



ICGN

International Corporate Governance Network
Inspiring good governance & stewardship

Regierungskommission
Deutscher Corporate Governance Kodex
c/o Deutsches Aktieninstitut e.V. Senckenberganlage 28
60325 Frankfurt am Main
Germany

By email: regierungskommission@dcgk.de

11 March 2022

Re: ICGN comment on proposed revisions to the German Corporate Governance Code

Dear Madame or Sir,

The International Corporate Governance Network (ICGN) welcomes the Regierungskommission's (Commission) consultation on the Revisions to the German Corporate Governance Code (Kodex).

Led by investors responsible for assets under management in excess of \$59 trillion, ICGN is a leading authority on global standards of corporate governance and investor stewardship to preserve and enhance long term corporate value, ultimately contributing to sustainable economies, societies, and the environment. Headquartered in London, our membership is based in more than 45 countries and includes companies, advisors, and other stakeholders. ICGN offers an important international investor perspective on corporate governance and investor stewardship to help inform public policy development and the encouragement of good practices by capital market participants. For more information on the ICGN, please visit www.icgn.org.

Germany is an important market for ICGN and its members. Our membership includes prominent German institutional investors, and our global institutional investor members have significant investments in the debt and equity of German companies. We closely follow developments in German corporate governance and have contributed comment letters on past consultations relating to the German Corporate Governance in both 2016 and 2019.

We applauded the improvements of the German Kodex in our letter to the Commission in 2019, while at the same time expressing areas of concern relating to corporate governance. These included:

- Effectiveness of co-determination: ensuring the fiduciary duty of care of employee-elected directors to support the long-term interests of the company as a whole, and not just the German labour unions;
- Quality of communication between Supervisory Board and Management Board: ICGN is agnostic on the question of two-tier boards versus unitary boards. But we

observe that the two-tier structure raises risks of ineffective coordination between the two governing bodies;

- Application of globally accepted standards of appropriate independence levels noting that this appears less far reaching in Germany than in other jurisdictions where majority independence is a norm;
- Concerns about the potential overt influence of controlling shareholders and respect for the rights of minority shareholders;
- Limited historical willingness by Aufsichtsrat members to engage with institutional investors;
- Cultural concerns: scandals at key German blue-chip companies in recent years.

All these issues remain a concern for institutional investors when looking at German corporate governance through the lens of international good practice and global investor expectations.

Having said that, we would like to focus our comments in this letter on the proposed changes that are being put forward in this latest revision.

In many ways our overarching reaction is positive, especially as this latest draft places much greater focus on the governance of sustainability issues in the Kodex. In our 2019 letter, we noted that the new Kodex language referencing social and environmental factors was encouraging, but vague; we suggested there was scope for greater clarification and expansion about board responsibilities. We are pleased to see that this revised version provides greater granularity about how sustainability themes are relevant throughout the Kodex.

However it is very important to note that the consultation documentation in English did not include the 'Begründung' document which elaborated on the motivations behind the new revisions. Crucially, English speaking readers did not fully appreciate the points relating to the 'Ausgleich' of stakeholder interests and shareholder interests that is discussed in the 'Begründung' document. Not only is this a critical omission; it is also misleading.

Let us be clear. ICGN fully supports the expansion of board responsibilities to include matters relating to the governance of sustainability at companies. At the same time, as an investor body, we are acutely aware of the fiduciary duties of institutional investors to investor beneficiaries, who for the most part are individual savers or members of pension plans. From this perspective our first priority is the protection of investor interests as providers of capital to companies. We do believe that this requires the consideration of relevant environmental and social factors as a fundamental part of management and governance. But we find the casual introduction of the term 'Ausgleich' (for German readers only) to be problematic and inadequately explained. In the context of our otherwise positive response, we would like to express our formal concerns on this point, and we are also concerned that other respondents to the consultation who rely on the English documentation may miss this point.

ICGN has been on a similar journey with our own Global Governance Principles¹ (ICGN Principles), which are formed through consultation with and ratification by ICGN members. First published in 2001, this is a core policy document for many ICGN investor members who use the ICGN Principles as a bellwether for their voting policies and company engagements. Last year, the ICGN Principles were updated as part of a periodic review, with a sharper focus on the governance of sustainability which we have framed through the lens of three capitals: financial, natural, and human. These revisions are summarised in the Appendix below and may be a useful reference for the Commission as it considers its changes to the Kodex. Particular areas of consideration in the revised ICGN Principles that are not in this version of the Kodex include:

- Encouraging the company to articulate a statement of purpose to guide its governance and strategy.
- Placing specific focus on systemic risks in the context of social and environmental governance.
- Reporting on how the company is addressing climate change and its approach to a net zero business model.
- Having a clearer statement of capital allocation.

With regard to specific text points in the revised version, we have the following comments:

- **Foreword.** It is positive to focus on the impact that the company has on its stakeholders and society more broadly. This is effectively applying the concept of dual materiality and it might be useful to make specific reference to that term. However, we do not see why the wording relating to corporate strategy and operating decisions should be removed. To be real, social and environmental factors should require integration into strategy discussions and decision making, both at the Management Board and Supervisory Board level.
- **Principle 4.** It is positive to clearly link sustainability factors to the overall process of risk management and oversight. We note that risk management requires a multi-year perspective, and this may be worth emphasising, especially for smaller firms that may have shorter-term planning horizons.
- **Principle 9.** We support the language seeking to ensure a meaningful proportion of women on the Management Board. Additionally, you may want to refer to diversity in the broader context of 'diversity, equity, and inclusion'. Gender diversity is critical – and ICGN recommends at least one-third of the board be comprised of female directors - but there are other important dimensions. Diversity should be strategically addressed both at the board level and in the workforce to ensure effective, equitable and inclusive decision-making in alignment with the company's purpose and long-term strategy.

¹ ICGN Global Governance Principles (2021): <https://www.icgn.org/sites/default/files/2021-11/ICGNGlobalGovernancePrinciples2021>

- **Recommendation A.7.** Though this language has not changed from the original version we believe that the chairman 'shall' (*soll*) meet with investors, rather than the looser use of the term 'should' (*sollte*).
- **Recommendation C.1.** It is positive to see recognition for sustainability expertise on the Supervisory Board. As noted in the draft this expertise should link to the specific sustainability or ESG issues that are material to the company and its stakeholders. Particularly with regard to climate risk, boards will require technical climate knowledge based on up-to-date hard data and will also require the ability to assess its relevance to the company's provision of services or products. In addition to this specialist expertise on the board we believe it is important for all board members to build an understanding and sensitivity to both the economic and ethical dimensions of sustainability.
- **Recommendations C.6 to C.12** (independence). We observe that no changes are proposed for this section. However, we note from our minority shareholder perspective that the employee-elected directors to the Supervisory Board should not be regarded as independent. We suggest consideration of creating a Lead Independent Director role to provide investors with another contact at the Supervisory Board level, particularly in cases when investors may have concerns about the company Chair. We also suggest that the Kodex consider term limits on board membership to prevent excessive board tenure for individual directors.
- **Recommendation C.16.** We believe it is best to have annual director elections for each director to strengthen director accountability to shareholders.
- **Principle 14.** We believe that boards of public companies should all have audit committees. We also believe that the entire audit committee should be comprised of independent directors. Separately, we welcome the inclusion of new language which brings sustainability factors under the purview of the audit committee.

In conclusion, ICGN appreciates the opportunity to provide comment on this important consultation and we hope you find our feedback helpful in your deliberations. Should you wish to discuss our comments further please contact me or George Dallas, ICGN's Policy Director: [REDACTED].

Yours faithfully,

Kerrie Waring
Chief Executive Officer, ICGN

Appendix

Summary of key revisions to ICGN Global Governance Principles (2021)

Company purpose: Boards should publicly disclose a company purpose to guide management's approach to strategy, innovation, and risk.

Governance of sustainability: Boards should take ownership of the governance of sustainability in the company and its integration with company strategy, operations, and risk oversight.

Diversity, equity, and inclusion: Diversity should be strategically addressed both on the board and workforce to ensure effective, equitable and inclusive decision-making in alignment with the company's purpose and long-term strategy.

Stakeholder relations: Boards should understand stakeholder level needs and support positive stakeholder relations linked to the board's oversight of the company's human and natural capital management.

Systemic risks: Boards should identify, address and report on relevant systemic risks to the business, particularly those identified in the United Nations Sustainable Development Goals.

Materiality: Boards should ensure disclosure around how a company identifies and mitigates workforce safety risks in its operations and supply chains, particularly in terms of the risk assessment process, policies, and procedures.

Climate change: Board's should assess and disclose the impact of climate change on the company business model and how it will be adapted to meet the needs of a net zero economy as part of a long-term strategy.

Capital allocation: Boards should disclose a clear approach to achieving a sustainable balance of capital allocation among different company, shareholder, creditor and stakeholder interests.

Human rights: Boards should be sufficiently informed of how human rights and modern slavery issues may present business and reputational risks or might compromise a company's own values and standards of behaviour.

Workforce Safety: Boards should ensure disclosure around how a company identifies and mitigates workforce safety risks in its operations and supply chains, particularly in terms of the risk assessment process, policies, and procedures.

Reporting: Sustainability reporting should reflect the complexities inherent in a contemporary business by blending financial, human, and natural capital considerations in the context of a company's current and future strategic direction.

Standards: Established sustainability reporting standards and frameworks should be used to facilitate consistency and comparability of reporting and to contribute to the global consolidation of sustainability standards.

Executive remuneration: Boards should incorporate material sustainability-related metrics into executive incentive plans, determined within the context of company's values, internal reward structures and competitive drivers.

Shareholder meetings: Boards should ensure that meetings are efficiently democratically and securely facilitated to enable constructive interactivity with shareholders.