4 of the German Stock Corporation Act), DIE AKTIENGESELLSCHAFT (AG), 677, 678 (2009); Matthias Döll, *Say on Pay: Ein Blick ins Ausland und auf die neue deutsche Regelung* (Say on Pay: A look abroad and to the new German regulation), ILF WORKING PAPER NO. 107, 6-8, available at: http://www.ilf-frankfurt.de/uploads/media/ILF_WP_107.pdf (last accessed: 27 June 2013). Interestingly, the UK government was about to change (toughen) its "say on pay" provision by proposing *inter alia* an annual binding vote on a company's proposed remuneration policy; an annual advisory vote on whether the shareholders are satisfied with the implementation of the previously approved remuneration policy; as well as a binding shareholder vote on any exit payment to a director that exceeds the equivalent of one year's base salary. *See* UK Department for Business, Innovation & Skills, *Directors' Pay: Consultation on Enhanced Shareholder Voting Rights* (June 20, 2012), available at: http://www.bis.gov.uk/Consultations/executive-pay-shareholder-voting-rights (last accesed: 27 June 2013). Some of these proposals have been enacted by the ENTERPRISE AND REGULATORY REFORM ACT 2013, April 24, 2013 (Part 6: Miscellaneous and General), available at: http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted (last accessed: 27 June 2013).

[2] However, it seems that the British model has not yet completely achieved acceptance in Europe, *see* Guido Ferrarini, Niamh Moloney & Maria Cristina Ungureanu, *Understanding Director's Pay in Europe: A Comparative and Empirical Analysis*, ECGI LAW WORKING PAPER 126, 38-40 (2009), available at: http://ssrn.com/abstract=1418463 (last accessed: 27 June 2013). *See also* EU Commission Staff Working Document, *Report on the application by Member States of the EU of the Commission Recommendation on director's remuneration of 13 July 2007*, SEC (2007) 1022, 6 ("This recommendation [*i.e.* shareholder vote on the remuneration policy] does not seem to be appropriately implemented in the majority of Member States. About a third of the Member States have such a recommendation in place.") *See also* the tables provided at pages 11-12.

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the German Parliament (*Deutscher Bundestag*) as part of the Act on the Appropriateness of Management Board Compensation (*Gesetz zur Angemessenheit der Vorstandsvergütung–VorstAG*) on 18 June 2009, it passed the second chamber of the German Parliament (*Deutscher Bundesrat*) on 5 July 2009 and was promulgated in the legal gazette (*Bundesgesetzblatt*) on 31 July 2009.[3] The new law became effective on 5 August 2009. In the meantime, the United States also enacted provisions with respect to a shareholder vote on executive compensation. The Dodd-Frank Wall Street Reform and Consumer Protection Act, often only referred to as the "Dodd-Frank-Act", introduced a mandatory, non-binding "say on pay", as well as a more specific shareholder vote on payments in the context of a change of control ("golden parachutes").[4] The SEC recently adopted rules in order to implement these provisions.[5]

Despite the common terminology, there exist considerable differences in the national implementations of a "say on pay" and the experiences the countries are having so far. The paper will primarily focus on the German provision and wants to shed some light on the German practice. This shall happen in three stages.

At first, the paper gives a short overview about the development towards the "say on pay" in Germany. The provision was not enacted out of the blue; instead, it was preceded by a process that endured almost five years. In this passage the Act on the Appropriateness of Management Board Compensation, which included the "say on pay" provision, will also shortly be described. The aim is to give the reader a better understanding of the legislative context in which the shareholder vote on executive remuneration was enacted (part B). The paper then goes on to describe the German "say on pay" in detail. At this point, legal questions that have arisen so far as to the interpretation and application of this relatively new rule will be addressed (part C). Finally, the paper will elaborate on the practical significance of the "say on pay" for the 30 largest listed corporations in Germany (the DAX 30 companies) by means of an empirical study. Shortly after its enactment it was–due to the peculiarities of the provision[6]–not uncommonly questioned whether the "say on pay" rule would attain any practical significance at all.[7] To answer this question, and more

[3] GESETZ ZUR ANGEMESSENHEIT DER VORSTANDSVERGÜTUNG [VORSTAG] [Act on the Appropriateness of Management Board Compensation], July 31, 2009, BGBl. I at 2509 (Ger.).

[4] *See* Lieder & Fischer, *supra* note 1, at 387-392.

[5] Securities and Exchange Commission, *Shareholder Approval of Executive Compensation and Golden Parachute Compensation*, 17 CFR PARTS 229, 240 and 249 = SEC Release Nos. 33-9178; 34-63768, available at: http://www.sec.gov/rules/final/2011/33-9178.pdf (last accessed: 27 June 2013).

[6] *See* parts C.II.2, C.II.5 and C.II.6.

[7] For such a skeptical assessment, *see* Eberhard Vetter, *Der kraftlose Hauptversammlungsbeschluss über das Vorstandsvergütungssystem nach § 120 Abs. 4 AktG* (The powerless shareholder resolution on the Management Board compensation system according to § 120 paragraph 4 AktG of the German Stock Corporation Act), ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2136, 2141, 2143 (2009); Arndt Begemann & Bastian Laue, *Der neue § 120*

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generally to be able to draw conclusions as to the experience with the new rule, the author has gathered information on how the DAX 30 corporations have dealt with it in the first three years since its enactment in 2009 (part D). The paper concludes with a short summary of its main findings (part E).

B. The (Legislative) Road to a "Say on Pay" in Germany

As already indicated in the introduction, it took several steps for the final enactment of the current "say on pay" provision. The following passages seek to give a short account of this process by depicting the relevant stages on the road to a "say on pay" in Germany.

I. The German Corporate Governance Code

The German Corporate Governance Code (*Deutscher Corporate Governance Kodex*) was enacted on 26 February 2002. The Code puts forward essential statutory regulations for listed German stock corporations (*börsennotierte Aktiengesellschaften*) and contains recognized standards for good and responsible governance. The objective is to make the German Corporate Governance system transparent and understandable, especially for international investors.[8] This seemed to be necessary since German stock corporations are governed by an internationally uncommon two-tier board system, consisting of a management board (*Vorstand*) that runs the corporation,[9] and a supervisory board (*Aufsichtsrat*) whose main task is to control and advise the management board in the fulfillment of its duties.[10]

According to § 161 of the German Stock Corporation Act (*Aktiengesetz*), listed stock corporations have to declare annually whether or not they comply with the Code's

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Abs. 4 AktG–ein zahnloser Tiger? (The new § 120 paragraph 4 of the German Stock Corporation Act, a toothless tiger?), BETRIEBS-BERATER [BB] 2442, 2443 (2009); Gerald Spindler, *Vorstandsgehälter auf dem Prüfstand–das Gesetz zur Angemessenheit der Vorstandsvergütung* (Board salaries to the test – The Act on the Appropriateness of Management Board Compensation, VorstAG) 9 NEUE JURISTISCHE ONLINE ZEITSCHRIFT [NJOZ] 3282, 3290 (2009); Stefan Lingemann, *Angemessenheit der Vorstandsvergütung–Das VorstAG ist in Kraft* (Appropriateness of Management Board Compensation-The VorstAG is in force), BETRIEBS-BERATER [BB] 1918, 1923 (2009).

[8] See *Foreword* to the German Corporate Governance Code, as amended on May 15, 2012, available at: http://www.corporate-governance-code.de/eng/kodex/index.html (last accessed: 27 June 2013). Both current and past versions of the Code can be found on the official internet page of the Government Commission of the German Corporate Governance Code, available at: http://www.corporate-governance-code.de/eng/archiv/index.html (last accessed: 27 June 2013).

[9] AKTIENGESETZ [German Stock Corporation Act], December, 2012, at § 76.

[10] *Id.* at § 111.

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recommendations, and if not, the reasons for not doing so (comply-or-explain principle).[11] While the initial version of the Code only suggested that the figures of the executive compensation of the members of the management board "should be individualized", its revision in May 2003 turned this proposal into a recommendation whose compliance had to be publically disclosed by listed companies.[12] With this step it became evident that a vast majority of corporations initially rejected this recommendation and did not disclose the compensation of their members of the management board on an individualized basis.[13] Instead, only the overall compensation for the management board was reported.

Empirical evidence has suggested that opposition towards this recommendation decreased gradually. For 2005 the disclosed compliance rate improved significantly, although unequally strong in different stock exchange indices.[14] The year 2006 saw a further boost in compliance with the individualized disclosure of executive compensation.[15] However, dissatisfaction with the speed of the progress ultimately triggered a legislative reaction. But before turning to this, it is worthwhile to have a quick look at the parallel development on the European level because of its influence on the evolution in Germany.

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[11] In this regard the Code's three-step approach needs to be pointed out: compliance with statutory provisions does not need to be announced; compliance is not an option at the discretion of corporations, but obviously an irrevocable legal obligation of every company. Recommendations (marked in the Code by the use of the word "shall"), though, are not binding, but here the reporting duty is triggered. Mere suggestions (marked as "should" or "can") are neither binding nor does a company have to disclose that it deviates from these provisions. With regard to the "comply-or-explain principle" it finally has to be mentioned that it was initially actually only a "comply-or-disclose principle". Until 2009, there was only the legal obligation to disclose, but not to explain, the non-compliance with recommendations. German Parliament has established a real "comply-or-explain principle" in the GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 161, by an amendment in the shadow of the enactment of the GESETZ ZUR MODERNISIERUNG DES BILANZRECHTS [BILMOG] [Accounting Law Modernization Act] May 25, 2009, BGBl. I at 1102 (Ger.).

[12] *See* § 4.2.4, sentence 2 of the German Corporate Governance Code, as amended on May 21, 2003, available at: http://www.corporate-governance-code.de/eng/archiv/index.html (last accessed: 27 June 2013).

[13] *See* the empirical study of Axel v. Werder, Till Talaulicar & Georg L. Kolat, *Kodex-Report 2004–Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex* (Code Report 2004-The acceptance of the recommendations and suggestions of the German Corporate Governance Code), DER BETRIEB [DB] 1377, 1379, 1381 (2004). There, the authors note that only 32.1 % of the DAX-, 24.2% of the MDAX- and only 14.3 % of the SDAX-companies complied with the recommendation in 2004.

[14] *See* the empirical study of Axel v. Werder & Till Talaulicar, *Kodex-Report 2005–Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex* (Code Report 2005-The acceptance of the recommendations and suggestions of the German Corporate Governance Code), DER BETRIEB [DB] 841, 844-845 (2005). There, the authors note that 69.0 % of the DAX-, 37.5 % of the MDAX and 27.3 % of the SDAX-companies complied with the recommendation in 2005.

[15] *See* the empirical study of Axel v. Werder & Till Talaulicar, *Kodex-Report 2006–Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex* (Code Report 2006-The acceptance of the recommendations and suggestions of the German Corporate Governance Code), DER BETRIEB [DB] 849, 851, 854 (2006). There, the authors note that 77.8 % of the DAX-, 55.6 % of the MDAX and 47.4 % of the SDAX-companies complied with the recommendation in 2006.

II. The EC Commission's Recommendations of 2004 and 2009

Business law in Europe is a multi-layer jurisdictional subject. It is by no means only a national matter but is instead, by and large, influenced–if not determined–by EU regulation.[16] While in some areas EU regulation is very strict, leaving Member States almost no room for maneuver,[17] it is also the case that the European Commission takes a more lenient approach by issuing recommendations for certain national actions. These recommendations are not binding on the Member States, but are mere suggestions by the Commission that can either be followed or not. With regards to the subject matter of this paper, an EC recommendation of 2004 and its modification in 2009 are of special interest.

1. The EC Commission's Recommendation of 2004

In December 2004, the EC Commission published a recommendation on fostering an appropriate regime for the remuneration of directors of listed companies.[18] Assuming that form, structure and level of directors' compensation are matters falling within the competence of companies and their shareholders,[19] the EC Commission named three recommendations that apply to all listed companies and that are of particular interest to the subject of this paper.

The first concerns the disclosure of the remuneration policy. It was recommended that shareholders be provided with a clear and comprehensive overview of the company's remuneration policy (the remuneration statement).[20] The remuneration statement should mainly focus on the company's policy on directors' remuneration for the following financial

[16] For an account of the methodical issues involved, *see* Christine Windbichler & Kaspar Krolop, *Europäisches Gesellschaftsrecht* (European Company Law), *in* EUROPÄISCHE METHODENLEHRE–HANDBUCH FÜR AUSBILDUNG UND PRAXIS § 19 (European Methodology Manual for Education and Practice Karl Riesenhuber ed., 2nd ed., 2010).

[17] That is especially true in cases where the EU uses the legislative form of a "regulation" which is binding on the Member States and generally does not need any transformation into national law. *See* Treaty on the Functioning of the European Union art. 288 (2), Mar. 30, 2010, 2012 O.J. (C326). But even in cases of "directives" the room to deviate for the Member States is often limited and differs on how close-meshed the framework of the directive is. A directive is binding on the Member States and has to be implemented into national law. *See* art. 288 (3) of the Treaty on the Functioning of the European Union.

[18] Commission Recommendation (2004/913/EC) 12/2004 of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies, 2004 O.J. L. 385/55.

[19] *See id.*, explanatory note 2.

[20] *See Id.*, sec. 3 (explanatory note 5). According to the European Commission Staff Working Document, *Report on the application by Member States of the EU of the Commission Recommendation on director's remuneration*, Jul. 13, 2007, SEC(2007) 1022, at 5, this recommendation was followed by about 60 % of the Member States in 2007.

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year and, if appropriate, the subsequent years.[21] The Commission also provided guidelines as to what information should especially be included into the remuneration statement, such as, *inter alia*, an explanation of the relative importance of the variable and non-variable components of director's remuneration and information on the performance criteria on which any variable components of remunerations are based.[22] The idea is to allow shareholders and investors to assess the main parameters and rationale for the different components of the remuneration package and the linkages between compensation and performance with the aim to strengthen the company's accountability to shareholders.[23]

This disclosure was supplemented by a recommendation concerning the disclosure of the remuneration of individual directors.[24] The Commission suggested that the total compensation and other benefits granted to individual directors over the relevant financial year should be disclosed in detail in the annual accounts, in the notes to the annual accounts or in a remuneration report.[25] The information should comprise, *inter alia*, the total amount of salary paid, bonus payments and the reasons why such bonuses were granted, any other significant additional remuneration paid to directors for services rendered outside the scope of their usual functions, the compensation paid to former (executive) directors as well as an estimated amount of any non-cash benefits considered as remuneration. Finally, detailed information as to share options and share-incentives schemes as well as (supplementary) pension schemes should be presented.[26] The stated rationale for an individualized disclosure is to allow for appreciating the compensation of each director in the light of the performance of the company and to hold individual directors accountable for the remuneration they earn.[27]

The third recommendation involves the active participation of shareholders as to executive compensation. The Commission did not only propose that the remuneration policy for directors is put as an explicit item on the agenda of the shareholders' general meeting, so that the shareholders are enabled to discuss the corporation's compensation policy and express their views on it without having to initiate the cumbersome process of tabling a

[21] *See* 2004/913/EC, *supra* note 18, section 3.1.

[22] For further details, *see* 2004/913/EC, *supra* note 18, section 3.3.

[23] *See* 2004/913/EC, *supra* note 18, explanatory note 5.

[24] This recommendation was followed by more than two thirds of the Member States in 2007. *See* SEC(2007) 1022, *supra* note 20, at 6.

[25] *See* 2004/913/EC, *supra* note 18, section 5.1.

[26] For details, *see id.*, sections 5.4 and 5.5.

[27] *See id.*, explanatory note 9.

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shareholder resolution.[28] Rather, it was also suggested that the remuneration statement–which contains the company's remuneration policy–be submitted to the annual general meeting for a shareholder vote which is–once again–intended to increase directors' accountability.[29] It is evident that this recommendation rested in principle on the British model.[30] The British "say on pay" model was, however, not simply translated to the European level since the shareholder vote on the remuneration policy may–at each Member State's choice–be either binding or only advisory.[31] On the other hand, with regard to the frequency of the shareholder vote, the recommendation seems to head in the same direction as the UK model. Here and there, a yearly vote by the shareholders on executive compensation is envisaged.[32]

2. The EC Commission's Recommendation of 2009 Complementing the 2004 Recommendation

In the wake of the financial crisis the EC Commission modified its initial recommendation of December 2004 in order to take account of false incentives in executive compensation schemes (short-termism), which are regarded as one of the major factors which contributed to the financial crisis.[33] Consequently, in its April 2009 recommendation the Commission supplemented the framework of 2004 mainly with regard to the recommendations related to the companies' remuneration policy.[34] Generally speaking the Commission's objective was to ensure that the structure of directors' remuneration promotes long-term sustainability of the corporation and that compensation is based on performance.[35] Variable components of remuneration should consequently be linked to

[28] *See id.*, section 4.1 and explanatory note 7.

[29] *See id.*, section 4.2 and explanatory note 8.

[30] Döll, *supra* note 1, at 3.

[31] This recommendation was followed by about a third of the Member States in 2007. *See* SEC (2007) 1022, *supra* note 20, at 6.

[32] *See id.*, section 4.2. For the UK model, *see* the references given at *supra* note 1.

[33] For a detailed elaboration on "short-termism" in the context of the financial crisis, *see* Lynne Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. OF CORP. L. 264 (2011); in a broader context COLIN MAYER, FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT (2013).

[34] Commission Recommendation (2009/385/EC) of 30 April 2009, complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies, 2009 O.J. L. 120/58.

[35] As an accompanying communication from the Commission points out, the lack of a requirement to align executive compensation with the long-term interest of companies was a shortcoming of Recommendation 2004/913/EC. *See* Commission Communication (COM (2009) 211 final) of 30 April 2009 accompanying Commission Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of

predetermined and measurable performance criteria,[36] while termination payments (so-called "golden parachutes") should be subject to quantified limits and must not be a reward for failure. In addition, share-based compensation schemes should also be better linked to performance and the long-term value creation of the firm.[37]

Furthermore, the Commission recommended that the remuneration statement should be clear and easily understandable[38] and suggested additional information that should be included in that statement, such as an explanation on how the choice of performance criteria contributes to the long-term interests of the company, and the methods applied in order to determine whether the performance criteria have been fulfilled.[39]

With regard to the shareholder vote on executive compensation there are no substantial modifications. However, the Commission made clear who was mainly being addressed with the "say on pay" rule. The main focus lies with institutional shareholders who should–according to the Commission–take a leading role in the context of ensuring increased accountability of boards with respect to compensation issues.[40]

III. The Act on the Disclosure of Management Board Compensation–VorstOG (2005)

After having briefly outlined the development concerning executive compensation on the European Community level from 2004-2009, I now want to come back to the German legislation. As mentioned before, initially, the recommendation of the German Corporate Governance Code to disclose the executive compensation on an individualized basis was met with broad opposition.[41] While compliance with this specific provision increased gradually, it was obviously not fast enough to prevent legislative action.[42] In 2005, the

directors of listed companies and Commission Recommendation on remuneration policies in the financial services sector, available at: http://ec.europa.eu/internal_market/company/docs/directors-remun/COM(2009)_211_EN.pdf (last accessed: 27 June 2013), at 3.

[36] For further details, *see* 2009/385/EC, *supra* note 34, section II.3.2, explanatory note 6. *See also* Gordon, *supra* note 1, at 333-335, who is generally skeptical concerning the opportunity to easily measure "pay for performance" (stating that "'pay for performance' is a complex phenomenon, not an easily measurable output variable, and that the attempt to reduce it to a simple output may lead boards, and the evaluators of boards, astray.").

[37] For further details, *see* 2009/385/EC, *supra* note 34, sections II.3.5., II.4, explanatory notes 7, 8.

[38] *Id.* at section II.5.1.

[39] For further details, *see id.* at section II.5.2.

[40] *Id.*, section II.6.1, explanatory note 10; *see also* COM (2009) 211 final, *supra* note 35, at 3.

[41] *See supra*, note 13.

[42] *See supra*, notes 14 and 15.

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German Parliament–being explicitly unsatisfied with the speed of the progress[43]–consequently enacted the Act on the Disclosure of Management Board Compensation (*Gesetz über die Offenlegung der Vorstandsvergütungen–VorstOG*).[44]

With reference to the European thrust, the German legislation mandated the individualized disclosure of executive remuneration for every listed company in the notes of its (group) financial statements or in its management report (*Lagebericht*) for business years beginning after 31 December 2005.[45] Consequently, for each member of the management board (*Vorstandsmitglied*) the company has to disclose its individual remuneration–separated with regard to fixed salary payments, performance-based payments and compensation schemes with long-term incentives.[46] However, the legislation also provided for the opportunity of an opt-out of this disclosure regime by a shareholder resolution that is limited to a maximum of five years and that has been passed by a three-quarter majority.[47] Furthermore, a new provision as to the disclosure of the remuneration system was introduced.[48] According to this rule the management report shall be responsive to the salient points of the compensation system.[49]

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[43] *See* Deutscher Bundestag, *Drucksachen und Protokolle* (Printed materials and protocols, BT-Drs.), 15/5577 at 5 (Ger.).

[44] *See* GESETZ ÜBER DIE OFFENLEGUNG DER VORSTANDSVERGÜTUNGEN–VORSTANDSVERGÜTUNGS-OFFENLEGUNGS-GESETZ [VORSTOG] (Act on the Disclosure of Management Board Compensation), August 3, 2005, BGBl. I at 2267 (Ger.); on this in detail, *see* Theodor Baums, *Zur Offenlegung von Vorstandsvergütungen* (Disclosure of Management Board Compensation), ZEITSCHRIFT FÜR DAS GESAMTE HANDELS- UND WIRTSCHAFTSRECHT [ZHR 169], 299 (2005); Holger Fleischer, *Das Vorstandsvergütungs-Offenlegungsgesetz* (The Act on the Disclosure of Management Board Compensation), DER BETRIEB [DB] 1611 (2005).

[45] *See* Deutscher Bundestag, *supra* note 43 at 5, 6. *See also* part B.II.1 of this paper.

[46] *See* HANDELSGESETZBUCH (GERMAN COMMERCIAL CODE), December, 2012, at §§ 285 No. 9 lit. a) sentence 5, 314 (1) No. 6 lit. a) sentence 5. The German legislature acknowledged that they fall behind the EC Recommendation in this regard since the breakdown of information that has been recommended by the EC Commission was regarded as more detailed. The legislation was still convinced of having struck the right balance. *See* Deutscher Bundestag, *supra* note 43, at 6.

[47] See GERMAN COMMERCIAL CODE, *supra* note 46 at §§ 286 (5), 314 (2) sentence 2.

[48] See *id.* at §§ 289 (2) No. 5, 315 (2) No. 4.

[49] The unclear language ("shall") has been subject to argument whether or not, and if yes, under which circumstances, this disclosure can be left out; see for further references Döll, *supra* note 1, at 4 (note 17). Furthermore, nothing in the law provided for an explanation of the (salient points of the) remuneration system to the shareholders. Only the German Corporate Governance Code contained–ever since its first amendment on May 21, 2003–a recommendation in this respect by suggesting that the chairman of the supervisory board shall outline the salient points of the compensation system and any changes thereto to the general meeting. See § 4.2.3 (at the end) of the different versions of the German Corporate Governance Code, available at: http://www.corporate-governance-code.de/eng/archiv/index.html (last accessed: 27 June 2013). According to empirical studies this recommendation has been complied with by a vast majority of corporations, see Axel v. Werder & Till Talaulicar, *Kodex Report 2009: Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex* (Code Report 2009: The acceptance of the recommendations and suggestions of the

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The stated intention behind greater transparency was to allow shareholders to exert control over executive compensation that is traditionally–in the German two-tier board system–set by the supervisory board.[50] In granting publicity of individualized figures of executive remuneration to actual and potential shareholders–so the argument went–the investors would be able to determine whether the supervisory board obeyed its (already existing) statutory duty to ensure that the remuneration bears a reasonable relationship to the duties and performance of each management board member as well as the condition of the company.[51] The disclosure was obviously intended to make use of the threat of (potential) shareholder tools (such as the dismissal of supervisory board members, or the refusal of their reappointment) to motivate the supervisory board to act diligently in performing their duty of setting the executive compensation in the first place. Even though the official legislative materials stated that the objective of the implemented disclosure regime is not to assuage public curiosity about the remuneration of individual managers,[52] one can still speculate on the implicit intention of the legislation to curb excessive remuneration by means of the (media) publicity that high executive compensation tends to provoke.[53] Regardless, with the opt-out possibility the legislation still provided for the necessary flexibility where "control through disclosure" is not regarded as necessary because more direct means of control are available to shareholders (e.g. in case of the existence of a controlling shareholder) or where the individualized disclosure was thought of by the shareholders as being counterproductive (e.g. because of a fear of leveling the executive compensation).[54]

German Corporate Governance Code), DER BETRIEB [DB] 689, 691 (2009). There, the authors note that 100 % of the DAX-, 93.9 % of the MDAX- and 95.2 % of the SDAX-companies have followed this recommendation in 2009. *See also* Axel v. Werder & Till Talaulicar, *Kodex Report 2010: Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex* (Code Report 2010: The acceptance of the recommendations and suggestions of the German Corporate Governance Code), DER BETRIEB [DB] 853, 855 (2010), where the authors note that 100 % of the DAX-, 94.1 % of the MDAX- and 87 % of the SDAX-companies have followed this recommendation in 2010.

[50] *See* Deutscher Bundestag, *supra* note 43 at 5.

[51] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9 at § 87 (1). According to §§ 116 and 93 the members of the supervisory board are personally liable for the violation of that duty.

[52] *See* Deutscher Bundestag, *supra* note 43, at 5.

[53] *See also* Matthias Schüppen, *Vorstandsvergütung–(K)ein Thema für die Hauptversammlung?* (Management Board Compensation – (not) a subject for the shareholders' meeting?), ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 905, 912 (2010). There, the author denies the constitutionality of the individualized disclosure requirements on grounds of a violation of the manager's right of privacy [*Persönlichkeitsrecht*] and his right of informational self-determination [*Recht auf informationelle Selbstbestimmung*].

[54] Deutscher Bundestag, *supra* note 43, at 7.

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As has become clear from this description, two of the three explained suggestions of the EC Commission's recommendation of 2004 were–at least partially–implemented into German law in 2005, *i.e.* the disclosure of the remuneration system as well as the individualized disclosure of executive compensation of management board members. What was still missing was a shareholder vote on executive compensation, namely a "say on pay" provision in German Corporate Law. The implementation of this concept still had to wait for about three and a half years until the enactment of the Act on the Appropriateness of Management Board Compensation in 2009, to which the paper will now turn.

IV. The Act on the Appropriateness of Management Board Compensation–VorstAG (2009)

Nomen est omen. With the Act on the Appropriateness of Management Board Compensation (*Gesetz zur Angemessenheit der Vorstandsvergütung–VorstAG*) several changes to the German Stock Corporation Act were concluded whose aim it is–in the aftermath of the financial crisis–to provide for a reorientation of the system of executive remuneration.[55] The changes especially focus on the supervisory board intending to reinforce its role and responsibility in designing the executive compensation system. Furthermore, the legislation aimed to make the remuneration of members of the management board more transparent to shareholders as well as to the public. In this section I will give a short overview of the major changes before I focus on the "say on pay" provision in more detail in the next section.[56]

1. The "Say On Pay" Provision: Overview

The shareholders' meeting has always had the possibility to determine the remuneration for the members of the supervisory board by way of a shareholder resolution. Even though the remuneration of the supervisory board may also have been determined in the articles of incorporation, the law provides for a relaxed amendment procedure in case the shareholders want to change the supervisory board's compensation: the shareholders' meeting is allowed to amend the articles by a resolution that requires only a simple majority,[57] and thus, this kind of resolution is exempted to a considerable extent from the

[55] *See* GESETZ ZUR ANGEMESSENHEIT DER VORSTANDSVERGÜTUNG [VORSTAG] (Act on the Appropriateness of Management Board Compensation), July 31, 2009, BGBl. I at 2509 (Ger.).

[56] *See* part C of this paper.

[57] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 113.

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cumbersome amendment procedures which would normally be applicable to changes of the articles.[58]

In contrast, concerning the remuneration of the management board, shareholders of German stock corporations historically had had no "say". Within the German two-tier board system, it was only the supervisory board that was able to determine executive remuneration.[59] The Act on the Appropriateness of Management Board Compensation introduced the idea of a shareholder "say on pay" into German Corporate Law.[60] In § 120 (4) of the German Stock Corporation Act, shareholders are granted the possibility to vote on the executive compensation system.

In doing so, the German legislation obviously took up comparative law and Community law role models.[61] While it did only shortly refer to the British "say on pay"[62] to point to the potential mode of action of the new provision,[63] the introduction of the rule explicitly[64]

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[58] *See id.* at § 179.

[59] *See id.* at §§ 84, 87.

[60] It is sufficient just to point out here that after the enactment of the "say on pay" provision, there has been some debate about whether a comparable shareholder vote would have been already available to shareholders in the past, *i.e.* before the enactment of the Act on the Appropriateness of Management Board Compensation. Occasionally it has been argued that such a vote would have indeed been possible within the framework of the annual shareholder vote on the approval of the actions of the supervisory board (*see id*. at § 120 (*Entlastung*)) because one of the statutory duties of the supervisory board is to set the executive compensation (*id.* at § 87). Proponents of this view argued that the general meeting has the competence to isolate the compensation issue of the general approval of the supervisory board's past actions (so-called "*Teilentlastung*"), *see* Theodor Baums, *Vorschlag eines Gesetzes zur Offenlegung von Vorstandsvergütungen* (Draft law for an act on the disclosure of Management Board Compensation), ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1877, 1884 (2004); Döll, *supra* note 1, at 11-12; for the majority view that rejects this idea *see e.g.* Julia Redenius-Hövermann, *Das Votum zum Vergütungssystem* (The vote on the remuneration system), DER AUFSICHTSRAT 173 (2009); Werner Paul Schick, *Praxisfragen zum Vergütungsvotum der Hauptversammlung nach § 120 Abs. 4 AktG* (Practical issues concerning the shareholder resolution on the remuneration system pursuant to § 120 paragraph 4 of the German Stock Corporation Act), ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 593, 599 (2011); Schüppen, *supra* note 53, at 907. Although one might be inclined to argue that this debate is wholly theoretically because–as far as it is apparent–no such shareholder vote has ever been cast in the past and now the shareholder vote on the executive compensation system has been introduced. This question has nevertheless some practical relevance since–as we will see later–the "say on pay" provision only applies to listed corporations. Thus, the notion of a "*Teilentlastung*" could play a role in non-listed companies in which shareholders would like to vote on the executive compensation system, but whose corporation does not fall within the scope of the new rule.

[61] Holger Fleischer, *Das Gesetz zur Angemessenheit der Vorstandsvergütung* (The Act on the Appropriateness of Management Board Compensation, VorstAG), NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 801, 805 (2009).

[62] *See supra* note 1.

[63] *See* Deutscher Bundestag, *Beschlussempfehlung und Bericht* (Recommendations for decisions and report, BT-Drs.), 16/13433 at 12 (Ger.). The legislative perception regarding the mode of action of the new provision is described in more detail in part C.I of this paper.

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served as a transformation of the EC Commission's Recommendation of 2004 that suggests that the remuneration statement of a listed company should be subjected to the general meeting for a shareholder vote.[65]

Interestingly, the "say on pay" provision was included into the act only very late in the legislative proceedings. The first draft law did not contain any such rule.[66] Instead, it was introduced due to a recommendation of the committee of legal affairs. This step came–according to the observations of some commentators–very surprisingly because there existed substantial reservations in the German scholarship as to such a rule.[67] A shareholder vote on management board compensation was regarded as unreasonably interfering in the well-balanced competence structure of German stock corporations that leaves it up to the supervisory board to set the compensation for the members of the management board. Any kind of shareholder participation in this regard was thus perceived as being an infringement of the supervisory board's responsibilities.[68]

While this is not the place to speculate extensively about the reasons the German legislation might have had to integrate the "say on pay" provision in the final legislative proceedings, it nevertheless seems to be a fair assessment that the shareholder vote was conceived of as a meaningful enforcement mechanism of the other amendments to the German Stock Corporation Act with regards to executive compensation.[69] It, therefore, seems to be appropriate to shortly address the adopted changes before coming back to the "say on pay" provision in more detail in the next section.

2. Further Amendments

One of the centerpieces of the Act on the Appropriateness of Management Board Compensation has been the reformulation of § 87 of the German Stock Corporation Act. Generally speaking this provision has ascribed the competence to set (appropriate) management remuneration to the supervisory board and has allowed–since its enactment in 1937–for restrictions of the freedom of contract in order to enable the supervisory board to adapt management compensation to changed circumstances of the corporation.

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[64] *See id*.

[65] *See* part B.II.1 of this paper.

[66] For the first draft law, *see* Deutscher Bundestag, *Beschlussempfehlung und Bericht (BT-Drs.)*, 16/12278 (Ger.).

[67] *See* Döll, *supra* note 1, at 4-5 (note 22, 24 and 25) for further references.

[68] The provision deals with that objection in prescribing that the shareholder vote does not have any legal significance. On this, *see* part C.II.6 of this paper.

[69] *See* part C.I of this paper for the legislative perception of the effects of the "say on pay" provision.

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With its amendments the German legislation intended to concretize and develop this provision in order to adjust executive compensation to long-term goals and a sustainable management of the corporation as well as to facilitate the retroactive decrease of management board remuneration by the supervisory board.[70]

Consequently, the provision now prescribes that the supervisory board shall, in determining the aggregate remuneration of any member of the management board (consisting of salary, profit participation, incentive-based compensation promises, commissions, reimbursement of expenses, insurance premiums etc.), ensure that the aggregate remuneration bears a reasonable relationship to the duties and performances of such member as well as to the condition of the company and that it does not exceed the standard remuneration without any particular reason.[71] Furthermore, the remuneration system of listed companies shall be aimed at the company's sustainable development.[72] The calculation basis of variable remuneration components should therefore be several years; for extraordinary developments, the supervisory board should provide for the possibility of remuneration limitations in the employment contracts with the management board members.[73] Finally, the provision now allows–with certain exceptions for pensions and similar payments–for an easier reduction of payments to the management board members if the situation of the company–after the determination of the remuneration has been made–deteriorates so that a continued payment would be unreasonable for the company. In this case the supervisory board, or the court upon petition of the supervisory board, shall reduce the remuneration to a reasonable level.[74]

The reformulation of § 87 German Stock Corporation Act and its envisaged orientation of executive compensation on the long-term interest of the corporation is accompanied by a

[70] *See* Deutscher Bundestag, *supra* note 66, at 5; *see also* Deutscher Bundestag, *supra* note 63, at 10.

[71] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 87 (1), sentence 1.

[72] *See id.* at § 87 (1), sentence 2.

[73] *See id.* at § 87 (1), sentence 3.

[74] See *id.* at § 87 (2). For comments on the new provision–especially with regard to the new criteria of a "standard remuneration" (*übliche Vergütung*)– *see* Deutscher Bundestag, *supra* note 63, at 10; Fleischer, *supra* note 61, at 802-804; Spindler, *supra* note 7, at 3283-3287; Lingemann, *supra* note 7, at 1918-1922; Klaus-Stefan Hohenstatt, *Das Gesetz zur Angemessenheit der Vorstandsvergütung* (The Act on the Appropriateness of Management Board Compensation), ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1349, 1350-1353 (2009); Michael Hoffmann-Becking & Gerd Krieger, *Leitfaden zur Anwendung des Gesetzes zur Angemessenheit der Vorstandsvergütung* (Guidance on the Application of the Act on the Appropriateness of Management Board Compensation, VorstAG), 26 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG]-BEILAGE, 1, 1-6 (2009); Philipp Jaspers, *Mehr Demokratie wagen–Die Rolle der Hauptversammlung bei der Festsetzung der Vergütung des Vorstands* (More democracy—The role of the shareholders' meeting in determining the remuneration of the Management Board), ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 8, 8-9 (2010).

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declaratory[75] extension of the liability provision for supervisory board members which now accentuates what was already valid law: supervisory board members are liable for damages if they determine an unreasonable remuneration.[76] Much more substance is offered in this regard with the prolongation of the vesting period for stock options. The legislation increased the minimum holding period from two to four years before stock options can be exercised.[77]

Furthermore, the provisions on the transparency of executive compensation–that had been implemented in 2005 by the Act on the Disclosure of Management Board Compensation (*VorstOG*)–have been toughened.[78] Here, the disclosure of benefits that have been promised by the corporation and that become due after the regular or untimely termination of membership in the management board (e.g. severance payments, pensions and survivors' benefits) were of a particular concern for the parliament.[79]

Moreover, companies that are taking out directors' and officers' liability insurances for the members of the management board are obliged to provide for a deductible of no less than 10 % of the damage up to at least an amount equal to 1.5 times the fixed annual compensation of the management board member.[80]

Finally, another amendment to the Stock Corporation Act needs to be mentioned even though it does not directly touch the issue of executive remuneration. The legislation also attacked the longstanding industry practice wherein former management board members (especially CEOs [*Vorstandsvorsitzende*]) of becoming–once they left the management board–immediately members of the corporation's supervisory board or even its chairman. Even though the German Corporate Governance Code contained for many years a recommendation that such an immediate change should not be the rule and that deviations from that recommendation should be explained at shareholders' meeting,[81]

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[75] *See* Fleischer, *supra* note 61, at 804; Spindler, *supra* note 7, at 3289; Hoffmann-Becking & Krieger, *supra* note 74, at 10.

[76] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 116 sentence 3 (in connection with § 93).

[77] *See id.* at § 193 (2), No. 4.

[78] *See* part B.III of this paper.

[79] *See* GERMAN COMMERCIAL CODE, *supra* note 46, at § 285 No. 9 lit. a) sentence 6, § 314 (1) No. 6 lit. a) sentence 6. For comments, *see* Fleischer, *supra* note 61, at 805; Lingemann, *supra* note 7, at 1923.

[80] See GERMAN STOCK CORPORATION ACT, *supra* note 9 at § 93 (2) sentence 3. For a more detailed account see *e.g.* Lingemann, *supra* note 7 at 1922; Hoffmann-Becking & Krieger, *supra* note 74 at 6-7.

[81] See § 5.4.4 of the German Corporate Governance Codes from June 2, 2005 to June 18, 2009, available at: http://www.corporate-governance-code.de/eng/archiv/index.html (last accessed: 27 June 2013).

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practice has arguably failed to pay attention to this "best practice".[82] That is why the legislation amended the Stock Corporation Act to prohibit a person from becoming a member of the supervisory board of a listed company if he has been a member of the management board of that company during the past two years (cooling-off period).[83] However, this general prohibition came with an exception to allow the corporation to preserve the firm-specific knowledge typified in the management board member: the relevant person can be elected into the supervisory board by majority vote of the general meeting if the person has been nominated by shareholders holding more than 25 % of the voting rights in the company, *i.e.* has not been nominated by the supervisory board as it would be the case in general. Whether this exception is–due to its high shareholder nomination threshold–only "law in the books", or whether it realistically leaves shareholders a choice to vote former management board members into the supervisory board has to be shown by practice in the next few years.

C. The "Say on Pay" Provision in Detail

After this short overview of the legislative path to a German shareholder vote on the executive remuneration system and the European and German legislative backdrop against which the new provision has been enacted, the following section will concentrate on the substance of the new provision. For this purpose, it might be useful to first have a look at the legislative purpose and perception of the mode of action of § 120 (4) of the German Stock Corporation Act before turning to its details.

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[82] Note the flexible language "shall not be the rule" in § 5.4.4, sentence 1 of the German Corporate Governance Codes, *supra* note 81, which allowed for the corporation to make a declaration of compliance even in case that a former management board member was appointed to the supervisory board in the year of the declaration. As long as such an immediate appointment was not the norm in the corporation, it arguably complied with § 5.4.4, sentence 1 of the Code. This might explain why empirical studies have not provided as devastating figures as one might have expected taken the public debate about this practice, see v. Werder & Talaulicar, *supra* note 15 at 851, stating that 77.8 % of the DAX-, 94.1 % of the MDAX- and 95.0 % of the SDAX companies complied with the provision in 2006; Axel v. Werder & Till Talaulicar, *Kodex-Report 2007–Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex* (Code Report 2007-The acceptance of the recommendations and suggestions of the German Corporate Governance Code), DER BETRIEB [DB] 869, 871 (2007), which states that 79.3 % of the DAX-, 88.9 % of the MDAX- and 86.2 % of the SDAX companies complied with the provision in 2007; Axel v. Werder & Till Talaulicar, *Kodex-Report 2008: Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex* (Code Report 2008-The acceptance of the recommendations and suggestions of the German Corporate Governance Code), DER BETRIEB [DB] 825, 828 (2008), which states 75.0 % of the DAX-, 96.6 % of the MDAX- and 82.6 % of the SDAX companies complied with the provision in 2008; v. Werder & Talaulicar, *supra* note 49, at 693, which states that 81.5 % of the DAX-, 87.9 % of the MDAX- and 89.5 % of the SDAX companies complied with the provision in 2009.

[83] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 100 (2) sentence 1, No. 4.

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I. Legislative Perception Regarding the Mode of Action

As has been shown, the Act on the Appropriateness of Management Board Compensation, *inter alia*, tried to exert a steering influence on executive remuneration. The "say on pay" provision was intended to reinforce that thrust by granting shareholders a means for controlling the existing system of management compensation.[84] Furthermore, the legislation expects positive results from the shareholder vote on the fulfillment of the supervisory board's duty in setting appropriate executive compensation.[85] The idea is, on the one hand, not to touch the supervisory board's remuneration competence, but, on the other hand, to put the supervisory board under pressure to justify its remuneration policy to its shareholders,[86] and thereby to cause the supervisory board to act with particular diligence in setting the executive compensation in the first place.[87]

While the new provision has been occasionally characterized and criticized as "soft law",[88] a "toothless tiger"[89] or even as "lettre morte",[90] the parliament–as well as other legal commentators–expects this mechanism to work. The denial of the executive remuneration system by shareholders is supposed to produce considerable publicity, especially in connection with the news coverage of the business press ("power of the pen"),[91] and thereby to exert factual pressure on the supervisory board to change its executive remuneration policy.[92] Some scholars even suggested that such a change will not only be triggered in case the remuneration system suffers a formal defeat in the shareholder vote, but also in case a considerable percentage of shareholders vote against the compensation

[84] Deutscher Bundestag, *supra* note 63, at 12.

[85] *Id.*

[86] Döll, *supra* note 1, at 3.

[87] Deutscher Bundestag, *supra* note 63, at 12.

[88] Peter Hanau, *Der (sehr vorsichtige) Entwurf eines Gesetzes zur Angemessenheit der Vorstandsvergütung* (The (very cautious) Draft Act on the Appropriateness of Management Board Compensation), 62 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1652, 1653 (2009).

[89] Begemann & Laue, *supra* note 7, at 2443; Spindler, *supra* note 7, at 3290.

[90] Vetter, *supra* note 7, at 2143.

[91] Fleischer & Bedkowski, *supra* note 1, at 685.

[92] *See supra* note 63 at 12. *See also* from the legal literature Barbara Deilmann & Sabine Otte, *"Say on Pay"–erste Erfahrungen der Hauptversammlungspraxis* ("Say on Pay"-first experiences on shareholder meetings), DER BETRIEB [DB] 545 (2010); Schüppen, *supra* note 53, at 908; FLEISCHER/BEDKOWSKI, *supra* note 1, at 685; DÖLL, *supra* note 1, at 21.

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system. It was assumed that dissenting votes of 20 % would already lead to fast adjustments by the supervisory board.[93]

The empirical study of the DAX 30 corporations–set forth in part D of this paper–will examine to what extent these expectations are justified. At this stage it suffices to state that it is generally expected that the shareholder vote will have some potential influence over how management board members will be compensated henceforth.

II. Implementation

According to § 120 (4) sentence 1 of the German Stock Corporation Act, the shareholders' meeting of a listed company may resolve on the approval of the executive compensation scheme. In sentences 2 and 3, the legislation denied the resolution any legal effect. The following paragraphs are going to set forth the intricacies of the German "say on pay".

1. The Scope of Application: Listed Companies

The new provision is limited to "listed companies" (*börsennotierte Gesellschaften*) only; the German legislation follows the EC Recommendation of 2004. Listed companies within the meaning of the German Stock Corporation Act are those whose shares have been admitted to a market that is regulated and supervised by state recognized authorities and that is directly or indirectly accessible to the public.[94] This also captures companies incorporated under German law whose shares are traded in comparable foreign stock markets.[95]

Occasionally the restriction in the scope of application to listed companies has been criticized. It was suggested that the legislation should have provided for a "catch-all clause" combined with an "opt-out" opportunity for non-listed companies.[96] Other commentators, to the contrary, have recognized that the provision is actually over-inclusive given the core justification that has been put forward by the legislation for the Act on the

[93] Fleischer & Bedkowski, *supra* note 1, at 685.

[94] See the definition of "listed companies" in GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 3 (2). *See also* Uwe Hüffer, AKTIENGESETZ–KOMMENTAR (Commentary on the German Stock Corporation Act, 9th ed., 2010) at § 3, note 5-6.

[95] Peter Doralt & Christoph Diregger, *in* MÜNCHENER KOMMENTAR ZUM AKTIENGESETZ (Munich Commentary on the German Stock Corporation Act, Wulf Goette, Mathias Habersack & Susanne Kalss eds., 3rd ed., 2008), at § 3 note 38.

[96] Redenius-Hövermann, *supra* note 60, at 173.

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Appropriateness of Management Board Compensation (*i.e.* "lessons learnt" from the financial crisis). According to this view, the over-inclusiveness of the rule can only be explained by a general unease of the parliament with the current level of compensation for management board members since excessive management compensation also concerns a sense of fairness within a society.[97]

Indeed, the discussion about excessive executive compensation has always centered on the largest German companies, but these corporations usually happen to be the listed ones.[98] These companies–irrespective of the industry in which they operate–are usually associated with governance and control problems due to their dispersed ownership, and one may thus expect that these companies have much more complex compensation schemes in place that are worth a policing shareholder vote. In concentrating on these corporations, the rule therefore does not seem to be under-inclusive at all. Instead, the legislation consistently upholds a differentiation (listed vs. non-listed companies) that has already been made with regard to executive compensation[99] in the Act on the Disclosure of Management Board Compensation (*VorstOG*) in 2005: as has been already shown, only listed corporations are obliged to disclose their executive compensation on an individualized basis and to give a description of the salient points of the remuneration system that is in place,[100] which in turn provides shareholders with useful data to cast their vote on an informed basis.

In addition, if one takes into consideration the peculiarities of the German "say on pay" provision, it can be argued that the provision is also not over-inclusive, and thus strikes an appropriate overall balance. As will be shown in more detail below, the German shareholder vote on the executive compensation system is not a mandatory one that has to take place every year. Instead, the vote generally depends on whether or not the management board adds this item to the agenda of the shareholders' meeting. The pressures from the capital markets and the public for the management to do so are, arguably, contingent on the size and the public exposition (e.g. towards the analyst community) of the company, which in turn gives smaller listed companies the necessary leeway to decide whether it is meaningful to hold such a shareholder vote or not. From my perspective, the German legislation consequently limited the scope of the "say on pay"

[97] Fleischer, *supra* note 61, at 801.

[98] See Hüffer, *supra* note 94, at § 3 note 5, stating that the listing of a corporation usually marks the dividing line between small stock corporations and larger ones.

[99] The legislative implementation of the notion that listed and non-listed companies pose different concerns as to corporate governance issues started in 1994 and has been reinforced in 1998 with the introduction of the definition of "listed company" in § 3 (2) and the respective changes to the GERMAN STOCK CORPORATION ACT, *supra* note 9. See for further details Doralt & Diregger, *supra* note 95, at § 3 note 40-43.

[100] *See* part B.III of this paper for further details.

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provision in a proper way that neither leaves out companies that need to be captured from a policy perspective, nor does it unreasonably burden small companies that are of a much lesser concern with respect to excessive management compensation.

2. The Inclusion of the "Say on Pay" Resolution as an Item on the Meeting's Agenda

A shareholder resolution on the approval of the executive compensation scheme requires that this item has been duly published in advance of the shareholders' meeting.[101] To call in a shareholders' meeting as well as to stipulate its agenda generally falls within the competence of the management board.[102] Since the language of § 120 (4) sentence 1 of the German Stock Corporation Act does not oblige the management board to include such an item on the agenda,[103] there exists the unfortunate situation that it is the management board that decides whether or not the shareholders are able to cast their votes on the executive compensation scheme.[104]

The question therefore arises, what happens if the management board does not arrange for a shareholder resolution on its remuneration scheme, and, thus, generally no such vote could be had even though the shareholders might consider it important. In this case the shareholders would have the possibility to demand the item to be put on the agenda and published accordingly if certain requirements are met. Firstly, the demand must be provided to the company at least 30 days prior to the meeting. Secondly, and even more importantly, the shareholder(s) demanding the item to be put on the agenda must hold

[101] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 124 (4) sentence 1.

[102] *See id.* at § 121 (2) sentence 1, § 121 (3) sentence 2.

[103] *See id.* at § 120 (4) ("The shareholders' meeting […] may resolve […]."; "Die Hauptversammlung […] kann […] beschließen."). *See further* the official legislative materials, Deutscher Bundestag, *supra* note 63, at 12, and the unanimous opinion in the corporate literature, *e.g.* Schick, *supra* note 60, at 599; Schüppen, *supra* note 53, at 908; Vetter, *supra* note 7, at 2139; Jochen Hoffmann, *in AKTIENGESETZ–KOMMENTAR* (Commentary on the German Stock Corporation Act, Gerald Spindler & Eberhard Stilz eds., 2nd ed., 2010) at § 120, note 54; Lieder & Fischer, *supra* note 1, at 386.

[104] This state of affairs explains some doctrinal efforts to virtually limit the management board's discretion in favor of a decision-making authority of the supervisory board, *see* Döll, *supra* note 1, at 16; Redenius-Hövermann, *supra* note 60, at 174, who wants to grant the right to make the respective proposal in analogy to § 124 (3) sentence 1 of the GERMAN STOCK CORPORATION ACT, *supra* note 9, to the supervisory board. In contrast, the prevailing opinion in the corporate literature adheres to the statutory distribution of competences, *see e.g.* Vetter, *supra* note 7, at 2139; Joachim Frhr. v. Falkenhausen & Dirk Kocher, *Erste Erfahrungen mit dem Vergütunsgvotum der Hauptversammlung* (First experiences with the vote of the shareholders' meeting on the remuneration system), DIE AKTIENGESELLSCHAFT [AG] 623, 626 (2010).

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shares that amount in aggregate to not less than one-twentieth of the share capital or represent an amount of the share capital corresponding to 500.000,00 Euros.[105]

While institutional shareholders might be able to meet this threshold,[106] it is obvious that it is too high a hurdle for dispersed and uncoordinated shareholders to take. In the light of these tough requirements, it was therefore argued that, if the conditions are not satisfied, the shareholders should at least have the possibility to cast a functional comparable vote within the framework of the annual shareholder vote on the approval of the actions of the supervisory board.[107] Since this is a mandatory, continuous item on every regular shareholders' meeting, the management board would not have a possibility to interfere with the shareholder vote (*i.e.* no management discretion) and no shareholder action in advance of the general meeting would be necessary (*i.e.* no need for a formal request for the item to be added). According to this view, the shareholders only have to petition on the meeting for an isolation of the compensation issue from the shareholders' general approval of the supervisory board's past actions (so-called *Teilentlastung*). The result would be a shareholder resolution that–if the quorum is satisfied–approves the actions of the supervisory board for the previous year, but under the explicit exclusion of the supervisory board's determination of the executive remuneration system.[108]

The overwhelming majority of commentators rightly reject this idea–not least because the duty to set the remuneration system for the management board is one of the most important duties of the supervisory board that cannot easily be separated from the general approval of its past actions.[109] Demanding an explicit item as to the "say on pay" on the general meeting's agenda, of course, fails to solve the aforementioned problem of what shareholders are to do if the management board does not add this item to the agenda and the shareholders are unable to achieve the necessary quorum to file a successful request.[110]

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[105] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 122 (2). On this more detailed in connection with the shareholder vote on executive remuneration see Schick, *supra* note 60, at 600.

[106] Hüffer, *supra* note 94, at § 120 note 21.

[107] GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 120 (1) and (2) (so-called "*Entlastung*").

[108] See *supra* note 60 for references.

[109] Hoffmann-Becking & Krieger, *supra* note 74, at 10-11; Vetter, *supra* note 7, at 2138; Deilmann & Otte, *supra* note 92, at 545; v. Falkenhausen & Kocher, *supra* note 104, at 626; Schüppen, *supra* note 53, at 907; Daniel Wilm, *Beobachtungen der Hauptversammlungssaison 2010* (Observations of the shareholders' meeting season in 2010), DER BETRIEB [DB] 1686 (2010); Schick, *supra* note 60, at 599.

[110] Therefore, some scholars are arguing in favor of decreasing the threshold for a shareholder request in § 122 (2) of the GERMAN STOCK CORPORATION ACT, *supra* note 9, see Lieder & Fischer, *supra* note 1, at 414.

However, this problem seems to be–at least for the largest listed German corporations–more a theoretical than a practical issue.[111] In anticipation of the findings of the empirical study set forth below, I would like to point out at this stage that the DAX 30 companies have all–without exceptions–voluntarily provided for a shareholder vote on the management board compensation scheme within the first two years of the enactment of the "say on pay" provision. This shows that there are other, practical forces at work that substitute for a legal obligation of the management board to add the compensation issue to the general meetings' agenda.[112] Furthermore, it should not be forgotten that the supervisory board has a fundamental self-interest to influence the management board to add the shareholder vote on the agenda. Otherwise, the supervisory board risks that shareholders–being unsatisfied with the denied opportunity to vote on an executive compensation scheme that they might have thought was improper–refuse to approve the supervisory boards' actions for the previous year in total. From the perspective of the supervisory board that does not seem to constitute a choice between Scylla and Charybdis. Instead, confronted with the option to choose from a worst case scenario (total refusal) or a bad, but not that bad, scenario (refusal limited to the compensation system by granting shareholders their "say on pay"), one might expect that rational supervisory board members will exert their influence on the management board to include the "say on pay" on the agenda as soon as there are credible signs from shareholders, especially institutional shareholders. As byproduct this flexible mechanism also ensures that the "say on pay" provision–despite focusing on all listed companies–is neither over nor under-inclusive, but will probably only target those companies whose compensation practices raise the most concerns.[113]

3. The Subject Matter of the Resolution

The subject matter of the German "say on pay" is the "existing" executive remuneration system. Even though this "existing scheme" requirement is not explicitly stated in § 120 (4) sentence 1 of the German Stock Corporation Act, it can be reasonably inferred from the statutory language (approval; *Billigung*) since something can only be approved by a vote that has already been set up and is thus in place. Consequently, the shareholders may only resolve on an already established executive compensation scheme as determined by the

[111] Similarly, though with a view to the general meetings' season of 2010, *see* Reinhard Marsch-Barner, *Ausblick auf die Hauptversammlungssaison 2011* (Prospects for the shareholders' meeting season 2011), 1 CORP. FIN. L. [CFL] 35 (2011); skeptical about the practical implications of the provision at the time of its enactment on the other hand, *see* Lingemann, *supra* note 7, at 1923.

[112] *See* part D.III.2 of this paper for further details.

[113] *See* part C.II.1 of this paper.

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supervisory board.[114] The statute thus provides for a shareholder resolution which is generally oriented to the past so as not to infringe on the competences of the supervisory board to stipulate executive remuneration.[115] Nevertheless some scholars–with reference to the experiences with the British "say on pay"–have pointed out that the provision will most probably also unfold with forward-looking effects. A looming defeat in the vote will probably lead to an informal contact between members of the supervisory board and institutional investors in advance of a shareholders' meeting, which might ultimately trigger changes in the executive compensation system.[116]

Still the question remains as to what exactly the shareholders cast their votes on. This seemingly easy question cannot be immediately answered since § 120 (4) of the German Stock Corporation Act speaks only about the executive remuneration scheme or system (*System zur Vergütung der Vorstandsmitglieder*) without defining or explaining what has to be understood by this and thus would be subject to the shareholder resolution.

In the literature, the starting point for the interpretation is usually the reference to the word "system", meaning a set of different elements forming an integrated whole. Consequently, a compensation system means the principles of various payment components that constitute the overall remuneration package and their relation to each other;[117] especially the relationship of fixed and variable compensation elements and a description of the criteria under which variable payments are to be made.[118] Further clarification can be achieved if one takes a look at the data that has to be provided by listed corporations according to §§ 289 (2) No. 5 and 315 (2) No. 4 of the German Commercial Code or–albeit only upon recommendation–is provided under § 4.2.5 of the German Corporate Governance Code.[119] According to these rules the management report (*Lagebericht*), and respectively the compensation report, shall be responsive to the salient points of the compensation system.

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[114] *See e.g.* Hoffmann, *supra* note 103, at § 120 note 53; Schick, *supra* note 60, at 594; Fleischer & Bedkowski, *supra* note 1, at 681.

[115] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at §§ 84, 87.

[116] Fleischer & Bedkowski, *supra* note 1, at 681-682, 685, stating also the border line for such an informal contact: the autonomous decision of the supervisory board as to the determination of the executive compensation into which the general meeting may not interfere.

[117] Vetter, *supra* note 7, at 2138; v. Falkenhausen & Kocher, *supra* note 104, at 625; Hohenstatt, *supra* note 74, at 1356.

[118] Hoffmann, *supra* note 103, at § 120 note 53; Hüffer, *supra* note 94, at § 120 note 20.

[119] Redenius-Hövermann, *supra* note 60, at 174; Döll, *supra* note 1, at 19; Schick, *supra* note 60, at 595.

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What should have become clear from this short account of the subject of the shareholder vote according to § 120 (4) of the German Stock Corporation Act is that it is a vote concerning the abstract and general remuneration concept.[120] Only the overall executive compensation system can be subject to a shareholder resolution. In contrast, a vote on the concrete amount of payments to individual members of the management board is impermissible.[121] Admittedly, this does not rule out that shareholders cast their votes on the compensation system according to their perception of the appropriateness of the compensation payments to individual management board members. And indeed, it seems to be a realistic assumption that these payments–that are disclosed on an individualized basis as long as the general meeting has not adopted an opt-out resolution[122]–may strongly influence the vote.[123] But still, the provision–in declaring the executive compensation scheme as the actual subject matter of the shareholder vote–prevents the general meeting from casting votes on each individual management board member's compensation package.

4. The Foundation for Informed Decision-Making

Interestingly, the German Stock Corporation Act does not contain any specifications as to the documents or information that must be provided in order to guarantee the informed decision-making of the shareholders with respect to the executive compensation system. Furthermore, there exists no statutory reporting requirement whatsoever.[124]

Still it is not clear whether this really poses a practical concern.[125] Instead, supervisory and management boards seem to have strong incentives to provide shareholders with

[120] See Fleischer & Bedkowski, *supra* note 1, at 682; Döll, *supra* note 1, at 18.

[121] See Vetter, *supra* note 7, at 2138; Hohenstatt, *supra* note 74, at 1356; Schüppen, *supra* note 53, at 907; Schick, *supra* note 60, at 594; Hoffmann, *supra* note 103, at § 120 note 53; this "detail" has been overlooked by Rosemarie Koch & Georg Stadtmann, *Das Gesetz zur Angemessenheit der Vorstandsvergütung* (The Act on the Appropriateness of Management Board Compensation), 60 ZEITSCHRIFT FÜR WIRTSCHAFTSPOLITIK 212, 229 (2011) in their short (positive) appreciation of the new advisory vote.

[122] *See* part B.III of this paper.

[123] *See* Hohenstatt, *supra* note 74, at 1356; Vetter, *supra* note 7, at 2138; v. Falkenhausen & Kocher, *supra* note 104, at 625; from a comparative law perspective, *see* Fleischer & Bedkowski, *supra* note 1, at 682.

[124] Deilmann & Otte, *supra* note 92, at 546; v. Falkenhausen & Kocher, *supra* note 104, at 626. This differentiates the German from the British "say on pay" provision to a considerable extent, because the latter provides for a connection between the information (remuneration report) and the shareholder vote; see Fleischer & Bedkowski, *supra* note 1, at 682; Lieder & Fischer, *supra* note 1, at 381; Gordon, *supra* note 1, at 341-342.

[125] Dissenting, *i.e.* arguing that relying on a voluntary reporting by the company is inadequate and therefore a respective duty needs to be imposed by law, *e.g.* Redenius-Hövermann, *supra* note 60, at 175. From my perspective, this view seems to neglect two things: firstly, the strong incentives the company has to report, and

sufficient information in order to enable them to cast their votes on an informed basis. Otherwise they risk that the shareholders vote the executive compensation system down only because of a lack of information. The official legislative material explicitly takes these incentives into account and therefore does not seem to see any need to impose any specific informational duties on listed companies.[126]

As a practical matter, shareholders can be informed about the executive remuneration system in four main ways: Firstly, the notice for the shareholders' meeting that is sent to the shareholder in advance of the actual meeting can contain the information.

Secondly, it can be provided in a special compensation report. This report may not be mandated by law, but its drawing up is recommended by the EC Recommendation of 2004[127] as well as the German Corporate Governance Code[128] and constitutes a "best practice" that seems to be complied with–as empirical studies have shown–by the overwhelming majority of listed companies.[129] And indeed, also practitioners state that the remuneration report is the major informational source for the shareholders to cast their vote on the executive compensation system.[130] Referring to the EC Recommendation of 2004 and the German Corporate Governance Code the corporate literature[131] suggests that companies shall include, *inter alia*, the following information in their compensation reports: (1) the form (*i.e.* cash benefits/benefits in kind) and structure (*i.e.* fixed/variable components) of management board compensation; (2) an explanation of the relative importance of the various components of the compensation scheme and the consequential effects on the incentivization of management board members, (3) a

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secondly, the empirical data that proves that companies are actually providing the information. *See* accompanying text.

[126] *See* Deutscher Bundestag, *supra* note 63, at 12.

[127] *See* 2004/913/EC, *supra* note 18, at section 3 (so-called "remuneration statement"); for further details, *see* part B.II.1 of this paper.

[128] *See* German Corporate Governance Code, *supra* note 8, at § 4.2.5.

[129] See v. Werder & Talaulicar, *supra* note 82 at 871, stating that 100 % of the DAX-, 92.9 % of the MDAX- and 83.3 % of the SDAX-corporations have complied with that recommendation in 2007; v. Werder & Talaulicar, *supra* note 82 at 827, stating that 100 % of the DAX-, 96.6 % of the MDAX- and 84.0 % of the SDAX-corporations have complied with that provision in 2008; v. Werder & Talaulicar, *supra* note 49 at 691, stating that 100 % of the DAX-, 97.0 % of the MDAX- and 95.0 % of the SDAX-corporations have complied with that provision in 2009; v. Werder & Talaulicar, *supra* note 49 at 855, stating that 100 % of the DAX-, 94.3 % of the MDAX- and 95.7 % of the SDAX-corporations have complied with that provision in 2010.

[130] Schick, *supra* note 60 at 597; Deilmann & Otte, *supra* note 92 at 546; v. Falkenhausen & Kocher, *supra* note 104 at 627.

[131] See *e.g.* Fleischer, *supra* note 61 at 805; Fleischer & Bedkowski, *supra* note 1 at 682; Vetter, *supra* note 7 at 2138; Deilmann & Otte, *supra* note 92 at 546.

description of the assessment basis of long-term compensation components, (4) a description of the arrangements in place for premature dismissals as well as (5) the structure and the requirements of retirement schemes for management board members.

Thirdly, additional information may be obtained by shareholders due to a statement given by the chairman of the supervisory board at the shareholders' meeting. According to a recommendation of the German Corporate Governance Code the supervisory board's chairman shall outline the salient points of the remuneration system and the changes thereto to the general meeting.[132] In practice, this oral report is regarded as especially valuable if a corporation has a very complex executive remuneration system in place that is hard for shareholders to understand.[133]

Fourthly and finally, shareholders have the possibility to raise questions concerning the compensation system because–being an item on the general meeting's agenda–their general right to ask questions and to demand corresponding information applies.[134]

Given these information channels and the strong incentives for the members of the supervisory board and the management board to provide shareholders with information once the "say on pay" is envisaged to be an item on the general meetings' agenda, it seems fair to assume that shareholders will be de facto provided with the requisite information which should generally enable them to cast their votes on an informed basis.

5. Regulation of the Frequency of the Resolution?

Section 120 (4) of the German Stock Corporation Act does not demand an annual vote nor does it prescribe a certain time frame or frequency for the shareholder vote.[135] According to legislative materials, the shareholder resolution on the executive compensation system is not a recurring vote that has to be repeated on a regular basis.[136] Thus, in contrast to similar provisions,[137] the German "say on pay" vote is purely optional. As already has been

[132] *See* German Corporate Governance Code, *supra* note 8, at § 4.2.3 (6). This recommendation is also complied with by a vast majority of companies, *see supra* note 49.

[133] Schick, *supra* note 60, at 597.

[134] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 131 (1) and (3).

[135] This seems to be a unanimous opinion, see Vetter, *supra* note 7, at 2139; Fleischer, *supra* note 61, at 805; Deilmann & Otte, *supra* note 92, at 546; Schüppen, *supra* note 53, at 907-08.

[136] *See* Deutscher Bundestag, *supra* note 63, at 12.

[137] For example the British "say on pay" demands an annual vote, *see* on this *e.g.* Lieder & Fischer, *supra* note 1, at 382, 386. The newly implemented "say on pay" provision in the US also provides for a time frame, see Sec. 14A (a)(1) and (2) Securities Exchange Act of 1934 (a shareholder approval not less frequent than once every three

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pointed out, it is at the discretion of the company (management board) to offer to the shareholders a vote on the executive remuneration system unless the shareholders successfully request a respective resolution, which requires them to fulfill criteria that are not always easy to meet.[138]

Whether or not corporations should nevertheless offer their shareholders an annual vote on the compensation system is controversial. Occasionally it has been argued that an annual vote would not be reasonable. According to that view, a new resolution would be unnecessary, as long as there have been no changes to an executive compensation system on which the shareholders have already voted; only in case the supervisory board has made changes to the system should shareholders be granted the opportunity to cast their votes again.[139] It is argued that only in the latter instance is there a real need to let the shareholders vote their shares, since the past approval of the compensation system does not yet cover the newly implemented one, and that it would be consistent with the legislative intent to let shareholders give their opinion on the "existing", thus the newly introduced, remuneration system.[140]

On the other hand, it has been argued that a steering effect on the supervisory board's conduct, *i.e.* here in setting an appropriate compensation system for management board members, can only be assumed if a respective shareholder vote is cast every year.[141] According to this view annual votes–even in the absence of any changes of the compensation system–are reasonable since they allow shareholders to better assess the character of the remuneration system: the business of the corporation may be volatile, its earnings (may) vary from year to year and the true nature of the remuneration system may only become evident against this backdrop.[142] Since it may take shareholders some time to ascertain how the management board compensation functions in these different scenarios, they should be allowed to cast their votes on a regular basis. Eventually, one might even question the legitimizing force of a shareholder approval that took place the previous year(s). The ownership structure of the corporation has changed due to the trading of the corporation's shares on the stock exchange; last year's shareholders are certainly not the same as today's and their views with regard to the appropriateness of the compensation system might consequently differ, so that it might make perfect sense to ask shareholders about their opinion on an annual basis.

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years; but the shareholders must get the opportunity to vote not less often than every six years on the issue as to whether a different frequency of the vote (annual, biennial or triennial) is preferred).

[138] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9 at § 122 (2); *see also* part C.II.2 of this paper.

[139] Deilmann & Otte, *supra* note 92, at 546.

[140] *Id*.

[141] Redenius-Hövermann, *supra* note 60, at 174; Döll, *supra* note 1, at 17.

[142] *See* Döll, *supra* note 1, at 17.

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Given the discretion of the corporation to decide whether a shareholder resolution on the remuneration system takes place or not, as well as the uncertainties with regard to the question of how often shareholders should be allowed to vote on it, the issue arises whether or not the articles of incorporation may prescribe a certain frequency of the "say on pay".[143] Due to peculiarities of German Corporate Law, the question is easy to raise but, unfortunately, not as easy to answer. Consequently, there are diverse views on this matter.[144] The answer revolves around § 23 (5) of the German Stock Corporation Act, which states that the articles of incorporation may only deviate from the provisions of the German Stock Corporation Act if the Act explicitly so permits. Furthermore, the articles may contain additional provisions, except as to matters that are conclusively dealt with in the Act.[145] The balancing act therefore involves, on the one hand, the exclusive, statutorily prescribed authority of the supervisory board to set management board compensation, and, on the other hand, the newly legislated "say on pay" provision that generally allows for a greater shareholder involvement in these matters.

This is not the appropriate forum for answering this issue exhaustively, but it may be shortly noted that the better reasoning argues for the admissibility of a provision in the articles that prescribes the frequency of the shareholder vote on executive compensation. The open language of § 120 (4) of the German Stock Corporation Act, the legislative intent to grant shareholders a controlling function as to management board remuneration as well as the lack of legal consequences of the shareholder vote[146] argue in favor of the possibility to amend the articles in the stated sense.[147]

Finally, it could be asked whether the German Corporate Governance Code could, or even should, provide for some guidance as to the frequency of the shareholder resolution on

[143] The question raised here has to be sharply distinguished from the question of whether the articles of incorporation may provide for a substantial regulation of executive compensation (*e.g.* prescribe the percentage of variable components of the overall compensation package). The latter question is–as far as can be seen–unanimously treated as a violation of the supervisory board's authority of setting the management compensation. Therefore, the shareholders do not have a right to implement substantial regulation as to management compensation into the articles of incorporation. *See* on this Vetter, *supra* note 7, at 2143.

[144] For an answer in the affirmative, *see* Schüppen, *supra* note 53, at 911; Döll, *supra* note 1, at 16. In contrast, *see* v. Falkenhausen & Kocher, *supra* note 104, at 628; Vetter, *supra* note 7, at 2143.

[145] *See* German Stock Corporation Act, *supra* note 9, at § 23 (5) sentence 1-2 (so-called "*Grundsatz der Satzungsstrenge*"); for a concise overview, see Hüffer, *supra* note 94, at § 23 note 34-38a.

[146] *See* part C.II.6 of this paper.

[147] Similarly, *see* Schüppen, *supra* note 53, at 911; Döll, *supra* note 1, at 16.

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the compensation system.[148] Some scholars have argued that–in the light of parliament's decision not to prescribe for a regular vote–the Government Commission responsible for the Corporate Governance Code is not free to enact such a rule. Instead, it had to consider the legislative judgment and refrain from prescribing a concrete time frame by declaring it to be a "best practice"; doing otherwise would thwart the deliberately created leeway for corporations.[149]

But this argumentation seems to confuse the question of the admissibility of the inclusion of such a "best practice" into the German Corporate Governance Code with the question of its reasonableness. Firstly, it can certainly be argued that the legislation only took a decision against any premature legislative restrictions at the time the "say on pay" provision was enacted. This does not at all preclude the development of practical experiences that might amount to "best practices" over time and then find their way into the German Corporate Governance Code. Secondly, the Code does not (legally) curtail the room for maneuver for any corporation. The opposite view misconceives the legal nature of the Code. Being only "soft law", companies are free to deviate from its recommendations, as it only requires them to state their reasons for doing so.[150]

Having said that, one, of course, also has to take into account the factual pressure to adhere to the Code's recommendations; but at this point we leave the question of the admissibility of a recommendation of a regular shareholder vote on the management board remuneration system–which I tend to answer in the affirmative–and reach the question of whether such an inclusion would also be reasonable. The latter question is a much harder call. Theoretically, one might argue that if the company's reasons for not complying with the Code's recommendation are understandable for the shareholders (*e.g.* a new compensation system is already in planning but not yet implemented at the time the shareholders' meeting is held), the company does not need to fear negative (capital markets) reactions. But it seems to be unclear whether this assessment really hits the nail on the head. The corporation might nevertheless be inclined–and well advised–to follow the recommendation even though it might be ill-suited in its particular circumstances.[151] A recommendation in the German Corporate Governance Code as to the frequency of the "say on pay" might therefore indeed–but from a factual perspective–curtail the

[148] Recommendations that either prescribe annual or regular votes that should take place every two or three years are conceivable; alternatively, one could imagine a recommendation that the shareholders should be granted with a vote every time the executive compensation system has been changed by the supervisory board.

[149] *See* Vetter, *supra* note 7, at 2142.

[150] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 161 (comply-or-explain principle). *See also* the description already given in part B.I of this paper, as well as note 11.

[151] The problem results from uncertainty about how the (non-)compliance with the German Corporate Governance Code translates into (negative or) positive capital market reactions. I am not aware of any empirical study that would address this question satisfactorily.

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corporations' leeway and lead to a "one-size-fits-all" corporate landscape. To conclude, it seems to be fair to say that while a respective recommendation is from a legal standpoint certainly permissible, it might not be the best choice to actually introduce such a provision in the German Corporate Governance Code.

6. The Legal (In)Significance of the Shareholder Vote

The shareholder vote on the executive compensation system in Germany is only an advisory vote, *i.e.* it has neither a direct legal effect on the compensation system nor does it bind the supervisory board in fulfilling its task of setting executive remuneration.[152] The resolution does not give rise to any rights nor to any obligations. The duties of the supervisory board remain explicitly unaffected in any case; approval as well as disapproval by the shareholders thus has no legal effects.[153] Consequently, liability of the members of the supervisory board according to §§ 116 sentence 3, 93 (2) of the German Stock Corporation Act cannot be established only by referring to the shareholders' disapproval of the executive compensation system and the supervisory board's passivity to change it in the vote's aftermath. Rather, it has to be determined separately whether the executive remuneration is appropriate or inappropriate according to (the newly framed) § 87 of the German Stock Corporation Act;[154] only in the latter case can a liability of the supervisory board's members be affirmed. Conversely, it is also clear that the supervisory board will not be exempted from liability for setting inappropriate executive compensation simply because the shareholders have approved of the remuneration system.[155] Thus, the shareholder vote does not have any prejudicial effects on the liability of supervisory board members.

Furthermore, the statute explicitly states that the resolution shall not be voidable.[156] This means, generally speaking, that the shareholder vote can neither be attacked for illegality nor for violations of the articles of incorporation.[157] The official legislative materials argued

[152] Begemann & Laue, *supra* note 7, at 2444 (also discussing the legal nature of a mere advisory vote); *see also* Holger Fleischer, *Konsultative Hauptversammlungsbeschlüsse im Aktienrecht–Rechtsdogmatik, Rechtsvergleichung, Rechtspolitik* (Advisory shareholder resolutions in Corporate Law-legal doctrine, comparative law, legal policy), DIE AKTIENGESELLSCHAFT [AG] 681, 682-684, 688-691 (2010), who examines the broader concept of advisory votes in German Corporate Law.

[153] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9 at § 120 (4) sentence 2.

[154] *See id.* at § 120 (4) second half sentence of sentence 2; *see also* part B.IV.2 of this paper regarding § 87 and its changes in 2009.

[155] *See also* Begemann & Laue, *supra* note 7, at 2444; v. Falkenhausen & Kocher, *supra* note 104, at 627.

[156] *See* GERMAN STOCK CORPORATION ACT, *supra* note 9, at § 120 (4) sentence 3.

[157] For further details, *see* German Stock Corporation Act, *supra* note 9, at § 243. It is quite unclear whether the exclusion of the action of voidance (*Anfechtungsklage*) also comprises an exclusion of an action for nullification

that the lack of any legal significance of the shareholder vote would make it unnecessary to allow for the option of voiding the shareholder "say on pay" vote.[158] However, in the literature it was assumed that the main reason for rendering the vote incontestable was arguably to prevent frivolous lawsuits filed by shareholders[159] who only sue in order to reach consequent settlements with corporations in which they are granted special benefits for withdrawing their legal actions.[160] With the exclusion of the possibility to file any action of voidance, the legislation effectively barred the "say on pay" vote from being exploited by this kind of shareholder.

It has become clear from the preceding remarks that the German legislation has used special diligence in designing the shareholder vote as a legally irrelevant vote whose foremost intention it is to reflect the shareholders' view on the appropriateness of the compensation system.[161] The legislation relied heavily on a factual, non-legal mechanism that centers around the negative publicity disapproval would provoke. In order to curb excessive management board compensation the German Parliament obviously deemed the signaling function of a formal disapproval and the potential *ex ante* effects on the setting of executive compensation by the supervisory board to be sufficient. A legally binding or otherwise legally relevant vote was considered to be unnecessary for achieving that goal.

D. The Significance of and Experience with a Legislated "Say on Pay" in Germany

In order to get a sense of the practical significance of the new regulation the author has gathered information of the 30 largest German listed corporations (DAX 30) with respect to the advisory vote on executive remuneration. The survey intends to shed some light on how these companies deal with the provision and tries to draw some inferences on its merits after nearly four years since its enactment. This is especially interesting since–as we have already seen–the "say on pay" provision rests purely on a factual mechanism of action: the legislation hoped that a negative shareholder vote would lead to a revision of the executive remuneration system by the supervisory board. Furthermore, some scholars

(*Nichtigkeitsklage*). On this, *see* Fleischer, *supra* note 61, at 805; Döll, *supra* note 1, at 23; v. Falkenhausen & Kocher, *supra* note 104, at 628; Begemann & Laue, *supra* note 7, at 2445.

[158] *See* Deutscher Bundestag, *supra* note 63, at 12.

[159] *See* Fleischer & Bedkowski, *supra* note 1, at 685; Fleischer, *supra* note 152, at 682; Vetter, *supra* note 7, at 2140. But *see also* the criticism as to this explanation, *e.g.* Döll, *supra* note 1, at 24 (raising doubts that the "say on pay" resolution can be a leverage for frivolous shareholders to pursue special benefits at the corporation's and other shareholders' expense); Lieder & Fischer, *supra* note 1, at 416.

[160] Commonly referred to in Germany as "räuberische Aktionäre" or "Berufskläger".

[161] Fleischer, *supra* note 61, at 805.

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have assumed that not only a formal defeat in the vote would trigger that change, but already a high rejection of about 20 % of the voting shareholders.[162]

I. Methodology

The survey takes into account shareholder resolutions ("yes" votes) as to the "say on pay" in the DAX 30 companies for the years 2010 through 2012, the sample period. The author was able to gather the necessary information due to the disclosure requirement in § 130 (6) of the German Stock Corporation Act. According to this provision, listed companies shall, within seven days following the general meeting, publish the determined results of the voting and certain details in this regard (*e.g.* the number of shares for which valid votes have been cast; the proportion of the nominal capital represented by theses valid votes) on their Internet pages.

In order to discern whether the corporations reacted to poor approval or even denial votes on their executive remuneration systems, the author gathered information (1) from the invitations to the general meetings of these companies for the following year as well as (2) from these companies' annual reports of the following year in which the supervisory board explains the remuneration system to the shareholders and therefore most probably points to any adopted changes in the executive compensation scheme to the previous year. This test allows us to assess whether the supervisory board really acts in the way the legislation envisaged when the new "say on pay" provision was enacted or whether no changes were made and/or the shareholders were just provided with a new possibility to vote on the unaltered compensation system.

Finally, to put the approval/denial votes for each corporation into perspective the author has also added the shareholder presence rate for the respective general meetings as well as the percentage of share capital that is reflected by these votes. For example, a high approval rate of 95 % at a shareholders' meeting at which only 50 % of all shareholders of the company are represented, is evidently relativized since this high approval rate would account for only 47.5 % of the overall voting rights of the company. Thus, in this example the approval does not necessarily reflect the opinion on the remuneration system of a majority of shareholders.

Before the data is presented and inferences are drawn, three cautionary notes are appropriate. Firstly, since the following survey only covers the largest listed German corporations, overhasty assumptions as to the acceptance of the new provision with regard to the overall German corporate landscape must be avoided. And indeed, an empirical study conducted for the 2010 season that also took into consideration exchange

[162] Fleischer & Bedkowski, *supra* note 1, at 685.

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segments in which smaller corporations are listed, suggests that these companies are much more hesitant to hold a vote on the executive remuneration system.[163] I can only speculate as to the explanation for that observation, but it may be fair to suggest three possible reasons. At first, legal uncertainties surrounding the new provision and difficulties implementing it may have caused these corporations to only reluctantly offer their shareholders a vote on the executive remuneration system in the transitional year of 2010.[164] From their perspective it might have been wise to wait in order to profit from some of the experiences of other companies with the new provision. Furthermore, mid- and small-sized public corporations are not as exposed to public attention, especially the business media and analysts' focus, as their larger counterparts in the DAX 30,[165] which made it possible for some of them to "fly below the radar" without asking their shareholders for a vote on the executive compensation system. Finally, the ownership structure as such might make a formal "say on pay" less important for smaller public companies since they seem to more often have a controlling or dominant shareholder in place who may already exert pressure from their position to influence the compensation schemes *ex ante*.[166]

The second caveat regarding the data set forth below concerns the ownership structure of the corporations covered. The survey does not systematically take into consideration the company's ownership structure.[167] This needs to be pointed out explicitly because the significance of a high shareholder approval in a corporation with a huge free float is higher than in a corporation with a dominating shareholder whose representatives often constitute the majority in the supervisory board. In the latter case anything other than a high shareholder approval of the executive remuneration system would indeed be surprising. Thus, for a corporation that is dominated by a single shareholder or a group of

[163] *See* v. Falkenhausen & Kocher, *supra* note 104, at 625, stating that 1/3 of the companies of the MDAX, about 1/2 of the corporations of the TEC-DAX and more than the majority of the SDAX corporations refrained from holding a shareholder vote in 2010. And these figures do not seem to have changed significantly in the following year, *cf.* Deutsche Schutzvereinigung für Wertpapierbesitz (DSW) e.V. (Press Release), *Say on Pay: 78% der MDAX Unternehmen stimmen über Vergütung ab / Bei SDAX Unternehmen herrscht noch ein großer Nachholbedarf*, August 12, 2011, available at: http://www.dsw-info.de/Say-on-Pay-78-der-MDAX-Unter.1807.0.html (last accessed: 27 June 2013), which states that taking 2010 and 2011 together, 78 % of all MDAX, about 63% of all TEC-DAX and about 42 % of all SDAX corporations have granted their shareholders a "say on pay".

[164] In the same direction, see v. Falkenhausen & Kocher, *supra* note 104, at 625.

[165] *See also* Lieder & Fischer, *supra* note 1, at 411.

[166] *See* Lieder & Fischer, *supra* note 1, at 412-413, stating that they have determined a free float in the DAX 30 of about 82.6 %, of 52.5 % in the MDAX and of 42.2 % in the SDAX.

[167] Infrequently, though, I will take into consideration the ownership structure of some of the DAX 30 corporations set forth in the table below, in order to interpret some peculiarities of that data. Anyhow, the focus then will not so much rest on whether there exist controlling or dominant shareholders or widely dispersed ownership; instead, I will focus on the nationality of these shareholders.

shareholders, high approval rates are easier to achieve than for companies who are characterized by a widely dispersed share ownership.

Thirdly, and regrettably, this paper cannot speculate about how the "say on pay" has influenced the overall amount of executive remuneration. The author is simply lacking the necessary data that would allow him to bring the executive remuneration to any sensible connection with the shareholder vote on the remuneration system.[168]

[168] Furthermore, my research has not yielded any empirical study as to the effects of the new "say on pay" provision on management compensation in Germany. For an empirical study that tries–much more general–to measure the influence of the VORSTOG as well as of the VORSTAG on executive remuneration, *see* Alexander Götz & Niklas Friese, *Empirische Analyse der Vorstandsvergütung im DAX und MDAX nach Einführung des Vorstandsvergütungsangemessenheitsgesetzes* (Empirical analysis of executive compensation in DAX and MDAX after the introduction of the Act on the Appropriateness of Management Board Compensation), 6 CORPORATE FINANCE BIZ 410 (2010), stating that the absolute amount of executive remuneration in the period from 2005-2009 has reduced for the DAX 30 as well as for the MDAX companies due to a decline in variable and stock-based remuneration–a result that seems to be intuitive because of the financial crisis and thus cannot really be generalized. The authors have continued their study and added the year 2010, *see* Alexander Götz & Niklas Friese, *Vorstandsvergütung im DAX und MDAX–Weiterführung der empirischen Analyse 2010 nach Einführung des Vorstandsvergütungsangemessenheitsgesetzes* (Executive compensation in the DAX and MDAX-continuation of the empirical analysis in 2010 after the introduction of the Act on the Appropriateness of Management Board Compensation), 8 CORP. FIN. BIZ 498 (2011), stating that in 2010 the overall remuneration of the DAX and MDAX companies has increased again and reached the level of 2006–this finding suggests that Götz & Friese measured less the influence of the VORSTOG/VORSTAG than the impact of the financial crisis on the executive compensation of DAX- and MDAX-companies. For an assessment of the economic consequences of the VORSTAG see also Koch & Stadtmann, *supra* note 121 at 212, expecting that the VORSTAG will have the effect of increasing management compensation because managers–anticipating the facilitated corporate means to decrease their remuneration, see GERMAN STOCK CORPORATION ACT, *supra* note 9 at § 87 (2), in case of a malposition of the corporation–will demand a higher compensation in the first place. For an interesting and fact-intensive study of the development of the executive compensation of the DAX 30 corporations in Germany from 1987 to 2010, *see* Joachim Schwalbach, *Vergütungsstudie 2011–Vorstandsvergütung, Pay-for-Performance und Fair Pay–DAX 30-Unternehmen 1987-2010* (Compensation Study 2011-Management Board remuneration, pay for performance and fair pay-DAX 30 companies 1987-2010), available at: http://www.wiwi.hu-berlin.de/professuren/bwl/management/managerverguetung (last accessed: 27 June 2013).

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II. Data

	2010			2011			2012		
DAX 30 company	**voting result**	**presence general meeting**	**% of share capital**	**voting result**	**presence general meeting**	**% of share capital**	**voting result**	**presence general meeting**	**% of share capital**
Adidas AG	**89.96%**	46.36%	41.69%	**(-)**	57.62%	(-)	**89.50%**	62.24%	55.35%
Allianz SE	**86.20%**	37.10%	31.41%	**(-)**	45.14%	(-)	**(-)**	43.83%	(-)
BASF SE	**98.36%**	52.02%	51.01%	**(-)**	45.46%	(-)	**(-)**	45.42%	(-)
Bayer AG	**95.25%**	n/a	45.23%	**(-)**	49.23%	(-)	**(-)**	n/a	(-)
Beiersdorf AG	**99.07%**	73.32%	72.64%	**97.89%**	69.49%	68.01%	**99.22%**	73.06%	72.49%
BMW AG	**97.66%**	77.48%	69.52%[1]	**95.83%**	74.55%	65.25%[1]	**95.45%**	75.62%	65.83%[1]
Commerzbank AG	**96.97%**	48.72%	22.75%	**(-)**	47.42%	(-)	**(-)**	46.60%	(-)
Daimler AG	**95.97%**	40.28%	38.17%	**97.38%**	43.06%	41.54%	**(-)**	44.06%	(-)
Deutsche Bank AG	**58.06%**	35.10%	16.90%	**(-)**	34.00%	(-)	**94.25%**	34.94%	29.77%
Deutsche Börse AG	**52.77%**	45.31%	23.68%	**(-)**	42.92%	(-)	**(-)**	59.69%	(-)
Deutsche Lufthansa AG	**97.30%**	48.00%	45.79%	**98.41%**	53.00%	51.74%	**(-)**	48.50%	(-)
Deutsche Post AG	**98.27%**	n/a	66.01%	**(-)**	64.74%	(-)	**(-)**	n/a	(-)
Deutsche Telekom AG	**95.91%**	58.70%	55.71%	**(-)**	62.10%	(-)	**(-)**	62.30%	(-)
E.ON AG	**95.88%**	n/a	n/a	**96.00%**	n/a	39.27%	**(-)**	n/a	(-)
Fresenius Medical Care AG & Co. KGaA	**99.26%**	75.30%	73.71%	**99.71%**	79.90%	77.99%	**(-)**	76.94%	(-)
Fresenius SE & Co. KGaA	**99.51%**	n/a	43.40%[2]	**(-)**	n/a	(-)	**97.00%**	n/a	72.71%
HeidelbergCement AG	**45.82%**	69.97%	30.63%	**96.04%**	72.04%	69.23%	**(-)**	73,41%	(-)
Henkel AG & Co. KGaA	**99.93%**	70.05%	48.87%[3]	**(-)**	56.96%	(-)	**(-)**	55.71%	(-)
Infineon Technologies AG	**(-)**	50.80%	(-)	**93.25%**	52.82%	49.57%	**(-)**	58.45%	(-)
K+S AG	**93.22%**	56.23%	52.17%	**(-)**	54.72%	(-)	**(-)**	54.72%	(-)
Linde AG	**98.56%**	62.99%	61.23%	**(-)**	64.81%	(-)	**96,45%**	65.51%	62.57%
MAN SE[a)]	**(-)**	60.71%	(-)	**85.12%**	64.82%	53.82%	**(-)**	82.14%	(-)
Merck KGaA	**(-)**	58.22%	(-)	**70.30%**	56.60%	36.17%	**86.73%**	63.49%	54.69%
Metro AG[b)]	**98.11%**	n/a	79.75%	**96.75%**	n/a	51.26%	**(-)**	n/a	(-)
Munich Re AG	**98.33%**	40.80%	39.56%	**89.79%**	45.40%	42.48%	**89.81%**	47.13%	42.13%
RWE AG	**96.14%**	60.49%	50.85%[4]	**(-)**	52.61%	(-)	**(-)**	58.06%	(-)
SAP AG	**97.54%**	n/a	54.85%	**(-)**	n/a	(-)	**65.85%**	n/a	43.84%
Siemens AG	**89.65%**	n/a	37.87%	**96.70%**	n/a	40.38%	**(-)**	n/a	(-)
ThyssenKrupp AG	**99.55%**	55.04%	54.60%	**94.91%**	58.47%	58.31%	**(-)**	65.46%	(-)
Volkswagen AG	**99.44%**	68.23%	57.44%[5]	**(-)**	59.25%	(-)	**(-)**	71.62%	(-)

By way of explanation, the first column for the respective year shows the percentage of "yes" votes in favor of the corporation's executive compensation system. The second column states the shareholder presence rate at the general meeting at which the resolution was taken. The third column, finally, presents the percentage of "yes" votes measured against the overall share capital. Since some companies issued common stock as well as preferred shares that generally do not yield voting rights, an addendum for those

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companies that have issued preferred shares is necessary in order to give the percentage of "yes" votes measured against the share capital that is eligible to vote. Consequently, the percentage increases. The data is: [1]BMW AG: for 2010: 75.61 %; for 2011: 71.00 %; and for 2012: 71.69 %; [2]Fresenius SE & Co. KGaA for 2010: 86.79 %; [3]Henkel AG & Co. KGaA for 2010: 82.38 %; [4]RWE AG for 2010: 54.64 %; [5]Volkswagen AG for 2010: 90.56 %.

Since 24 September 2012 MAN SE[a)] as well as Metro AG[b)] are not members of the DAX 30 anymore. They have been substituted by Continental AG and Lanxess AG, both of which held their only "say on pay" resolution during the sample period in 2010. For the sake of completeness, the data for these two new members shall be added here: Continental AG for 2010: 97.09 % "yes"; 83.10 % shareholder presence rate at the general meeting; 79.63 % of share capital reflected by the "yes" votes. Lanxess AG for 2010: 99.10 % "yes"; 61.09 % shareholder presence rate at general meeting; 60.54 % of share capital reflected by the "yes" votes.

III. Analysis

1. General Remarks

As can be inferred from the table above, 27 out of 30 DAX corporations have already taken a shareholder resolution on their respective executive remuneration system in 2010, *i.e.* in the first year after the enactment of the Act on the Appropriateness of Management Board Compensation (*VorstAG*). Only the shareholders of Infineon Technologies AG, MAN SE and Merck KGaA have not been able to cast their votes on the compensation scheme in 2010. This can arguably be explained by the fact that these companies had not yet implemented the legislative changes brought about by the *VorstAG* at the time their general meetings took place and a shareholder vote on the old system was either thought to make no sense or to be superfluous.[169] Out of these three corporations, Infineon Technologies AG at least put an item on the general meeting's agenda to enable its shareholders to discuss the executive compensation system and to air their views on the remuneration scheme.[170] Seven other DAX companies, by contrast, have granted their shareholders the possibility to cast their votes on the existing–not yet adjusted–management board compensation schemes even though some *VorstAG* related amendments were anticipated at the time of the shareholder resolution.[171]

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[169] *See especially* the notice of the general meeting of Infineon Technologies AG (11 February 2010), item 2, available at: http://www.infineon.com/cms/en/corporate/investor/reporting/agm2010/index.html (last accessed: 27 June 2013).

[170] *Id*.

[171] The corporations in question were Daimler AG, Deutsche Lufthansa AG, Henkel KGaA, Linde AG, Metro AG, Siemens AG and ThyssenKrupp AG.

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In 2011 the amount of shareholders resolutions on the executive remuneration system dropped to 14 out of 30 DAX corporations. Among those companies that have allowed their shareholders to cast "say on pay" votes were mainly those that did not grant a vote in 2010 (*i.e.* Infineon Technologies AG, MAN SE and Merck KGaA) and those that indeed have allowed their shareholders to vote on the compensation system in 2010, but where the resolution concerned the pre-*VorstAG* remuneration system that was amended after the shareholder vote of 2010.[172] Nevertheless, by 2011 all DAX 30 companies had allowed their shareholders at least one "say on pay" vote.

In 2012 we saw a further decline of respective shareholder resolutions. Only 9 out of 30 DAX corporations took a shareholder vote on the executive compensation system.

2. The Proactive Addition of a "Say On Pay" Item on the General Meeting's Agenda

It was argued above that there is no duty imposed on the corporation (*i.e.* the management board or the supervisory board) to provide for the "say on pay" as an item on the general meeting's agenda. If there is no such suggestion from the corporation, the shareholders would theoretically need to become active, which may result in the aforementioned problems for shareholders of complying with the needed threshold requirement.[173] This peculiarity of the German "say on pay" model has led some commentators to doubt the practical significance of the provision because it was questioned that the item would be voluntarily put on the general meetings' agenda by the corporation.

In light of the production of data set forth above, this skepticism appears to be unwarranted. As far as can be seen, all corporations have indeed voluntarily allowed their shareholders to cast an advisory vote on the executive compensation system. The management boards–most probably in coordination with their supervisory boards–have proactively allowed for shareholder resolutions on their compensation systems.[174] The author is not aware of any case in which shareholders would have been required to formally request the "say on pay" item to be put on the general meeting's agenda. Thus, the threshold requirement does not seem to have been an issue.

[172] *See id.* for the names of these corporations; only Linde AG did not provide for a new vote in 2011.

[173] *See* part C.II.2 of this paper.

[174] See for the same observation for the general meetings' season of 2010 Marsch-Barner, *supra* note 111, at 35; Schick, *supra* note 60, at 600.

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There might be several explanations for this observation, which are not mutually exclusive but instead complement one another. It may largely be attributed to the good investor relations policies of companies. They may have reacted to respective contacts between the management board or supervisory board on the one hand, and institutional investors as well as shareholder protection associations on the other hand. Especially respective requests from foreign (institutional) investors–who may be used to a similar "say on pay" mechanism from their home country or other legal jurisdictions in which they have invested–may account for the companies' willingness to voluntarily provide for the possibility of such a shareholder resolution. For example, the business media has reported on an open letter of the Hermes Fund Managers to all DAX and MDAX corporations demanding that these companies give their shareholders the possibility to vote on the executive compensation system on the general meetings in 2010.[175]

Similarly, DSW (*Deutsche Schutzvereinigung für Wertpapierbesitz e.V.*), a German shareholder protection association, has campaigned for a shareholder vote shortly after its introduction in 2009 and requested that the DAX 30 companies allow their shareholders a decision on the issue during their general meetings in 2010.[176] It is likely that such requests were heard. From the perspective of the management and supervisory board, a shareholder vote on the executive remuneration scheme may, furthermore, help avoid the allegation that they shy away from a thorough discussion of that critical subject with their shareholders.[177] In light of a shareholder approval, the supervisory board may even be strengthened in the public debate that seemingly flares up every year during the general meetings' season and that–more or less uniformly–denounces excessive management compensation.[178] The public pressure and the need to justify high management compensation may be decreased if the supervisory board is able to point to an overwhelming shareholder approval of the executive compensation system that the supervisory board has designed.[179]

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[175] *See* Dietmar Palan & Thomas Werres, *Mit welchen Methoden sich Topmanager hohe Gehälter sichern–trotz Krise und neuer gesetzlicher Vorschriften* (How top managers secure high salaries-despite the crisis and new legislation), 12 MANAGER-MAGAZIN 56 (2009).

[176] *See Vergütungsvotum–Premiere gelungen*, FOCUS MONEY (July 7, 2010), available at: http://www.focus.de/finanzen/boerse/verguetungsvotum-premiere-gelungen_aid_527649.html (last accessed: 27 June 2013).

[177] Deilmann & Otte, *supra* note 92, at 545; Schick, *supra* note 60, at 600.

[178] See *e.g.* the recent discussion of Patrick Bernau & Georg Meck, *Dürfen Top-Manager ihre Gehälter an Star-Gagen messen?* (Can top managers measure their salaries to star salaries?), FRANKFURTER ALLGEMEINE ZEITUNG (March 24, 2012), available at: http://www.faz.net/aktuell/wirtschaft/pro-contra-duerfen-topmanager-ihre-gehaelter-an-star-gagen-messen-11695994.html (last accessed: 27 June 2013).

[179] *See* Vetter, *supra* note 7, at 2141.

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Admittedly, the fact that the "say on pay" was voluntarily put on the general meeting's agenda is only one side of the coin. In order to get a full picture, we must also turn to the frequency of the shareholder resolution on the executive compensation system, as well as to the approval rates of the respective resolutions, because only then will it be possible to assess the practical significance of the German "say on pay" provision.

3. The Frequency of a "Say On Pay"

As mentioned, the German legislation did not specify a certain time frame within which the "say on pay vote" must be cast; instead, the legislative materials stated that the vote is not (necessarily) intended to constitute a recurring theme for each annual shareholders' meeting. And indeed, with regards to the issue of frequency there exist diverging practices between the DAX 30 corporations.

During the sample period (2010-12), thirteen corporations only once granted their shareholders a "say on pay"; eleven of these votes already took place in 2010. Some more "say on pay" votes were given to shareholders of fourteen other companies that have enabled their "owners" to vote twice on the executive compensation system. In nine of those corporations the vote took place in two consecutive years (2010-11 or 2011-12), while the remaining five of those companies held votes in 2010 and have allowed their shareholders a further vote in 2012. In all those cases, the second vote can arguably be attributed to amendments of the executive compensation system by the supervisory board.[180] Obviously the companies saw a need to once again ask their shareholders to express their views on the newly implemented systems.

Only the minority of three out of the 30 DAX corporations (BMW AG; Beiersdorf AG; Munich Re AG), in contrast, allowed for a shareholder vote in every year of the sample period. At least in one of these three companies, namely Munich Re AG, the annual shareholder vote appears to be considered an important investor relations tool since the "say on pay" was held in 2011 and 2012 without being "necessitated" by alterations of the executive compensation system in any of these two years. The case of BMW AG seems to be more elusive, because after the initial vote of 2010 there have been changes to the executive remuneration scheme which seem to be the explanation for the vote in 2011. However, there do not seem to be (important)[181] changes in the system in 2012 and the

[180] Of the same general opinion, *see* Carsten Wettich, *Aktuelle Entwicklungen in der Hauptversammlungssaison 2011 und Ausblick auf 2012* (Current developments in the shareholders' meeting season of 2011 and prospects for 2012), 19 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 721, 726 (2011).

[181] The notice of the general meeting in 2012 does not state that alterations to the executive compensation system have been made. Only the remuneration report section of the financial statements of 2012 states that there has been an increase of the fixed compensation components for the management board members, see BMW AG–Annual Report 2011 at 165, available at:

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shareholders were nevertheless asked to cast their votes on the compensation system. Therefore, it may well be possible that an annual "say on pay" also constitutes an important part of the corporate governance of BMW AG. In this regard, more certainty can only be gained by an extension of the sample period in future years. In contrast, Beiersdorf AG–the third company allowing three consecutive shareholder votes–does not necessarily seem to rely on the merits of an annual shareholder resolution. Instead, the "say on pay" in this company is most likely explained by changes to the compensation system, which occurred annually throughout the sample period.[182] In common with the companies that have let their shareholders vote twice, Beiersdorf AG is likely to adhere to the view that a shareholder resolution is only meaningful in connection with altered remuneration schemes.

To conclude, the overall result of the frequency appears to be that annual shareholder votes on the compensation system for management board members are only very rare examples. In accordance with the legislative materials, the vast majority of DAX 30 companies do not allow their shareholders to vote regularly on this issue; put differently, the "say on pay" is not a continuous item on the agendas of most general meeting's. Nevertheless, it is fair to assume that a shareholder resolution appears to be considered as necessary in all sample corporations as soon as there have been any changes to the respective executive remuneration systems.

4. The Approval Rates

Finally, I want to draw attention to the almost invariably high shareholder approval of the executive compensation systems of the DAX 30 companies. In many cases the approval rates during the sample period were at the top end of 90 %. In fact, the data indicates the average rates were approximately 91.58 % for 2010 and 93.48 % in 2011, while in 2012 the median shareholder approval was approximately 89.73 %.

During the three years there was only one case, HeidelbergCement AG in 2010, in which the shareholders denied their approval. But this case was deemed to be rather unique. The company only recently joined the DAX 30 club and arguably it had yet to adopt a system that complied with the standards set out by the Act on the Appropriateness of Management Board Compensation, especially its intention of long-term incentivization. Furthermore, the shareholders seemed to have been unsatisfied with a special bonus for the management and the overall increase of executive compensation from 8.3 Million Euro

http://www.bmwgroup.com/bmwgroup_prod/e/0_0_www_bmwgroup_com/investor_relations/corporate_events/hauptversammlung/2012/BMW-Annual-Report-2011.pdf (last accessed: 27 June 2013).

[182] *See* the respective invitations to its general meetings during the sample period (2010-2012), available at: http://www.beiersdorf.com/Investors/Annual_General_Meeting/Archive.html (last accessed: 27 June 2013).

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in 2008 to 16.6 Million Euro in 2009.[183] Another explanation points to the fact that HeidelbergCement AG did not disclose the executive compensation on an individualized basis and to the shallow information provided in the remuneration report.[184] In any event, a revision of the compensation system was subsequently announced, and in the following year the shareholders approved it with an overwhelming majority (96.04 %) that also reflected a very sizable majority of the overall share capital (69.23 %).

In contrast to the very high approval rates, the shareholder votes of Deutsche Bank AG (58.06 %) and Deutsche Börse AG (52.77 %) in 2010 were comparatively remarkably low. In the case of Deutsche Börse AG, the resolution was even close to a formal defeat of the proposal. These figures get even more noteworthy if one also takes into consideration the overall share capital that is reflected by these "yes" votes. Due to low shareholder presence rates, the executive compensation systems were approved by only 16.90 % (Deutsche Bank AG) and 23.68 % (Deutsche Börse AG) of the shareholders measured against the overall share capital. Thus, the question arises what may account for these bad results.

In the case of Deutsche Bank AG, the investor services provider RiskMetrics criticized the opacity of the remuneration model and suggested to its customers the denial of the remuneration system in place. Particularly American institutional investors were said to have followed this recommendation, which apparently led to the poor result.[185] This explanation appears to be plausible given that approximately about half of Deutsche Bank's shareholders are foreign.[186] The same explanation seems to hold true for Deutsche Börse AG as well, which displays an even greater foreign investor base.[187] While in 2010 only 18 % of the shares were owned by German investors, 82 % of its shareholders were foreign investors, of which a total of 48 % comes from the US (32 %) and Great Britain (16

[183] *See* Julia Löhr & Joachim Jahn, *Aktionäre halten deutsche Vorstandsgehälter für angemessen* (Executive pay according to German shareholders appropriate), FRANKFURTER ALLGEMEINE ZEITUNG (June 23, 2010), available at: http://m.faz.net/aktuell/wirtschaft/unternehmen/manager-verguetung-aktionaere-halten-deutsche-vorstandsgehaelter-fuer-angemessen-1635139.html (last accessed: 27 June 2013); Franck Stocker, *Die Wut der Aktionäre über die Vorstandsgehälter* (Franck Stocker, Shareholders' anger concerning executive compensation), DIE WELT (June 27, 2010), available at: http://www.welt.de/finanzen/article8191205/Die-Wut-der-Aktionaere-ueber-die-Vorstandsgehaelter.html (last accessed: 27 June 2013).

[184] *See* Christian Strenger, *Wichtige Neuerungen im Deutschen Corporate Governance Kodex aus Sicht institutioneller Investoren* (mportant innovations in the German Corporate Governance Code from the perspective of institutional investors), 36 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1401 (2010).

[185] *See* Stocker, *supra* note 183; *see also* Strenger, *supra* note 184, at 1402.

[186] *See* Deutsche Bank AG, *Shareholder Structure*, available at: https://www.deutsche-bank.de/ir/en/content/shareholder_structure.htm (last accessed: 27 June 2013).

[187] *See* Strenger, *supra* note 184, at 1402.

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%).[188] Still, this must not be confused with a simple causal chain indicating that a high amount of foreign investors automatically leads to low approval rates of the compensation system.[189] Deutsche Bank AG, for example, falls behind the DAX 30 average amount of stock owned by non-German investors, which was about 52.6 %.[190] Other companies, such as Daimler AG or Bayer AG,[191] have more stock owned by foreign investors, but still displayed better results as to the shareholder vote on the executive compensation system.

Interestingly, Deutsche Bank AG as well as Deutsche Börse AG neither fundamentally altered their compensation systems nor looked for another shareholder approval in the following year (2011) despite the alarming low approval rates of 2010. Even though Deutsche Bank AG implemented (minor) changes to its executive remuneration system and granted a "say on pay" on its 2012 general meeting, it appears to be the case that these changes as well as the new shareholder vote do not respond to the relatively meager result of 2010. Instead, Deutsche Bank's notice for the general 2012 meeting simply ascribed the conduct of a new vote to some regulatory changes that had to be implemented into the compensation system during 2011, and that the shareholders should have the opportunity to issue their opinion on the established executive compensation system.[192] Anyhow, this time an overwhelming majority of 94.25 % voted in favor of Deutsche Bank's executive remuneration system. Deutsche Börse AG, on the other hand, does not seem to have altered its compensation system during the whole sample period and also did not provide for another "say on pay" resolution for its shareholders.

These two cases casts some doubts on the expectations of some legal scholars that already poor shareholder approval rates of about or lower than 80 % might bring about changes to the compensation system. On the other hand, Merck KGaA might be an example that could

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[188] *See* Deutsche Börse AG, *Shareholder Structure*, available at: http://deutsche-boerse.com/dbg/dispatch/en/kir/dbg_nav/investor_relations/20_The_Share/40_Shareholder_Structure (last accessed: 27 June 2013).

[189] Similar to this view, *see* Lieder & Fischer, *supra* note 1, at 413.

[190] *See* the average figure for the year 2008, Bundeszentrale für politische Bildung, *Aktionärsstruktur von DAX-Unternehmen* (September 25, 2010), available at: http://www.bpb.de/wissen/0ZUWM5,0,0,Aktion%E4rsstruktur_von_DAXUnternehmen.html (last accessed: 27 June 2013).

[191] *See* Bayer AG, *Ownership Structure*, available at: http://www.investor.bayer.com/no_cache/en/stock/ownership-structure/overview/ (last accessed: 27 June 2013); Daimler AG, *Shareholder Structure*, available at: http://www.daimler.com/investor-relations/daimler-shares/shareholder-structure (last accessed: 27 June 2013).

[192] *See* the notice of the general meeting of Deutsche Bank AG, *General Meeting 2012* (May 31, 2012), item 8, available at https://www.deutsche-bank.de/ir/en/download/HV2012_Tagesordnung_en_2304.pdf, stating that some smaller adjustments had to be implemented–not least because of some newly enacted requirements for the banking system.

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be–at least prima facie–put forward for this view. The company had only received a comparatively poor approval of 70.30 % in its first vote on the executive compensation system in 2011. While this result–as is the case with Deutsche Bank AG and Deutsche Börse AG–is also brought in connection with the influence of shareholder protection associations and investor services providers,[193] Merck KGaA stated in the notice of its 2012 general meeting that it has changed its remuneration system of the management board by adding a long-term variable compensation component with the objective of making the compensation system more sustainable and to align it not only with the target achievement, but also to a durable performance of the company's share price.[194] This appears to have convinced the shareholders, since a solid 86.73 % approved of this system at the general meeting of 2012. Admittedly, it is not clear whether the result of the previous vote in 2011 triggered that change or not; but at least it can be tentatively assumed that this resolution has had some impact since the compensation system was altered forthwith.[195]

Commerzbank AG is also noteworthy, albeit in a different context. Although the company had a very high approval rate of 96.97 % in its first and only shareholder resolution on the executive remuneration system in 2010, the result becomes interesting if one also takes into account the percentage of share capital that is reflected by this approval rate. The 96.97 % only account for 22.75 % of the share capital of the company, while the shareholder presence at the general meeting in 2010 was 48.72 %. Since one share represented one vote in Commerzbank AG,[196] it is clear that a huge percentage of shareholders (more than 25 %) must have refrained from voting on this item of the agenda. The explanation can arguably be found in the ownership structure of Commerzbank AG: The Federal Republic of Germany has become–through its Financial Market Stabilization Fund (*Sonderfonds für Finanzmarktstabilisierung–SoFFin*)–the leading (institutional) investor in Commerzbank AG in the follow-up of the financial crisis. Germany held and still holds 25 % plus one share of the bank's stock. Although neither

[193] *See* Wettich, *supra* note 180 at 726.

[194] *See* the notice of the general meeting of Merck KGaA, *Annual General Meeting 2012* (20 April 2012), item 7, available at: http://www.merckgroup.com/company.merck.de/en/images/HV_2012_Agenda_EN_tcm1612_87388.pdf?Version= (last accessed: 27 June 2013).

[195] This differentiates Merck KGaA from Deutsche Bank AG; the latter had had its comparatively poor result already in 2010 and has altered its executive compensation system only by now. This appears to support the assumption that the amendments for Deutsche Bank AG rest more on the implementation of regulatory changes for the financial industry–as it is also stated in Deutsche Bank's notice of 2012–than on a response to the low approval rate in 2010.

[196] *See* Commerzbank AG, *Total number of shares and voting rights at the time the meeting was convened*, available at: https://www.commerzbank.de/media/en/aktionaere/haupt/2010/Anzahl_Stimmrechte.pdf (last accessed: 27 June 2013).

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Commerzbank AG nor *SoFFin* officially commented on the "say on pay" voting result in 2010, the data allows for a strong inference that it must have been the federal government that withheld its votes on this item.[197] The media speculated that the government did not agree with the amended compensation system, which provided for an increase in executive compensation once the federal government had disposed of its shares and Commerzbank AG had repaid the financial assistance it received, which initially triggered a compensation cap at 500.000 Euro for the members of the management board.[198] While it seems odd at first glance that the federal government did not use an instrument, *i.e.* the possibility of a shareholder voice on the system of executive remuneration, that it has created itself in order to enhance the (internal) corporate governance of listed German corporations, there may still be good reasons for that behavior, such as the notion to limit state influence on Commerzbank AG to the smallest possible extent,[199] or the idea that the remuneration system involves periods after the federal government has been repaid and Commerzbank AG has left state guardianship.

In leaving these special cases aside and in turning once again to the starting point of the overall high approval rates in the sample period, one might wonder what accounts for this phenomenon. Do shareholders not invest enough attention and simply approve of the compensation system because it would be too complicated and too costly for them to intensely scrutinize it? Does a vote that remains in the abstract and that does not concern the individual remuneration of management board members, but instead only the compensation system in general, not attract shareholders' interest? Or might the legal insignificance of the vote let shareholders believe that their votes make no difference and that any engagement in this matter is simply not worthwhile?

While these explanations cannot be completely ruled out, they still seem to be very unlikely. At least institutional investors–for whom the "say on pay" concept was initially

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[197] For the same conclusion, *see Commerzbank-Vorstandsgehälter: Bund enthält sich bei Abstimmung* (Commerzbank executive pay: federal government abstains from voting), FRANKFURTER RUNDSCHAU (May 20, 2010), available at: http://www.fr-online.de/wirtschaft/commerzbank-vorstandsgehaelter-bund-enthaelt-sich-bei-abstimmung,1472780,4461466.html (last accessed: 27 June 2013); *see also* Jutta Maier, *Commerzbank setzt sich bei den Gehältern durch* (Commerzbank prevails in salaries), BERLINER ZEITUNG (May 21, 2010), available at: http://www.berliner-zeitung.de/archiv/bund-enthaelt-sich-bei-entscheidender-abstimmung-commerzbank-setzt-sich-bei-gehaeltern-durch,10810590,10718226.html (last accessed: 27 June 2013)

[198] *Id*.

[199] On the other hand, this explanation would have suggested a withdrawal from voting on other items of the general meeting's agenda as well, which has not been the case. The federal government has voted on every other issue which can be inferred from the share capital that is represented by the respective votes, *see* Commerzbank AG, *Annual General Meeting–Voting on proposals contained in the agenda* (May 19, 2010), available at: https://www.commerzbank.de/media/aktionaere/haupt/2010/Abstimmungsergebnisse_HV2010_e_2.pdf (last accessed: 27 June 2013).

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designed[200]–can be deemed to be rational enough to be interested in the executive compensation issue, since it has traditionally been understood that one of the major means of overcoming the principal-agent conflict within a (publicly held) corporation is by aligning the interests of management with those of the shareholders, and thereby reducing the threat of opportunistic managerial behavior and overreach. Instead, the opposite explanation appears to be more likely: as opposed to the public debate about excessive management remuneration, the shareholders of the DAX 30 companies seem to generally agree with the compensation of their management board members. The high approval rates may simply signify that the remuneration systems–in the eyes of the shareholders as the "owners" of these companies–by and large strike the right balance between "pay" and "performance".

This interpretation can be–to a certain extent–buttressed if one takes into consideration the voting results of other items on the agenda. Nearly identical results on every item on the agenda would suggest that shareholders do not really differentiate and reflect on the individual items, since it appears to be very unlikely that shareholders agree on everything on the agenda to the same (high) extent and uniformly follow the respective proposals from the management boards. In fact, the heterogeneity of shareholders and their interests suggest that we should observe a more diverse picture if the shareholders reflect about how to vote. Although the author was not able to conduct a systematic survey in which the approval rates concerning the executive compensation system of all DAX 30 corporations would be contrasted in detail with the voting results on other items of the general meeting's agenda, a general trend could still be identified with a smaller sample group, namely with companies that experienced approval rates of below 90 %.

Those corporations that experienced poor approval rates of their remuneration systems, *i.e.* a result well below 80 %,[201] gained much better results on all the other items of the general meeting's agenda. This suggests–which could also be tentatively inferred from the description of the respective shareholders votes and their possible explanations above–that the shareholders in these companies really focused on the executive remuneration system.[202] The negative voting results were not manifestation of a general challenge of the management of these corporations, but instead a narrowly tailored expression of the shareholders' dissatisfaction with the design of the respective management compensation systems. The same holds true for those corporations that already had good shareholder approval rates (80 % - 90 %) as to the remuneration system in the sample period.[203] Here

[200] *See* parts B.II.2 and C.I of this paper.

[201] These corporations are Deutsche Bank AG (in 2010), Deutsche Börse AG, Merck KGaA (in 2011), HeidelbergCement AG (in 2010), and SAP AG (in 2012). *See* the data set forth in the table above (part D.II).

[202] For observations in the same direction for 2010, *see* Wilm, *supra* note 109, at 1687.

[203] These corporations are Adidas AG (in 2010 and 2012), Allianz SE, MAN SE, Siemens AG (in 2010), Merck KGaA (in 2012) and Munich Re AG (in 2011 and 2012), *see* the data set forth in the table above (part D.II).

we can also generally observe improved voting results for the other items on the general meetings' agendas.[204] This, once again, demonstrates that shareholders do care, that they indeed differentiate on how to vote on different items, and that it is fair to assume that the approval rates set forth in the table above in fact indicate what they appear to suggest: a generally high affirmation of the executive compensation systems in the DAX 30 corporations by their respective shareholders. This, in turn, suggests that the legislative idea of the (factual) mode of action of the German "say on pay" provision largely works out; the supervisory boards of the DAX 30 corporations seem to set the executive remuneration systems in a way for which a broad consensus can be obtained at the respective general meetings.

E. Conclusion and Possible Developments

The German legislation–driven by the perceived need to curb excessive executive compensation in the aftermath of the financial crisis–provided for a shareholder vote on the compensation system of management board members of listed corporations in § 120 (4) of the German Stock Corporation Act. The vote is an abstract vote on the established system, rather than on the individualized amount of compensation to be granted by the corporation to each executive. Similar to foreign provisions, the German "say on pay" is non-mandatory, *i.e.* it is only an advisory vote that is intended to enable the shareholders to express their views on the system of management compensation. It neither grants rights nor does it oblige the supervisory boards to act according to the voting results. Legally, the vote is totally insignificant.

Instead, the legislation relied on a factual mode of action, adhering to the idea that public and (business) media oversight as well as the vigilance of analysts and institutional investors will require that supervisory boards act diligently in setting the right compensation levels for their respective management boards. That is also why the German legislation did not provide for an annual shareholder vote, nor made any other prescriptions as to the time frame of the "say on pay". In theory, this leads to the unfortunate situation where it is up to the discretion of the management board to grant shareholders an opportunity to vote on the executive compensation system. While all this has led some commentators to believe that the new provision would remain "law in the books" only, the empirical study presented in the paper showed that "say on pay" does play a role at least for the DAX 30 companies. All DAX 30 corporations have allowed for a "say on pay" within the first two years after the enactment of the new provision. And

[204] There is one seemingly and one real exception to this observation. The first concerns the general meeting of Siemens AG in 2010 where two items have been denied; but these points were introduced by minority shareholders and not put on the agenda by a management board initiative. The only case in which the approval to another item has been lower than to the "say on pay" for the companies stated in note 203 was on the general meeting of MAN SE in 2011 (re reappointment of two members of the MAN supervisory board).

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although such shareholder votes were not generally a continuous item on the general meeting's agenda, the evidence provided in the paper demonstrates that a new "say on pay" is voluntarily granted as soon as the supervisory board has amended the executive compensation system. Furthermore, the assessment of the approval rates seem to suggest that the shareholders of the DAX 30 companies are generally of the opinion that executive compensation systems strike the right balance between "pay" and "performance".

However, on 8 May 2013 the German government announced that it intends to alter § 120 (4) of the German Stock Corporation Act.[205] Seemingly influenced by the overwhelming success of a March 2013 referendum on managers' pay in Switzerland,[206] the German government proposes to prescribe a mandatory and binding annual shareholder vote on the executive remuneration system. Furthermore, it is envisaged that shareholders must be provided with concrete information on the maximum amount of remuneration that management board members may possibly claim under the respective compensation schemes.[207] As the findings of this paper suggest, no such change is necessitated by the (practical) experiences with the current German "say on pay" provision. Whether the government proposals will indeed become law is subject to the political process in the run-up to the parliamentary elections in September 2013. Regardless of what the decision will look like, executive compensation certainly will remain one of the most contested means in the corporate governance toolbox.

[205] Die Bundesregierung, *Regierungspressekonferenz vom 8. Mai 2013* (government press conference, May 8, 2013), available at: http://www.bundesregierung.de/Content/DE/Mitschrift/Pressekonferenzen/2013/05/2013-05-08-regpk.html (last accessed: 27 June 2013); *see also* Bundesministerium der Justiz, *Mehr Kontrolle für Manager* (More control over managers), PRESS RELEASE (May 8, 2013), available at: http://www.bmj.de/SharedDocs/Pressemitteilungen/DE/2013/20130508_Mehr_Kontrolle_fuer_Manager.html?nn=1468684 (last accessed: 27 June 2013).

[206] *See* on this, The Economist, *Executive pay: Fixing the fat cats–Switzerland votes to curb executive pay* (May 9, 2013), available at: http://www.economist.com/news/business/21573169-switzerland-votes-curb-executive-pay-fixing-fat-cats/ (last accessed: 27 June 2013).

[207] For further details on the envisaged provision, *see* Ulrich Noack, *Unternehmensrechtliche Notizen: Vorstandsvergütung, mal wieder (ergänzt)* (Corporate Legal notes: Executive compensation, again (updated), May 8, 2013), available at: http://notizen.duslaw.de/vorstandsvergutung-mal-wieder/ (last accessed: 27 June 2013).

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