

Legal bases and implementation of clawback clauses:

A comparison between US and Germany

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Abstract

The implementation of clawback clauses provides an opportunity to prevent mismanagement of executive officers without unnecessarily increasing the complexity of compensation systems. Driven by various legal initiatives, companies in the USA increasingly implemented clawback clauses in the last decade. This study shines a light on the legal foundation of clawback clauses in Germany. Moreover, this article examines the level of implementation of clawbacks in the thirty German companies with the highest market capitalization (DAX 30 companies).

I. What are clawbacks and how do they work?

The origins of clawbacks go back to events in the early 2000s when the US companies Enron and WorldCom were suspected and convicted of massive balance sheet and profit and loss (P/L) manipulation by the Securities and Exchange Commission (SEC). Following the legal reconditioning, which revealed that the companies' board was responsible for the manipulation due to lax regulatory guidance, the US government started a legislative process to prevent similar manipulations in the future.¹ One key element of the new regulatory guidance was to reclaim an already paid or promised compensation of company's executive members due to (un-)intentional misbehavior. This mechanism is known as clawback and was first introduced in the Sarbanes-Oxley-Act (SOX) in 2002.² FIGURE

¹ cf. Morgensen (2019), p. 1.

² cf. SOX Sec. 304, p. 34.

1 shows the mechanism of clawing back short-term incentives (STI) and long-term incentives (LTI).

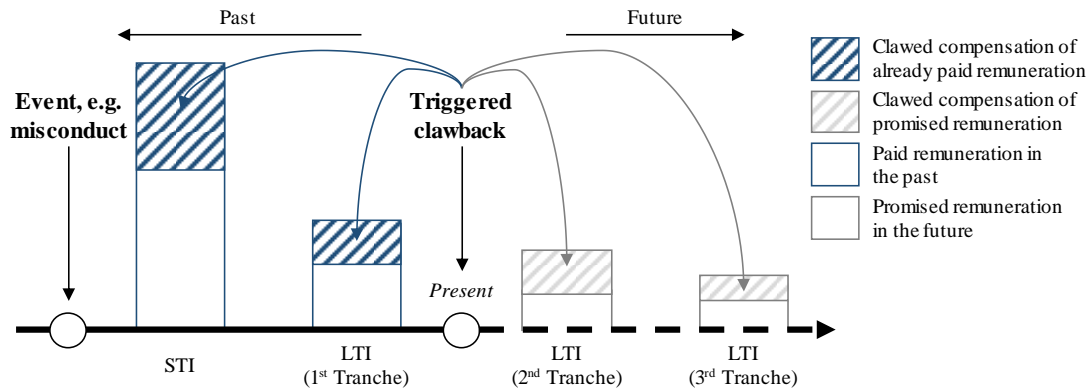


FIGURE 1: Mechanism of clawing back short-term incentives (STI) and long-term incentives (LTI)

Clawbacks are triggered by a certain event in the past. This event could arise due to misbehavior such as P/L manipulation which takes place before the STI and LTI is determined. Depending on the extent of misconduct, it is possible to claw already paid remuneration but also to claw promised but not paid remuneration.³ Empirical results show that adopting clawbacks in incentive systems offers the advantage to increase reporting quality and to decrease auditing fees.⁴ The increasing number of clawback clauses adopted in S&P500 companies also highlights the importance of clawback clauses in compensation contracts. In 2013, already more than 60% of the S&P 500 companies report the implementation of clawback clauses. In 2015, the number increased to more than 77%.⁵

³ cf. Schneider (2010), p. 24.

⁴ cf. Chan et al. (2012), p. 180; deHaan et al. (2013), p. 1027.

⁵ cf. Equilar (2016), p. 16.

This article evaluates the current state of the implementation of clawback clauses in the DAX 30 companies and how these clauses are formalized. It shows that almost two third of the DAX 30 companies have already adopted clawback clauses in their executive compensation schemes in 2018.

The implementation of clawback clauses in corporate compensation systems is the results of several legislative, supervisory board, and shareholder initiatives that have accelerated this development. In Germany, the legislative process of clawback guidance clearly lags behind the American initiatives, but the catching-up process is picking up speed. Since the amendment of the German Remuneration Ordinance for Institutions or Institutsvergütungsverordnung (InstitutsVergV) of 2017, clawback clauses are required for credit and financial service institutes. Additionally, the upcoming amendment of the of the German Stock Corporation Act or Aktiengesetz (AktG) – Zweite Aktionärsrechterichtlinie (ARUG II) – will further strengthen the voluntary adaption of clawback clauses in German companies.

The article is structured as follows: In section II the existing and upcoming legislative initiatives are presented in detail. Section III will illustrate that clawback clauses are at this point implemented in most of the DAX 30 companies and shows how the clauses are formalized. The last section IV gives a conclusion of the study's findings and the potential implications.

II. Clawbacks as a regulatory requirement and governance instrument

When investigating clawback clauses in the United States and in Germany, five initiatives have to be considered: SOX, Dodd-Frank-Act (DFA), Voluntary clawbacks due to DFA, InstitutsVergV and ARUG II (see FIGURE 2). All five have in common that they are based

on legislative initiatives but either could be seen as a regulatory requirement, if they are mandatory to implement or as governance instrument, if they are voluntary.

	SOX Sarbanes-Oxley-Act	DFA Dodd-Frank-Act	Voluntary clawback due to DFA	Instituts Verg V Institutsvergütungs- verordnung	ARUG II Zweite Aktionärsrechterrichtlinie
	United States			Germany	
	Regulatory requirement		Governance instrument	Regulatory requirement	Governance instrument
Applies to...	Listed companies	Listed companies	All companies (probably limited to public companies)	Credit and financial service institutions (as defined in Banking Act)	Listed companies (as defined in Stock Corporation Act)
Required?	Mandatory	Mandatory (if in force)	Voluntary (Adaption on request of compensation committee and shareholders due to DFA)	Mandatory	Voluntary (if in force)
Triggered by...	<ul style="list-style-type: none"> • Fraud • Financial misstatement 	<ul style="list-style-type: none"> • Financial restatement 	<ul style="list-style-type: none"> • Financial restatement • Compliance issues 	<ul style="list-style-type: none"> • Actions that cause high losses or regulatory sanctions • Serious breach of internal or external regulations 	<ul style="list-style-type: none"> • Not specified
Enforced by / Monitored by...	SEC	SEC	Compensation committee + Shareholder	Supervisory board + Compensation committee	Supervisory board + Shareholder
Who will feel the claws?	CEO + CFO	Executive officers	Executive officers	Employees whose variable remuneration exceeds 50,000 EUR	Board of directors

FIGURE 2: Clawback initiatives in the United States and in Germany

SOX

The starting point of the emerging clawback practices in the US is the SOX of 2002. The act is mandatory for all public listed companies at American stock exchanges and shall “[...] protect the interests of investors and further the public interest in the preparation of informative, accurate, and independent audit reports for companies [...]”.⁶ Section 304 of the SOX act enforces the SEC to claim charges, if “[...] an accounting restatement [is necessary] due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws [...]”.⁷ The term misconduct

⁶ SOX Sec. 101, p. 6.

⁷ SOX Sec. 304, p. 34.

encompasses intended misbehavior such as fraud or misstatement. The charges allow the SEC to reimburse any bonuses, incentive- or equity-based compensation received or profits realized from the sale of securities during a 12-month period after the first public issuance of the financial disclosure.⁸ Clawbacks formalized in the SOX act are limited to the CEO and the CFO of a company.

DFA

The DFA passed legislation in 2010 but to date, not all sections – including section 954 (Recovery of executive compensation) – are in force. The main difference between the DFA and the SOX act is that it additionally covers financial restatements. In contrast to intentional misbehavior as formalized in SOX, a restatement is based on unintentional behavior. A restatement is defined as “[...] *an error that is material to previously issued financial statements, the obligation to prepare the restatement would trigger application of the recovery policy*”.⁹ An error could be a “[...] *mathematical mistakes, mistakes in the application of generally accepted accounting principles [...]*”.¹⁰ Currently, a three-year period preceding the first issuance of the restated financial statement is discussed in which clawbacks could be applied. In addition to CEOs and CFOs, the DFA act expands its sanctionary elements to “[...] *any vice-president of the issuer in charge of a principal business unit, division or function (such as sales administration or finance), any other officer who*

⁸ cf. SOX Sec. 304, p. 34.

⁹ DFA Sec. 954 (B)1, p. 25.

¹⁰ DFA Sec. 954 (B)1, p. 24.

*performs a policy-making function, or any other person who performs similar policy-making functions for the issuer. Executive officers of the issuer's parents or subsidiaries would be deemed executive officers of the issuer if they perform such policy making functions for the issuer".*¹¹ The act could be seen as an extension of the SOX act, because it defines stricter regulatory guidance to a broader group of responsables. Thus, clawbacks in the context of DFA are stronger than clawbacks in the context of SOX.¹²

Voluntary clawbacks due to DFA

As stated above, section 954 of the DFA act is to date not in force. In the meantime, the legislation process of the DFA causes a growing willingness to implement voluntary clawback clauses in US companies. As the term voluntary implies, it is not mandatory to implement clawback clauses and thus, they could be seen more as an instrument to sharpen governance guidelines rather than a regulatory requirement. *"While listed companies do not need to implement DFA 954's mandatory clawback policies until the rule is finalized by the SEC, the effectiveness of this requirement is reflected in the increase in voluntary adoption of clawback provisions between 2005 and 2009."*¹³ The early implementation of such rules emerges due to the *"[...] anticipation of this requirement, [...], either voluntarily, or at the request of shareholder activists"*.¹⁴ Compared to clawbacks defined in the

¹¹ DFA Sec. 954 (C)1, p. 34.

¹² cf. Chan et al. (2012), p. 181.

¹³ Erkens et al. (2018), p. 148.

¹⁴ Bao et al. (2018), p. 1579.

SOX and DFA act, voluntary clawbacks are not limited to intended or unintended misreporting of financial information. They also include rules to penalize compliance issues such as ethical misconduct.¹⁵ The target group of potentially clawed executives is identical to the DFA act.

InstitutsVergV

The German InstitutsVergV is based on the European Union directive 2010/76/EU and shall strengthen the regulatory guidance on remuneration policies in capital markets after the financial crisis in 2007. The InstitutsVergV passed the legislation process in 2010 followed by an amendment in 2017, which includes clawback clauses as a mandatory element to sanction misbehavior. The guidelines defined in the InstitutsVergV are limited to German credit and financial service institutions.¹⁶ The supervisory board and the compensation committee have to take actions, if the misconduct causes high losses or regulatory sanctions or in case of serious breach of internal or external regulations.¹⁷ The supervisory board and the compensation committee are further permitted to claw back a variable remuneration that has already been paid out and prohibit a variable remuneration that has already been promised but not paid out.¹⁸ The clawback clauses have to be determined in the compensation plan if the variable remuneration exceeds 50.000 EUR per fiscal year.¹⁹

¹⁵ cf. deHaan et al. (2013), p. 1027.

¹⁶ §1 (1) InstitutsVergV.

¹⁷ §18 (5) InstitutsVergV.

¹⁸ §20 (6) InstitutsVergV.

¹⁹ §18 (1) InstitutsVergV.

ARUG II

Similar to *InstitutsVergV*, ARUG II is based on a European Union directive (2017/828/EU) which should strengthen the rights of the shareholders. The legislation process of ARUG II is expected to be finalized in late 2019. The legislative proposal by the Cabinet of Germany empowers the shareholder to vote in conjunction with the supervisory board on the compensation plan of board of directors of public listed companies.²⁰ This is also named the right to Say-On-Pay.²¹ The compensation plan might include clawback clauses to recover a variable remuneration. The consideration of clawback clauses is limited to the board of directors but the proposal does not state in which cases clawbacks have to be applied.²² Clawback clauses formalized in ARUG II are voluntary and thus not binding to implement. Therefore, the guideline has to be considered as governance instrument and not as a regulatory requirement such as SOX, DFA or *InstitutsVergV*. Nevertheless, ARUG II grants shareholders the right to have a greater say in the design of the compensation system. Thus, the interests of shareholders have to be reflected even more. Additionally, the proposed paragraphs are vaguely phrased. It is not specified when clawbacks could be applied (intentional vs. unintentional misbehavior) at all which leaves room for discretionary decisions.

The following chapter elaborates the current state of clawback implementation and how they are defined in the DAX 30 companies.

²⁰ cf. Cabinet of Germany (2019), p. 32.

²¹ cf. Cabinet of Germany (2019), p. 1.

²² cf. Cabinet of Germany (2019), p. 8.

III. Application of clawback clauses in DAX 30 companies compared to US companies

Similar to US companies a decade ago, the analysis of the compensation reports of annual financial statements of the DAX 30 companies of 2018 shows a trend to voluntarily adopt clawback clauses. While in the year 2017 less than 20% of the DAX companies integrated clawback clauses in their incentive systems,²³ the study shows that today almost two third of the DAX 30 companies (19) implemented some form of clawback clause. Noticing that ARUG II is still not finalized and comparing it to 2017, this increase highlights the importance of clawback clauses in the DAX 30 companies.

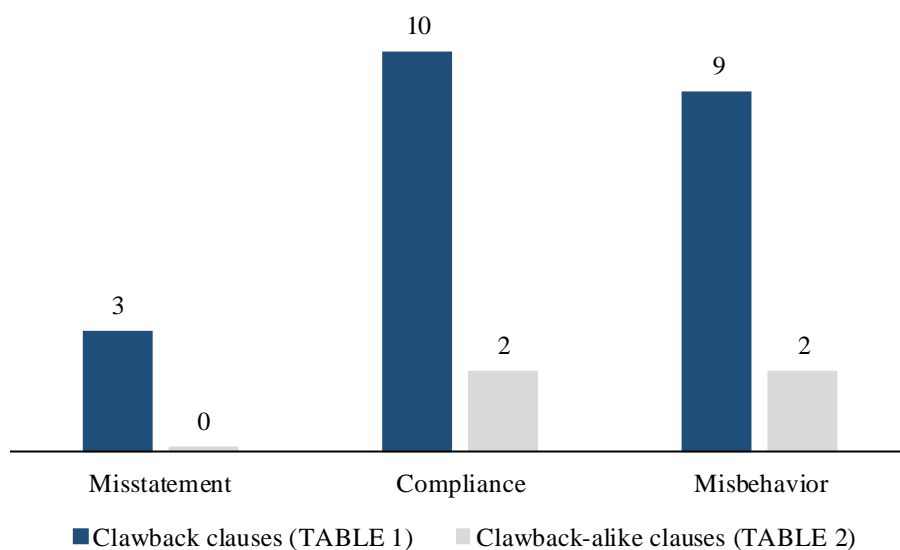


FIGURE 3: Defined clawback triggering events in DAX 30 companies

FIGURE 3 shows that most companies specified compliance and misbehavior (in terms of breach of duty) as trigger events of clawing back the variable remuneration. These two defined trigger events are often mentioned in combination. Thus, most of the defined

²³ cf. Firk et al. (2019), p. 35.

clauses could be compared to clauses that arose after the implementation of SOX in the United States as they cover fraudulent behavior. Additionally, the results show that even a misstatement is specified as a clawback trigger event in three compensation reports: Adidas AG, Henkel AG & Co. KGaA and SAP AG. As highlighted in the DFA section above, these companies follow a quite strict clawback guidance as a simple misstatement could trigger a clawback.

Very detailed clawback clauses including the description of specific events, when to apply the clawback of bonuses, are specified and listed in twelve annual compensation reports (see TABLE 1). Most of the clawback clauses are focusing on clawing back the LTI already paid or about to be paid out in tranches. For example, BASF SE describes in detail: *“In the event that a Board member commits a serious infringement of the Code of Conduct of BASF Group or of the duty of care as a member of the management of the company, this provision allows for a reduction or cancellation of not yet paid variable compensation as well as the clawback of variable compensation paid out since January 1, 2018.”* (p. 152). Furthermore, most of the defined clawback clauses give the supervisory board the discretion to decide, whether and to which extent clawbacks could be applied. For example, Adidas AG states: *“[...] these provisions allow the Supervisory Board at its equitable discretion, under certain circumstances, to reduce the compensation from the LTIP 2018/2020. Such circumstances are, for instance, material misstatements in the financial reports as well as serious compliance violations.”* (p. 45).

Besides these very specific clawback clauses, the analysis shows clawback-alike clauses in the annual report of seven companies (see TABLE 2). These clauses are mostly named clawback clauses but are no clawbacks in a narrow sense. For example, ThyssenKrupp AG

states in their annual report “*Clawback rule: Supervisory Boards right to reduce compensation in case of deterioration in company’s situation pursuant to § 87 (2) AktG*” (p. 17).”

The reduction of bonuses in case of, for example, a declining company performance as stated in § 87 (2) AktG is part of the common remuneration of the management board and differs from clawing back already paid bonuses because of compliance issues, misstatement or fraud. Two exceptions are mentioned in the report of the Daimler AG and the RWE AG, which adopted a clawback clause following the legal recommendations but did not name them clawbacks.

Additionally, the reported sections in TABLE 1 and TABLE 2 were analyzed regarding the scope of the potentially clawed compensation. As illustrated in FIGURE 1, STI as well as LTI could be clawed. The highlighted passages in TABLE 1 and TABLE 2 show that Adidas AG, BASF SE, Henkel AG & Co. KGaA, Merck KGaA, RWE AG and SAP AG differentiate between the clawback of STI and/or LTI. For example, Henkel AG & Co. KGaA states the possibility “[...] *to wholly or partially withhold the variable remuneration (STI, LTI) or to demand the repayment [...]*” (p. 52).

Similar to Henkel AG & Co. KGaA, the clawback clauses of BASF SE and SAP AG cover STI as well as LTI. In contrast, the executive compensation scheme of Merck KGaA only allows to claw back LTI: “[...] *a clawback provision was included in the Long-Term Incentive Plan [...]*” (p. 172). In the remaining reports, we do not find a specified differentiation between STI and LTI: E.g., Allianz SE describes that the “[...] *variable remuneration already paid may be subject to a clawback*” (p. 54). Thus, it is not fully differentiable whether STI and/or LTI could be clawed.

Company	Clawback clauses in annual compensation reports	Trigger event	Scope of clawbacks
Adidas AG	“Furthermore, the terms and conditions of the LTIP 2018/2020 contain malus and claw back provisions ; until expiry of the lock-up period (malus) and beyond (claw back), these provisions allow the Supervisory Board at its equitable discretion, under certain circumstances, to reduce the compensation from the LTIP 2018/2020. Such circumstances are, for instance, material misstatements in the financial reports as well as serious compliance violations.” (en: p. 45; de: p. 46)	misstatement & compliance	LTI
Allianz SE	“Variable remuneration components may not be paid, or payment may be restricted, in the case of a significant breach of the Allianz Code of Conduct or regulatory Solvency II policies or standards, including risk limits. In the same way, for three years after payout, variable remuneration components already paid may be subject to a claw-back .” (en: p. 52; de: p. 54)	compliance & misbehavior	not specified
BASF SE	“A clawback clause was introduced for the variable compensation and applies in the event of substantial breaches of duty by a Board member.” (en: p. 146; de: p. 146) [...] “A withholding and clawback clause was introduced as of January 1, 2018, for the performance bonus and the LTI program for all members of the Board of Executive Directors. In the event that a Board member commits a serious infringement of the Code of Conduct of BASF Group or of the duty of care as a member of the management of the company, this provision allows for a reduction or cancellation of not yet paid variable compensation as well as the clawback of variable compensation paid out since January 1, 2018.” (en: p. 152; de: p. 152)	compliance & misbehavior	STI + LTI
Bayer AG	“The Supervisory Board has the discretion to alter the amount of an annual bonus if the Supervisory Board arrives at an assessment that differs from the evaluation determined for a member of the Board of Management. Irrespective of this, the legal basis exists for Bayer to reduce payments or demand their return if a Board of Management member commits a breach of duty that results in financial loss. It is intended that this also be contractually agreed in the future.” (en: p. 147; de: p. 147) [...] “The Supervisory Board also plans to include explicit clawback provisions – i.e. possibilities for reclaiming compensation components that have already been paid out – in the contracts.” (en: p. 154; de: p. 154)	compliance & misbehavior	not specified
Deutsche Bank AG	“All contractually agreed provisions with respect to variable compensation elements apply accordingly to the severance payment, including the option to reclaim any variable compensation (clawback), and the severance payment is subject to a regulation for the offsetting of income received from other sources.” (en: p. 173; de: p. 177) [...] “ Claw-back : In the event an InstVV MRT participated in conduct that resulted in significant loss or regulatory sanction; or failed to comply with relevant external or internal rules regarding appropriate standards of conduct.” (en: p. 189; de: p. 208)	compliance & misbehavior	not specified
Fresenius Medical Care AG & Co. KGaA	“In addition, on the basis of the LTIP 2016 plan conditions and in accordance with the employment contracts concluded with individual members of the Management Board as from January 1, 2018, the Company is entitled to reclaim already earned and paid compensation components (claw back). Such right to reclaim exists in particular in case of relevant violations of internal guidelines or undutiful conduct.” (en: p. 133; de: p. 141)	compliance & misbehavior	LTI
Fresenius SE & Co. KGaA	“In the event of violation of compliance rules, the Supervisory Board, in due exercise of its discretion, is entitled to reduce the number of performance shares vested on a member of the Management Board to zero. Furthermore, Fresenius SE & Co. KGaA is entitled to a complete or partial reimbursement in the event of violation of compliance rules in the period of three years following disbursement.” (en: p. 150; de: p. 150)	compliance	not specified

HeidelbergCement AG	“Introduction of a clause to reduce, remove, and reclaim variable remuneration in the event of breaches of major due diligence obligations (clawback /malus clause).” (en: p. 99; de: p. 99)	misbehavior	not specified
Henkel AG & Co. KGaA	“Malus and clawback regulations were added to the remuneration policy, starting on January 1, 2019. They give the Supervisory Board of Henkel Management AG the authorization – in specific circumstances and, after due consideration, at its discretion – to wholly or partially withhold the variable remuneration (STI, LTI) or to demand the repayment, within specific limits, of variable remuneration that has already been paid. Such circumstances include, in particular, severe breaches of a Management Board member’s duties or material misstatements in financial reports.” (en: p. 52; de: p. 52)	misstatement & compliance	STI + LTI
Linde plc	“ Recapture Clawback Policy : The Board of Directors of the Company has adopted a policy for the recapture of annual performance-based variable compensation payouts, equity grants and certain equity gains in the event of a later restatement of financial results. Specifically, if the Board, or an appropriate committee thereof, has determined that any fraud [...] of the Company materially contributed to the Company having to restate all or a portion of its financial statements, the Board or committee shall take, in its discretion, such action as it deems necessary to remedy the misconduct.” (en: p. 47 (only available in English))*	misbehavior	not specified
Merck KGaA	“In order to take even greater account of the prominent position of entrepreneurial responsibility in compensation, a clawback provision was included in the Long-Term Incentive Plan, effective January 1, 2018, allowing amounts allocated from the Long-Term Incentive Plan but not yet paid out to be retained. Cases in which the clawback provision may be applied include violations of internal rules and regulations (Merck Code of Conduct), legislation, other binding external requirements in the area of responsibility, significant breaches of duty of care within the meaning of section 93 AktG, other grossly non-compliant or unethical behavior or actions that are contradictory to our company values.” (en: p. 172; de p. 172)	compliance & misbehavior	LTI
SAP AG	“ Clawback Provisions : SAP has the contractual right to request that the Executive Board member returns any payments made from STI or LTI if it subsequently emerges that the payment was not justified in whole or in part because targets were not achieved at all or not achieved in the scope assumed when calculating the payment amount due on account of false information having been provided. In such case, the Executive Board member is obliged to repay to SAP the amount by which the payment actually made exceeds the payment amount due on the basis of the targets actually achieved. Such contractually agreed claim to repayment supplements the claim for restitution of unjustified enrichment pursuant to section 812 of the German Civil Code (BGB).” (en: p. 77; de: p. 32)	misstatement	STI + LTI
Siemens AG	“Beginning in fiscal 2019, plans call for the Supervisory Board to review and, if appropriate, reduce bonus payout amounts in the event of a breach of duty or a violation of compliance regulations (clawback).” (en: p. 44; de: p. 48) “If a member of the Managing Board violates compliance regulations, the Supervisory Board is entitled at its duty-bound discretion to revoke without replacement all or some of the Stock Awards, depending on the gravity of the compliance violation (clawback).” (en: p. 45; de: p. 49)	compliance & misbehavior	not specified
<p>LTIP = Long-Term Incentive Plan; STIP = Short-Term Incentive Plan en: p. = Page in the English annual financial statement; de: p. = Page in the German annual financial statement * The highlighted section refers to the proxy statement of the Linde plc.</p>			

TABLE 1: Clawback clauses in DAX 30 companies

Company	Clawback-alike clauses in annual compensation reports	Trigger event	Scope of clawbacks
Daimler AG	“In this context, agreements were reached with the members of the Board of Management allowing for the partial reduction or complete elimination of the annual bonus for any member who clearly violates our Integrity Code. If it is not possible to reduce a future bonus payment, or a payment that has yet to be made, the Board of Management member in question will be required to pay back the amount of the bonus reduction. The Supervisory Board has the final decision on all such bonus reductions.” (en: p. 123; de: p. 123)	compliance & misbehavior	not specified
Deutsche Post AG	“We comply with the requirement regarding the ability to retain or reclaim (clawback) variable remuneration in justified cases by making the granting of LTIP components (SARs) dependent upon the attainment of previously stipulated goals. Extraordinary developments can therefore already lead to a decrease in the number of SARs at the time they are granted. Moreover, SARs are granted on the condition that the Supervisory Board may limit the payment amount in the event of extraordinary developments.” (en: p. 27; de: p. 27)	no clawback	-
E.ON SE	“ Clawback rule: The Supervisory Board’s right pursuant to Section 87, Paragraph 2 of the German Stock Corporation Act to reduce compensation if the Company’s situation deteriorates” (en: p. 83; de: p. 83)	no clawback	-
Münchener Rück AG	“Contractual clawback provisions requiring reimbursement of variable remuneration components already paid out are triggered in the event of a serious breach of duty. All employment contracts of the members of the Board of Management include a provision according to which, in particular pursuant to Section 93 of the German Stock Corporation Act (AktG), a member of the Board of Management is required to reimburse the Company for any damage attributable to them as a result of a breach of duty. The contractual indemnity provision protects the Company; it is designed to safeguard the Company’s assets in the event of a serious breach of duty. In the Company’s view, an additional clawback provision for bonuses already paid is therefore not required. ” (en: p. 32; de: p. 32)	no clawback	-
RWE AG	“The SPP also contains a provision which gives the Supervisory Board the power to punish infractions by Executive Board members, for example serious violations of the company’s Code of Conduct, by reducing or completely voiding ongoing SPP tranches.” (en: p. 65; de: p. 65)	compliance & misbehavior	LTI
ThyssenKrupp AG	“Clawback rule: Supervisory Board right to reduce compensation in case of deterioration in company’s situation pursuant to § 87 (2) AktG” (en: p. 17; de: p. 17)	no clawback	-

LTIP = Long-term incentive plan; STIP = Short-term incentive plan; SPP = Strategic performance plan
en: p. = Page in the English annual financial statement; de: p. = Page in the German annual financial statement
The analysis identified no clawback clauses in the financial statements of Beiersdorf AG, BMW AG, Continental AG, Covestro AG, Deutsche Börse AG, Deutsche Lufthansa AG, Deutsche Telekom AG, Infineon AG, Volkswagen AG, Vonovia SE and Wirecard AG.

TABLE 2: Clawback-alike clauses in DAX 30 companies

IV. Conclusion & implication

The article investigates the present legal basis and the level of implementation of clawback clauses in the DAX 30 companies in comparison to US companies. The results of the study show first, that the legislative process of clawbacks in Germany lags behind the process in the US. But despite the relatively weak legal basis of clawback clauses in Germany, the DAX 30 companies are following the trend of US companies and are increasingly adopting voluntary clawbacks into the incentive scheme of the management board. In 2018, nearly two third of the DAX 30 companies defined clawback clauses – mostly covering compliance and misbehavior issues – in the compensation contracts of management boards (compared to less than 20% in 2017). This trend might be further amplified by the finalization of ARUG II.

For practitioners it might be interesting to know, that ARUG II foresees clawback provisions on a voluntary basis for non-credit and non-financial institutes. Thus, ARUG II grants the shareholders the right to Say-On-Pay, and therefore, the design of the compensation system of the management board has to consider the interests of the shareholders even stronger. The high degree of implementation in the DAX 30 companies may put pressure on other companies and their board members and supervisory board to adopt clawback clauses as well.

Furthermore, the study shows that predominantly very detailed clauses are used, stating mostly compliance violations or serious infringement of the duty of care as a trigger event for clawbacks. As highlighted in the introduction, adopting clawbacks into incentive systems can increase reporting quality and decrease auditing fees. Besides those potential favourable functional effects of clawbacks, dysfunctional effects can occur. For example, Chan et al. (2015) show that the implementation of clawback clauses correlates negatively with R&D expenditures.²⁴ Further research is needed to investigate, whether this relation can also be found in German companies. Further research could analyze the consequences of the integration and mixture of clawbacks with already existing bonus and

²⁴ cf. Chan et al. (2015), p. 160.

malus systems and how the implementation of such clauses affect compensational effects in the existing systems.

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