

#STAYONBOARD

THE TEMPORARY SUSPENSION OF BOARD POSITIONS IN GERMAN CORPORATE LAW

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DR. TOBIAS DE RAET

lindenpartners

PARTNERSCHAFT VON
RECHTSANWÄLTINNEN UND
RECHTSANWÄLTEN mbB

BACKGROUND



Westwing announces changes to its Management Board

- Sebastian Säuberlich will succeed Dr. Dr. Florian Drabeck as CFO effective April 1, 2020
- Founder & Chief Creative Officer Delia Lachance (née Fischer) starts her maternity leave, which is planned for six months, in March 2020 and has therefore stepped down from the Management Board, as legally required

Munich, March 3, 2020. Westwing, the leader in inspiration-based Home and Living eCommerce in Europe, today announced changes to its Management Board. As of April 1, 2020, Sebastian Säuberlich will succeed Dr. Dr. Florian Drabeck as CFO of Westwing, who is leaving to pursue other interests. Moreover, Delia Lachance starts her maternity leave in March 2020. As the current legal framework in Germany does not provide the opportunity of maternity leave to board members of stock corporations, she has stepped down from her role as Board Member effective March 1, 2020. Her maternity leave is expected to last six months.

BACKGROUND

SPiEGEL Job & Karriere

Gesetzeslücke

Für Vorständinnen gilt kein Mutterschutz

Delia Lachance musste ihren Posten als Vorständin des Onlineshops Westwing niederlegen - weil sie ein Kind erwartet. Das Gesetz erlaubt keine Babypause für Vorstandsmitglieder. Nun regt sich Widerstand.

Von **Verena Töpfer**
23.03.2020, 22.01 Uhr

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RTL News & Sto

< Geld Sparen Brutto-Netto-Rechner Job Karriere

Initiative '#stayonboard' kämpft für Elternzeit-Anspruch in Chefetagen

Westwing-Gründerin Delia Lachance muss wegen Baby zurücktreten



GRÜNDERSZENE MAGAZIN PLUS WHISTLEBLOWING EVENTS JOBBÖRSE MEHR

DEBATTE

Warum eine Vorständin in der Babypause ihr Amt abgeben muss

Hannah Scherkamp
🕒 10 Mrz 2020

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Deutsche Gründerinnen kritisieren, dass Mutterschutz und Elternzeit für eine Vorständin rechtlich nicht vorgesehen sind. Das sagen Arbeitsrechtler dazu.

BACKGROUND

- **Delia** Lachance: Founder, board member and Chief Creative Officer of listed e-commerce company Westwing
- In March 2020 Lachance started her six-month-long maternity leave
- Westwing Group AG announced Lachance had **therefore** stepped down from the management board, **as legally required**
- The case sparked a public debate, which led to the creation of the **#stayonboard** initiative

THE LEGAL FRAMEWORK PRIOR TO #STAYONBOARD

- **No legal framework for long-term absences**
 - No possibility to temporarily suspend the person's board position
 - No possibility of delegating duties completely
- **Board members remained liable during any absence, even when they were inactive, because of the duty to supervise fellow board members (Siemens/Neubürger-case LG Munich)**
- **Contractual agreements were possible, but not sufficient**
 - Legal uncertainty for companies, board members and third parties
 - No right for board members to request such an arrangement

PROBLEM STATEMENT

PRINCIPLE OF COLLECTIVE RESPONSIBILITY

- Management board is responsible for managing the affairs of the company, Sec. 76 (1) AktG
- Board members must exercise the due care of a prudent manager, faithfully complying with the relevant duties, Sec. 93 (1) 1 AktG
- In the event of breaches of duty, board members are liable to the stock company for damage, Sec. 93 (2) 1 AktG
- **Multi-member boards** must fulfill their responsibilities as a **collective body**
- In principle, no possibility of delegating duties – even temporarily – completely to other members of the executive board or even employees

PROBLEM STATEMENT

COLLECTIVE RESPONSIBILITY DURING LONG-TERM ABSENCES

- **Principle of collective responsibility means duties of the executive bodies continue to exist even during absences**
 - Liability risks may arise, especially because supervisory tasks cannot be properly performed
- **Longer-term absences (e.g. maternity leave, parental leave, long-term sickness, care for relatives) effectively force board members to resign from their office**
- **Impact on careers of all board members**

SIEMENS/NEUBÜRGER-CASE

Company Involved: Siemens AG

Individual: Dr. Heinz-Joachim Neubürger, former CFO of Siemens AG

Case Context: Siemens faced significant legal and financial consequences due to large-scale corruption scandals during the mid-2000s. Neubürger was accused of breaching his fiduciary duties by failing to prevent corruption and compliance violations.

SIEMENS/NEUBÜRGER-CASE

Court Rulings (LG München I, Urteil vom 10.12.2013 – 5 HKO 1387/10)

- **Liability for Compliance Failures:** Executives are personally liable if they fail to establish adequate compliance systems, leading to damages for the company, even if compliance does not belong to such board member's department.

Key Takeaways

1. **Executive Accountability:** Corporate executives have a duty to ensure effective compliance systems.
2. **Personal Liability:** Failure to act on known risks or implement preventive measures can result in personal financial consequences.
3. **Governance Standards:** The case set a precedent for stricter enforcement of governance and compliance obligations in Germany.

PREVIOUS LEGAL SITUATION OPTIONS

Contractual Agreements

Option 1:
Suspension of duties

Pro: Continuation
of the mandate

Contra: Liability
risks persist during
absence

Option 2:
**Revocation of appointment and
contractual guarantee of reappointment**

Pro: No liability
during absence

Contra: No legal
guarantee of
reappointment


THE #STAYONBOARD INITIATIVE

#stayonboard Zielsetzung Eckpunktepapier News Initiator*innen Unterstützer*innen FAQ Kontakt


Zielsetzung

Unser Ziel ist es, durch eine Ergänzung des Aktiengesetzes zu erreichen, dass Vorstandsmitglieder nicht wie bisher ihr Amt niederlegen müssen, wenn sie wegen der Geburt eines Kindes, wegen längerer Krankheit oder wegen eines Pflegefalls in der Familie vorübergehend ihr Amt nicht wahrnehmen können und wenn sie die damit verbundenen Haftungsrisiken vermeiden möchten.


#stayonboard Zielsetzung Eckpunktepapier News Initiator*innen Unterstützer*innen FAQ Kontakt




Verena Pausder
Gründerin und Autorin »Das Neue Land«




Dr. Tobias de Raet
Rechtsanwalt, Partner Lindenpartners




Dr. Jessica Jacobi
Rechtsanwältin, Partnerin KLIEMT.Arbeitsrecht




Prof. Dr. Florian Möslin
Universitätsprofessor für Bürgerliches Recht,
Deutsches und Europäisches Wirtschaftsrecht



Daniela Hangarter
Rechtsanwältin, Hangarter | Legal



Andreas v. Oppen
Rechtsanwalt, Gründungspartner von Greenfort



Dr. Sophie Pollok
Rechtsanwältin & Unternehmerin

INITIATIVE #STAYONBOARD

CORE DEMANDS

- Avoidance of **liability** during suspension
- **Automatic resumption of the office** after the end of the suspension
- Implementation by **minimally invasive amendments** of current statutory law
- **No creation of employee rights** for board members (no continued payment of remuneration, no parental benefits, no protection against dismissal)
- Taking the interests of companies into account by providing for **exceptions** and a **reasonable notice period**
- Considering the interests of creditors and the public by providing for **transparency in the commercial register**

INITIATIVE #STAYONBOARD

OUR INITIAL PROPOSAL

- **Personal right to suspend office**
- Statutorily defined **exhaustive list** of reasons for suspension
- **Maximum duration:** e.g. up to 6 months
- Reasonable **notice period**
- Consideration of legitimate company interests (exceptions such as a crisis)
- Transparency in the **commercial register (Handelsregister)**
- Exclusion of dismissal during suspension

LEGISLATIVE PROCESS

#STAYONBOARD TO LEGISLATION IN 16 MONTHS

- **#stayonboard initiative** started in **March 2020**
- We were supported by selected politicians, entrepreneurs and executives
- **September 2020: #stayonboard** discussed in the Bundestag
- Fast growing support for the movement by almost all political parties
- **February 2021:** Proposal by the **German Ministry of Justice** and Consumer Protection
 - No personal right of board members to request a mandate pause
 - Decision on revocation and reappointment at discretion of the supervisory board

LEGISLATIVE PROCESS

#STAYONBOARD TO LEGISLATION IN 16 MONTHS

- **June 2021:** Final amendments
 - Mandate pause structured as a **personal right** of board members
 - Introduction of the tiered model in Sec. 84 (3) AktG
 - Proposal embedded into FÜPoG II draft
- **August 2021:** FÜPoG II incl. new **Sec. 84 (3) AktG** come into force and effect

SEC 84 (3) AKTG

APPOINTMENT OF MEMBERS OF THE MANAGEMENT BOARD AND REMOVAL FROM OFFICE

A member of a management board consisting of several persons is **entitled to request** that the supervisory board revoke their appointment if said member **temporarily is unable to fulfil the duties** entailed by their appointment **due to the protection accorded to working mothers, due to the member's taking parental leave, due to their giving care to a family member or due to their having fallen ill**. Where a management board member exercises this right, the supervisory board **must** revoke the appointment of said management board member

1. and in so doing must make a commitment, in the case of the protection of working mothers, **to re-appoint** them upon expiry of the periods of protection set out in section 3 (1) and (2) of the Maternity Protection Act (*Mutterschutzgesetz – MuSchG*),

2. and in so doing must make a commitment, in the cases of parental leave being taken, care being given to a family member or the management board member having fallen ill, **to re-appoint them following a period of up to three months as requested by the management board member**; the supervisory board may refrain from revoking the appointment for grave cause.

In the cases set out in sentence 2 no. 2, the supervisory board may revoke the appointment of the management board member, upon the latter's request, while making a commitment to re-appoint them following a period of up to 12 months. The end foreseen for the prior term of office will continue in force also as the end of the term of office following the re-appointment. In all other cases, the provisions of subsection (1) remain unaffected (...)

SCOPE OF APPLICATION

APPLICABLE TO ALL CORPORATE FORMS: AG, GMBH, MONISTIC AND DUALISTIC SE

AG

Sec. 84 (3)
AktG

GmbH

Sec. 38 (3)
GmbHG

Dualistic
SE

Sec. 84 (3)
AktG in
connection
with Art. 9 I
lit. c ii SE-VO

Monistic
SE

Sec. 40 (6)
SEAG

NEW SEC.84 (3) AKTG

TIERED MODEL

Maternity Leave, Sec. 84 (3) 2 No. 1



Parental leave, caregiving, illness:
Up to 3 months, Sec. 84 (3) 3 No. 2



Parental leave, caregiving, illness:
3-12 months, Sec. 84 (3) 3

SPECIFIC SITUATIONS

Maternity leave, Sec. 84 (3) 2 No. 1 AktG	Parental leave, caregiving, and illness Sec. 84 (3) 2 No. 2, 3 AktG		
	Parental leave	Caregiving	Illness
Minimum absence period tied to the legal requirements set by the Maternity Protection Act (Sec. 3 MuSchG)	Definition is based on Sec. 15 Parental Benefit and Parental Leave Act (Gesetz zum Elterngeld und zur Elternzeit – BEEG)	Definition is based on Sec. 3 (1) 1, (5) 1, VI 1 Home Care Leave Act (Pflegezeitgesetz – PflegeZG)	<ul style="list-style-type: none"> • No specific requirements • Inability to carry out the responsibilities linked to the appointment

SPECIFIC SITUATIONS

Maternity leave, Sec. 84 (3) 2 No. 1 AktG	Parental leave, caregiving, and illness Sec. 84 (3) 2 No. 2, 3 AktG		
	Parental leave	Caregiving	Illness
<p>Obligation of the supervisory board to revoke a board member's appointment, with a guarantee of reappointment after maternity leave</p>	<p>Mandate pause up to 3 months, Sec. 84 (3) 2 No. 2 AktG</p> <ul style="list-style-type: none"> • Upon request • Guarantee of reappointment after a requested period of up to 3 months • No minimum duration 		<p>Mandate pause over 3 months, Sec. 84 (3) 3 AktG</p> <ul style="list-style-type: none"> • Upon request • Guarantee of reappointment after a period of 3 to 12 months at the discretion of the supervisory board

SPECIFIC SITUATIONS

Maternity leave, Sec. 84 (3) 2 No. 1 AktG	Parental leave, caregiving, and illness Sec. 84 (3) 2 No. 2, 3 AktG			Voluntary option
	Parental leave	Caregiving	Illness	
<p>Obligation of the supervisory board to revoke a board member's appointment, with a guarantee of reappointment after maternity leave</p>	<p>Mandate pause up to 3 months, Sec. 84 (3) 2 No. 2 AktG</p> <ul style="list-style-type: none"> • Upon request • Guarantee of reappointment after a requested period of up to 3 months • No minimum duration 		<p>Mandate pause over 3 months, Sec. 84 (3) 3 AktG</p> <ul style="list-style-type: none"> • Upon request • Guarantee of reappointment after a period of 3 to 12 months at the discretion of the supervisory board 	<ul style="list-style-type: none"> • Voluntary, temporary revocation of the appointment has been and remains possible • Twelve-month maximum period for a mandate pause can be exceeded at discretion of the company • The voluntary option serves greater legal uncertainty for the board member

PROCEDURES

APPLICATION PROCESS FOR MANDATE PAUSE

- **Application**
 - Application to the supervisory board Sec. 112 (1) 2; Sec. 78 (2) 2 AktG
 - In a GmbH without a supervisory board: Shareholders' meeting, Sec. 46 No. 5 GmbHG
 - No formal requirements
- **Timing, Sec. 84 (3) 2 AktG**
 - No statutory notice period
 - Fiduciary duties demand application to be the earliest opportunity, when it becomes evident that mandate pause will be required

PROCEDURES

APPLICATION PROCESS FOR MANDATE PAUSE

- **Conditions and requirements for approval**
 - Presence of one of the conditions under Sec. 84 (3) AktG during the relevant period
 - Disclosure of the board member's health information might be necessary and appropriate
- **Final decision**
 - By resolution of the supervisory board
 - Supervisory board may approve or reject the request within the legal framework
 - Supervisory board cannot make a divergent decision, Sec. 84 (3) 2 No. 2 AktG

EXCEPTIONS AND LIMITATIONS

CONDITIONS UNDER WHICH THE SUPERVISORY BOARD CAN REFUSE THE MANDATE PAUSE

Maternity leave, Sec. 84 (3) 2 No. 1 AktG	Parental leave, caregiving, and illness Sec. 84 (3) 2 No. 2, 3 AktG		
	Parental leave	Caregiving	Illness
<ul style="list-style-type: none"> • Application for mandate pause must be accepted • No consideration of the companies' interests, no good reason 	<p>Up to three months, Sec. 84 (3) 2 No. 2 AktG</p> <ul style="list-style-type: none"> • Supervisory board may refrain from revoking the appointment for grave reason • Consideration of the companies and the board members interests • Good cause: e.g. time of request at an inopportune moment, upcoming important decisions 		<p>Three to twelve months, Sec. 84 (3) 3 AktG</p> <ul style="list-style-type: none"> • Supervisory board can refuse the application without good cause • Mandate pause at discretion of the supervisory board

LEGAL IMPLICATIONS OF THE MANDATE PAUSE

- **Temporary termination of board position**
- **Release from (most) company responsibilities**
 - Principle of fiduciary duty remains (e.g. re information obligations)
 - Prohibition of competition applies during mandate pause, Sec. 88 AktG
- **Exemption from liability during absence**
- **Limited application of statutory provisions during mandate pause regarding the minimum number of board members or proportion of women (Sec. 76 (3) a AktG and Sec. 393 a (2) No. 1 AktG) during mandate pause, Sec. 84 (6-8) AktG**
- **End of term remains unchanged by mandate pause, Sec. 84 (3) 4 AktG**

LEGAL IMPLICATIONS

TRANSPARENCY

- **Revocation and reappointment are to be registered in the commercial register (*Handelsregister*), Sec. 81 (1), 84 (3) AktG**
 - Registration doesn't show whether the revocation is time-limited
- **Transparency requirements regarding insider information**
 - Within the scope of the Market Abuse Regulation
- **Press releases**
 - Board member's privacy to be considered (e.g. Art. 9 DS-GVO)

EXCEPTIONS AND LIMITATIONS

POTENTIAL CONFLICTS

- **Approval of a mandate pause is final and binding**
 - Change in circumstances or in the staffing of the supervisory board have no effect
 - Board members have no right to return early
- **Early ending of mandate pause**
 - When reason for mandate pause no longer exists (“healthy again”)
 - Fiduciary duty to return early on request of the company
- **Refusal of guaranteed reappointment**
 - Possible, when circumstances come up that would have prevented the first appointment

A photograph of a green plant with long, slender leaves, possibly a bamboo or similar species, set against a blurred background of a cityscape. The plant is the central focus, with its leaves extending across the frame. The background shows buildings and structures, but they are out of focus, creating a sense of depth. A white rectangular box with a green border is overlaid on the left side of the image, containing the text 'Q&A'.

Q&A

FURTHER REFERENCES

- <https://stayonboard.org/#eckpunktepapier>
- *de Raet/Möslein*: Die Mandatspause im Kapitalgesellschaftsrecht, NJW 2021, 2920
- *de Raet/Möslein*: #stayonboard: Recht auf Mandatspause wird Gesetz, NZG 2021, 897
- <https://www.bmfsfj.de/bmfsfj/service/gesetze/zweites-fuehrungspositionengesetz-fuepog-2-164226>


Dr. Tobias de Raet

Partner

Tobias is a Corporate/VC/M&A partner and has more than ten years of experience advising on transactions, corporate governance and corporate/securities litigation with a particular focus on cross-border matters.

He graduated from the universities of Muenster/Germany and St. Gallen (HSG, Switzerland). Prior to joining lindenpartners in 2017, he worked for Hengeler Mueller in Düsseldorf/Germany and Davis Polk & Wardwell in New York/USA. Tobias teaches international corporate law at the Frankfurt School of Finance and Management.

 deraet@lindenpartners.eu

 [+49 \(0\) 170 1104997](tel:+49(0)1701104997)

 [Tobias de Raet](#)

