

# Position Paper

on the introduction of a suspension period for  
the office of board members due to  
maternity/parental leave/illness/care

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## 1. Situation

Delia Lachance was a member of the board and Chief Creative Officer of Westwing, a listed e-commerce company. She started her maternity leave and a six-months parental leave at the beginning of March 2020. Therefore, Lachance had to resign from her position as a member of the board. A press release, which can also be read on the company's website, states: "The legal framework in Germany does currently not provide the possibility of taking maternity leave and parental leave". Lachance had therefore "resigned from her office as a member of the board, as required by law".

## 2. Problem

Longer-term absences (e.g. maternity leave, parental leave, long-term sickness, care for relatives) effectively force board members to resign from their office. If the office is not terminated, the duties of the executive bodies continue to exist even during the absence. Considerable liability risks may arise, especially because supervisory tasks cannot be properly performed.

This problem is not limited to the (few) female board members. Male members of the executive board are also affected, as they too cannot take parental leave or care leave to look after their children or relatives in need of care. Furthermore, responsibility and liability also continue in the event of illness of members of the board. In the event of a prolonged illness, e.g. due to a pandemic, the only option is the termination of the office.

### 3. Proposal

Our aim is to amend statutory law to allow members of the executive board and comparable management bodies of other legal forms to suspend their office and all associated rights and obligations under the law and their service contract (if any) for a limited period of up to six months. At the same time, the legitimate interests of the company concerned are to be taken into account in that the suspension may not be requested at an inappropriate point in time or if there are other important reasons in the interests of the company. Furthermore, the supervisory board shall decide in accordance with the existing statutory law whether, for the duration of the suspension, (i) another board member is appointed, (ii) the remaining board members temporarily take over the duties of the board member whose office is suspended or (iii) a supervisory board member is appointed to cover for the board member whose office is suspended.

The core elements of our proposal are  
(for the legal details of the proposed regulation see 4.1.1):

- 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 period of notice
- Taking into account the interests of creditors and the public by providing for transparency in the commercial register

## **4. Current legal situation**

### **4.1. Corporate law**

#### **4.1.1. Situation**

In the current legal situation, members of the executive boards of stock companies have no possibility of temporarily suspending their office in the event of a long-term absence (such as in connection with the birth of a child or the illness of relatives). The duty under stock corporation law to manage the company with due care also applies during a possible absence. There is no possibility of delegating duties – even temporarily – completely to other members of the executive board or even employees.

In the event of breaches of duty, board members are liable to the stock company under civil law for damages. In certain cases, there is even the risk of criminal law consequences, e.g. in the event of a breach of the obligation to file for insolvency.

Board members who cannot or do not want to fulfil their duties for a certain period of time must therefore resign from their office permanently, otherwise there is a considerable liability risk. Inter-party arrangements such as a contractually agreed reappointment after the end of the suspension are unsatisfactory for all parties involved. They result in damages to reputation and legal uncertainty for the board members and companies concerned, as well as for third parties such as business partners and contractual partners of these companies.

Comparable problems exist with regard to other legal forms, especially the limited liability company (GmbH).

### 4.1.2. Proposed solution

Through moderate interventions in stock corporation law, a regulation can be created which, on the one hand, grants board members the right to suspend their office under certain circumstances for a limited period of time and with a reasonable notice period without being liable for damages caused during this time and which, on the other hand, takes appropriate account of the legitimate interests of the company, shareholders and contractual partners concerned.

For other legal forms, e.g. the GmbH, comparable regulations can be created, taking into account the specific features of the legal form.

#### Core elements of the proposed regulation:

- **Right to suspend the office:** An amendment to § 84 of the German Stock Corporation Act (AktG) is intended to give members of the executive board a personal right to temporarily suspend their office under certain circumstances.
- **Legally defined reasons:** The right to suspend the office should only exist in cases defined by law (e.g. pro-longed illness or circumstances that would entitle employees to maternity leave, parental leave or care leave).
- **Maximum duration:** The suspension should not exceed a maximum duration stipulated by law (e.g. up to 6 months), after which the office should be automatically resumed.
- **Notice period:** Board members should be required to give a reasonable period of notice regarding the suspension.
- **Consideration of legitimate company interests:** Exceptions should be provided by law to ensure that the suspension may not be re-requested at an inappropriate point in time or if there are important reasons in the best interests of the company (e.g. in companies with only one board member without a replacement being available or in times of crisis).

- **Register publicity:** The legitimate interests of the public are to be taken into account in that the fact (but not the reason) and period of suspension are to be entered in the commercial register.
- **Exclusion of dismissal:** The dismissal of a board member who has announced a state of suspension or is in a state of suspension shall be excluded, unless there is a conduct-related reason for revocation from office for good cause.

**Main legal consequences:**

- Right to suspend the office.
- Avoidance of liability during the suspension.
- Automatic resumption of the office after the end of the suspension.
- No employee rights for board members.

## 4.2. Employment law

### 4.2.1. Situation

Members of the executive boards of stock companies are not entitled to maternity or parental leave, as the relevant laws only apply to employees. Board members are not employees.

### 4.2.2. Problems of the current legal situation

In contrast to employees, board members are not subject to any instructions regarding the place, time or content of their work. A board member who becomes a mother or father would therefore be allowed to manage the company's business from the hospital or from home. However, the board member remains fully responsible and continues to be subject to all liability risks associated with the board position.

### **4.2.3. No "employment law solution", but a follow-up solution in the service contract**

In public debate there have been calls for the extension of the regulations on maternity and parental leave to board members. In our view, this is not a solution. The Maternity Protection Act (MuSchG) and the Parental Benefits and Parental Leave Act (BEEG) are applicable to employees and – in the case of the Maternity Protection Act – since 1 January 2018 also to "external" (i.e. non-shareholding) managing directors of a GmbH without a blocking minority. In view of the different roles of employees on the one hand and members of the executive board on the other, extending the scope of application of the protective employment laws to board members would be contrary to the system. The extension would lead to consequences that would go far beyond the concerns to be addressed (examples: duration of parental leave of up to three years per child, protection against dismissal, financial protection by the company and/or the health insurance company during pregnancy and the maternity protection periods) Therefore, we propose the approach under corporate law described above.

If a board member takes advantage of the proposed legal entitlement to a suspended their office, a number of follow-up issues arise which, in our view, should be regulated in the service contract or a supplementary agreement to be concluded on the occasion of the suspended office. These include the question of whether and to what extent individual remuneration components should continue to be granted (basic remuneration, company car, bonuses). With regard to Long Term Incentive Plans (LTIP) or stock option programmes, for example, it should be regulated how the suspension affects holding periods / vesting periods / assessment bases etc. It must also be clarified whether holiday entitlements should continue to be acquired pro rata temporis during the period of suspension.

## **5. Comparable regulations for members of management bodies of other legal forms**

For members of management bodies of other legal forms (e.g. managing directors of limited liability companies), comparable regulations should be created, taking into account special features of the respective legal form.

## **6. Comparable regulations for supervisory bodies**

A similar solution could be established for members of supervisory bodies. However, in contrast to the situation of members of the executive board, it must be taken into account that the time spent on a supervisory office as well as its intensity are reduced. Furthermore, aspects such as parity, existing quota regulations and the appointment of substitute members by the general meeting must also be considered in this context.

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