

Compensation for Works Council Members as Embezzlement? Six Months after BGH

INTRODUCTION

“Audi reduces salaries of works council members... and is even examining whether to reclaim income of works council members.” These and similar headlines could be read yesterday in both the tabloids and the financial newspapers. After the smoke following the well-known decision of the criminal division of the Federal Court of Justice (BGH) regarding the accusations of embezzlement against human resource managers at VW because of the high level of compensation for works council members had dissipated to some extent, one thing has become clear: These issues are being worked on at a fast pace behind the scenes, and for good reason. The following is a brief summary of the current situation.

BGH JUDGMENT OF JANUARY 10, 2023 – 6 STR 133/22

In this case, the BGH dealt with the criminal liability of VW HR managers for embezzlement due to excessive compensation for works council members. After their election, members of that body were put into up to 20 salary pay grades above their regular pay grade and received annual bonuses of up to EUR 560,000. The violation of a fiduciary duty resulted from a violation of the prohibition of favoritism under Sec. 78 sentence 2 Works Constitution Act. Under the statute, works council members may not be disadvantaged because of their involvement, but, similarly, they may not be given preferential treatment. Instead, their pay must be in line with the compensation of comparable employees with the regular pay developments customary in the company. The individual, hypothetically extraordinary career of a works council member as a manager is of no relevance. Rather, the governing standard is how a colleague with qualifications and job duties comparable to those of the works council member is paid.

IN BUSINESS PRACTICE

There is a very thin line between a violation of the prohibition of favoritism under works constitution law and embezzlement under criminal law. There has been considerable movement since the BGH decision, which is reflected in a few comments for business practice:

- The judgment of the BGH has clearly shown that the mere circumstance that those who are now in charge just found that certain systems for the compensation of works council members already existed does not release them from their responsibility. This applies even if – as is often the case – these systems were explicitly approved by legal memoranda. One can judge this as one wishes, but the finding of

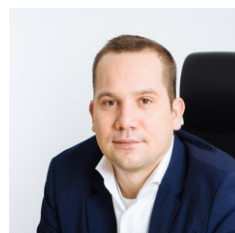
the highest criminal court in Germany is very clear on this point.

- “Creative models” (There are a slew of “creative” models for works council member compensation in the literature, and this was often referred to in the past as justification.) are bad counselors.
- The case law, which is based on the hypothetical salary development in the works council member’s regular job (credible comparative group), sets up the guard rails. However, a stop has been put to “creative” justification patterns within these guard rails, including the „soft“ or „hard“ additional skill sets acquired during time on the works council. The BGH is very clear on this and rejects many an attempt from the past.
- The example of VW may appear extraordinary because of the salary levels, but the BGH is also very clear on this: „Where it has been established that there has been a violation of Sec. 93 Joint Stock Companies Act, no room remains for the examination of whether this violation was serious or evident.
- Similarly, the days when it was possible to make excuses for not wanting to deal with this issue in the interests of a protecting a „cooperation based on mutual trust“ are over. Here as well, the BGH is very clear – reference is made to this.

The foregoing aspects show that the need to review and adapt is not an exceptional case. This is made clear by the example of Audi – possible (required) reclamations to avoid the accusation of embezzlement included – and the response of the media in its wake.

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