# Austria

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## Sources of corporate governance rules and practices

### 1 Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance?

The rules on corporate governance are primarily contained in company law (the Stock Corporation Act, the Limited Liability Company Act), stock exchange law (the Stock Exchange Act, the trading rules of the Vienna Stock Exchange), the Austrian Corporate Governance Code and also in the Austrian Commercial Code since the entry into force of the Austrian Commercial Code Amendment Act 2008. According to Austrian company law, the articles of association of stock corporations (*Aktiengesellschaften*) and limited liability companies (*Gesellschaften mit beschränkter Haftung*) may provide for further rules on corporate governance, in particular more detailed rules on the compensation and obligations of the management board and the supervisory board. In practice, the supervisory board of stock corporations may pass rules of procedure for itself as well as for the management board. Such rules contain technical provisions as far as meetings are concerned as well as detailed provisions on reserved supervisory board or shareholder matters.

### 2 Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder activist groups whose views are often considered?

According to article 10/1/6 of the Federal Constitution, the republic is responsible for the relation between private and legal persons, whereas company law and stock exchange law regulates the affairs between private persons as state law. The Stock Corporation Act, the Limited Liability Company Act and all other acts in company law including the Stock Exchange Act were passed by the federal parliament. Two houses of parliament exist, the National Council and the Federal Council. The National Council consists of 183 members elected by the people in general, equal, direct, personal, free and secret elections taking place every four years. The Federal Council is regarded as a representative body of the federal states within the federal parliament. Its members are elected by the state council of the respective federal state. The bodies responsible for enforcing such rules are the ordinary courts. The ordinary courts have jurisdiction over all civil and commercial disputes unless such are referred to special courts or other authorities.

Austria has no specific tradition of shareholder activist groups. Unlike Germany where minority shareholders traditionally exercise a certain influence in shareholders' meetings, Austria, to date, is nearly unaffected in that respect. However, the Austrian Shareholder Association has increased its activities by representing shareholders in meetings, filing shareholders' complaints and submitting opinions on legislative proposals.

## Rights and equitable treatment of shareholders

### 3 Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action?

Members of the management board are appointed by the supervisory board of the company for a maximum term of five years. There are no restrictions on their reappointment as members of the management board after the expiration of the initial term in office. The appointment of a member of the management board may be revoked by the supervisory board only for a good cause. Gross negligence in carrying out duties, inability to manage properly, or rescission of confidence by the shareholders' meeting, provided that the rescission of confidence was obviously the result of objective considerations, will generally constitute good cause. The revocation of appointment does not necessarily terminate the management board member's employment contract.

The supervisory board of a stock corporation consists of at least three members, although the articles of association may stipulate a higher number of supervisory board members (capped at 20 members by the Stock Corporation Act). The members of the supervisory board are appointed by a resolution of the shareholders' meeting. The appointment of members of the supervisory board is limited in time. Prior to the expiration of the period, the appointment may be revoked by a resolution of the shareholders' meeting without cause. This resolution requires a three-quarters majority of the votes cast.

Apart from shareholders' basic right to receive dividends and to dispose of their shares, according to the law and the articles of association, shareholders have the right to take part in all shareholders' meetings, to participate in discussions and to vote with their shares. Shareholders do not have specific rights to intervene in management decisions. However, shareholders holding 5 per cent of the registered share capital or any other lower percentage provided for in the articles of association may request a shareholders' meeting in writing, indicating the purpose of the meeting. Shareholders representing 5 per cent of the registered share capital may also request that a certain matter be put on the agenda of a shareholders' meeting. The Stock Corporation Act provides for further minority rights.

### 4 Shareholder decisions

What decisions must be reserved to the shareholders?

The following decisions require resolution by the shareholders:

- appointment of members of the supervisory board and of auditors of the corporation;
- amendment of the articles of association;

- filing of claims against the management board or the supervisory board or shareholders;
- approval of the annual financial statements, if the management board and the supervisory board refer the matter to the shareholders' meeting or if the supervisory board does not approve the annual financial statements as submitted by the management board;
- distribution of profits and release from liability of the management board and supervisory board for a specific fiscal year;
- increase and decrease of the share capital; and
- reorganisation matters (spin-offs, mergers, etc).

**5 Disproportionate voting rights**

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

Each shareholder holding ordinary shares is entitled to vote with his, her or its shares in the shareholders' meeting. The articles of association can limit or exclude the voting rights of certain shareholders holding certain kinds of shares, in particular preferred shares. Preferred shares do not confer voting rights to the shareholders but a preferential right for dividends.

The articles of association can further provide for voting rights restrictions. The voting rights of all shareholders can thereby be limited to a certain percentage of the share capital in the shareholders' meetings. In practice, voting rights restrictions are not often used by listed companies. In the past, for example, VA Technologie AG and Austria Tabak AG had restricted voting rights in their articles of association. Both companies have been taken over and are no longer listed on the Vienna Stock Exchange. In connection with restricted voting rights, see also ECJ C-112/05.

Austrian stock corporation law prohibits disproportionate voting rights. Therefore, 'golden shares' are also prohibited (regarding golden shares, see also ECJ C-463/00, C-98/01, C-367/98, C-483/99, C-503/99).

Rule 2 of the Corporate Governance Code holds that the principle of 'one share, one vote' is a comply-or-explain rule. Thus, restricted voting rights are excluded for listed companies.

**6 Shareholders' meetings and voting**

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote?

Shareholders' meetings are called by the management board. The convocation must be published and must state the name of the company as well as the time and place of the meeting. The last publication of the convocation must not be made later than 14 days before the date of the meeting. The articles of association may provide that voting rights can only be exercised if the shares are deposited with a notary public or a bank until a given date prior to the meeting. This is particularly important for shares. Further conditions may be contained in the articles of association, in particular a longer convocation period or a certain period for the deposit of the shares with a notary public or a bank. In practice, most shares are deposited with banks. For that reason, banks regularly issue deposit confirmations.

**7 Shareholders and the board**

Are shareholders able to require meetings of shareholders to be convened, resolutions to be put to shareholders against the wishes of the board or the board to circulate statements by dissident shareholders?

A minority shareholder or a group of shareholders representing 5 per cent of the registered share capital of a stock corporation is entitled to request the convocation of a shareholders' meeting or call the meeting if the management board does not comply with such request; the articles of association may provide for shareholders holding a lower percentage of the registered share capital being entitled to convene a shareholders' meeting. A minority shareholder may also request that a certain matter be put on the agenda of a shareholders' meeting.

If neither the management board nor the supervisory board of a stock corporation complies with the request of the shareholders, the competent court may empower the shareholders who requested the convocation of a shareholders' meeting or a certain issue being put on its agenda to do so.

However, shareholders of Austrian stock corporations may not require the management board to circulate statements by dissident shareholders. Nevertheless, the shareholders of a stock corporation have the right to take part in shareholders' meetings, to request information and to vote with their shares. In particular, they may request information and have the right to file petitions regarding all issues on the agenda of the shareholders' meeting.

**8 Controlling shareholders' duties**

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action against controlling shareholders for breach of these duties be brought?

Fiduciary duties originally stem from partnership law. Only recently, however, fiduciary duties have also been argued for stock corporations and limited liability companies. In particular, regarding limited liability companies, precedents not only acknowledge fiduciary duties between the company and its shareholders but also between the shareholders. For stock corporations, fiduciary duties exist (for example, prohibition of abusive exercise of voting rights), although there is no specific precedent and the Austrian Supreme Court has made no judgment in this respect.

Fiduciary duties are derived from the articles of association. The articles of association, as is the case with any other contract, have protective effects and contractual partners. Fiduciary duties not only bind controlling shareholders but also minority shareholders (which is explicitly acknowledged in the context of limited liability companies). The content of fiduciary duties is not explicitly defined in the Stock Corporation Act. However, fiduciary duties materialise in different situations such as resolutions of the shareholders' meeting, management decisions, issues of specific shareholders' interests, excessive use of discretionary powers and the like. As a consequence of a breach of fiduciary duties, resolutions of the shareholders' meeting can be enforced by an opposition action. A breach of fiduciary duties gives rise to claims for damages against the stock corporation as well as its shareholders.

**9 Shareholder responsibility**

Can shareholders ever be held responsible for the acts or omissions of the company?

According to article 48 of the Stock Corporation Act, a stock corporation is liable to creditors for its assets only. However, personal liability of shareholders for debt of the stock corporation is not totally excluded. 'Breakthrough liability', in particular, has been argued for in cases of insufficient capitalisation of the stock corporation, amalgamation of assets, misuse of legal form, and in cases of controlling or de facto management.

Insufficient capitalisation means that the company has insufficient capital for its business operations and therefore is likely to affect its creditors' interests. Insufficient capitalisation can either exist at the time of establishment of the stock corporation or later in the course of business operations.

Amalgamation of assets means that the shareholder uses the stock corporation's assets for his, her or its private interest. Misuse of legal form denotes a kind of circumvention of the law, for example by artificially splitting a single enterprise up into multiple legal entities. In cases of controlling or de facto management, a shareholder who is not a member of the management board or supervisory board of the stock corporation controls the management of the company.

In all the above cases, the shareholder negatively affects the interests of the stock corporation or its creditors and therefore can be held liable for their claims. The issues of insufficient capitalisation, amalgamation of assets, misuse of legal form and controlling or de facto management are strongly disputed in Austria. In practice, the Supreme Court has only once held shareholders liable for insufficient capitalisation.

## Corporate control

### 10 Anti-takeover devices

Are anti-takeover devices permitted?

The management board and the supervisory board of stock corporations are bound by a duty of neutrality in takeover proceedings. The management board and supervisory board of a listed stock corporation may not take measures likely to deprive their shareholders of the opportunity to make a free and informed decision on the takeover offer.

From the point at which the management board or the supervisory board of a target company becomes aware of the offeror's intention to make a takeover offer until the publication of the results of a takeover offer (according to article 19 of the Takeover Act) – and, if the takeover goes ahead – until the takeover offer has been implemented, the management board and the supervisory board of the target company must refrain from any act that might frustrate the takeover offer. This restriction does not apply where measures are based on a prior obligation of the management board or the supervisory board of the target company or on resolutions passed by the general meeting of shareholders after the intention of the offeror to make a takeover offer has become known.

### 11 Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted, and if so what restrictions are commonly adopted?

Shares of a stock corporation are not divisible but they are inheritable and freely transferable. Whereas bearer shares are transferred by simple physical transfer, registered shares can only be transferred by endorsement. If a registered share is transferred, the company must be notified of the transfer and the share certificate must be presented to the company to prove the transfer. The company will then enter the transfer into the share register. In this respect, the company is under a duty to inspect the correctness of the endorsement clauses but not the validity of the respective signatures.

The articles of association may provide that the transfer of registered shares requires the prior approval of the company. Such approval is granted by the management board if the articles of association do not provide otherwise. For example, the articles of association may also provide that the transfer of shares requires a resolution by the shareholders' meeting. Approval may only be refused for good cause.

In practice, transfer restrictions are normally not contained in the articles of association of listed companies. Name registered shares currently cannot be traded at the Vienna Stock Exchange. Therefore in practice, transfer restrictions are only contained in shareholders' agreements.

### 12 Compulsory repurchase rules

Are compulsory share repurchase rules allowed? Can they be made mandatory in certain circumstances?

A stock corporation may only acquire its own shares for limited reasons contained in the Stock Corporation Act, inter alia:

- if necessary to avoid imminent damage;
- by universal succession;
- if the acquisition has been made free of charge or by a credit institution in execution of a buying commission;
- by authorisation of the shareholders' meeting, valid for a period not exceeding 18 months, if the shares are to be offered for sale to employees, executives and members of the management board or supervisory board of the company or an affiliated enterprise; or
- by authorisation of the shareholders' meeting, valid for a period not exceeding 18 months, if the shares of the company are admitted to an organised stock market or a recognised public duly functioning stock market in a full member state of the Organisation for Economic Co-operation (OECD). Trading in its own shares shall be excluded for the purpose of the acquisition. The shareholders' meeting may also authorise the management board to redeem the company's own shares without any further resolutions of the shareholders' meeting.

The principle of equal treatment of shareholders shall be applicable to the acquisition and sale of the company's own shares. Acquisition and sale by means of a stock exchange or a public offering shall meet this requirement. In certain cases, the amount of nominal capital consisting of shares shall not, together with the company's shares that are held by the company, exceed 10 per cent of the nominal capital. The company shall not be entitled to any rights arising from shares it holds in the company. A subsidiary or any other party holding shares for the account of the company or a subsidiary cannot exercise voting rights and pre-emptive rights from such shares. If a company has acquired its own shares in violation of Stock Corporation Act, they must be sold within one year of their acquisition. The creation of a pledge over its own shares shall be considered equal to the acquisition of its own shares.

## Responsibilities of the board (supervisory)

### 13 Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The stock corporation has, without exception, a two-tier management system, composed of the management board and the supervisory board. Unlike the Austrian stock corporation, the Societas Europaea (SE) can follow either a one-tier or a two-tier system. The shares of an SE may be listed on the Vienna Stock Exchange.

### 14 Board's legal responsibilities

What are the board's primary legal responsibilities?

The supervisory board is bound to supervise the management of the company. At any time, the supervisory board can request a report from the management board concerning company matters, including the company's relations with other companies in the group. This request may be raised by a single member of the supervisory board. If the management board refuses to grant the request, however, the request can only be sustained if another member of the supervisory board also requests a report. The supervisory board may also inspect and review all books and documents of the company, including its assets, in particular, cash assets and its stock of securities and goods.

Certain transactions can only be effected by the management after approval of the supervisory board. The obligation of the management board to obtain prior approval from the supervisory board does not, however, affect the validity of the mentioned transaction as regards third parties, but may make the management board liable for any damages resulting from it.

The management board represents the stock corporation in all matters. This representative power extends to all contractual obligations of the company entered into by the management board on behalf of the company. Insofar as the articles of association or the supervisory board limit the scope of the representative power of the management board, the board is then bound by such limitations. As regards third parties, any limitation of the management board's representative authority is invalid and without effect.

**15 Board obligees**

Whom does the board represent and to whom does it owe legal duties?

The supervisory board and the management board are both administrative bodies of the stock corporation. According to the Stock Corporation Act, it is the responsibility of the management board to manage the company in the best interests of the company considering the interest of shareholders and employees as well as the interests of the public. The management board is free of any orders by shareholders or supervisory board members and therefore is only obliged to safeguard the interests of the company. Although it is regularly the case in practice, the supervisory board members may not represent the interest of controlling shareholders. Although the Stock Corporation Act does not contain specific rules on who is eligible to be appointed a member of the supervisory board, the Corporate Governance Code contains in its annex 1 guidelines on the independence of supervisory board members from the company and its management board. Annex 1 of the Corporate Governance Code is not mandatory.

**16 Enforcement action against directors**

Can an enforcement action against directors be brought on behalf of those to whom duties are owed?

According to section 84 of the Stock Corporation Act, the members of the management board must act with the care and diligence of a prudent manager when operating the business. The same provision applies to members of the supervisory board. It is a general, objective requirement, not subjective or aimed at the personal qualifications of the members of the respective board. The members of the respective board cannot refer to his or her lack of qualifications as an excuse.

The management board members and the supervisory board members are only liable to the company. Normally, they are not liable towards third parties. Creditors are restricted in their damage claims to the company. Direct claims of creditors against members of the supervisory board of a stock corporation can only be based on the breach of a specific protective act or in the case of a specific legal relationship existing. If, however, a member of the management board or the supervisory board acts to the detriment of the company or its shareholders for the purpose of gaining special benefits for him or her or for a person other than the company, the management board member or supervisory board member shall personally be liable for any damage resulting from it.

**17 Care and prudence**

Do the board's duties include a care or prudence element?

The members of the management board must act with 'the care and diligence of a prudent manager' when operating the business. Provisions as to liability that are valid and binding on members of the management board also apply to members of the supervisory board. The degree of care and diligence required has been specified in more detail in decisions of the Supreme Court. A careful and prudent member of the supervisory board must have more experience in commercial and financial matters than the average businessman and must furthermore be able to understand complex legal and economic interdependencies and their effects on the company.

**18 Board member duties**

To what extent do the duties of individual members of the board differ?

The duties of individual members of the board do not differ. In particular, any member of the management board or the supervisory board may not refer to his or her lack of qualifications as an excuse. Each member of the management board and the supervisory board must safeguard the interest of the stock corporation and protect it from prejudice and damages. This duty also comprises the duty to observe any applicable statutes and regulations as well as the articles of association of the company.

**19 Delegation of board responsibilities**

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

The management board is responsible for the management of the company. However, the management board may grant special power of attorney to employees for certain cases of daily business. The *Prokura* is the most comprehensive authority entitling the special agent (*Prokurist*) to engage in all kinds of commercial transactions and legal acts in and out of court (which the operation of any kind of business may bring about). Without granting the full power included in a *Prokura*, the owner of a business can appoint a person and grant him or her a commercial power of attorney (*Handlungsvollmacht*). This person's authority extends to the operation of the particular business and any transactions in the ordinary course of that business.

**20 Non-executive and independent directors**

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent directors' and how do their responsibilities differ from executive directors?

The supervisory board of a stock corporation consists of at least three members, although the articles of association may provide for a larger number of supervisory board members (capped by the Stock Corporation Act at 20 members). According to rule 52 of the Corporate Governance Code, the maximum number of supervisory board members shall not exceed 10 (without Works Council representatives). Companies with a free float of more than 20 per cent shall have at least one independent representative (as defined in rule 53 of the Corporate Governance Code) as a member of the supervisory board (rule 54). Rules 52, 53 and 54 of the corporate governance code are comply-or-explain rules and hence not mandatory.

Members of the management board and employees of the company or other entities may not become supervisory board members. Individuals who are already members of the supervisory board of 10 other stock corporations or limited liability companies are excluded (the function of chairman of the supervisory board counts double for the purpose of determining the maximum figure). Individuals holding more than eight supervisory board memberships in listed stock corporations are also excluded.

The function as supervisory board members is equal to the function as a member of the executive board of a Societas Europaea.

**21 Board chairman and CEO**

Do law, regulation, listing rules or practice require separation of the functions of board chairman and CEO? If flexibility on board leadership is allowed what is generally recognised as best practice and what is the common practice?

Members of the management board cannot become members of the supervisory board. Therefore, the management board member holding the position of a CEO may not, at the same time, be the chairman of the supervisory board.

**22 Board committees**

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

The supervisory board may set up subcommittees to deal with special aspects of the board's duties. The supervisory board may appoint one or more committees from among its members, in particular, for the preparation of its hearings and resolutions or the supervision of the execution of its resolutions. Pursuant to section 92(4a) of the Stock Corporation Act, capital market oriented companies (section 221(3) of the Commercial Code) and companies which are defined as very large companies pursuant to section 271a(1) of the Commercial Code, are required to appoint an audit committee. The most important duties of the audit committee include, inter alia, supervising the auditing process and the effectiveness of the internal control system and examining the annual financial statements, the statement of affairs of the company and the corporate governance report. An audit committee must meet twice in the business year and at least one member of the committee must be familiar with the relevant company and possess sufficient practical financial, accounting and reporting knowledge and experience (financial expert). A person who has been a member of the management board or a key employee or the auditor of the corporation in the last three years is excluded from being the chairman of the audit committee or the finance expert. Members of the Works Council who have been delegated to the supervisory board pursuant to the Labour Relations Act shall have the right to occupy at least one seat in any committee and to vote in any committee. This shall not apply to meetings and votes regarding the relationship between the company and members of the management board, except for resolutions concerning the appointment or the dismissal of a member of the management board as well as the granting of company share options.

According to the Corporate Governance Code (rule 39 et seq), the supervisory board shall set up committees from among its members, depending on the specific circumstances of the enterprise and the number of supervisory board members. In addition to the legal requirement to set up an audit committee (rule 40), the supervisory board shall set up a human resources committee (rule 41). Finally, the supervisory board shall set up a remuneration committee (rule 43). Unlike rule 40, which is a legal requirement, compliance with rules 39, 41 and 43 of the Corporate Governance Code is not mandatory.

**23 Board meetings**

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

The supervisory board shall convene at least once every quarter of a calendar year.

**24 Board practices**

Is disclosure of board practices required by law, regulation or listing requirement?

The Stock Corporation Act does not contain any such requirement. According to the Corporate Governance Code, the candidates for election to the supervisory board shall be announced and presented on the website of the company one week prior to the shareholders' meeting (rule 5). A calendar of corporate financial events shall be posted immediately after completion of the current business year on the website of the company. This shall contain all dates of relevance for investors and other stakeholders for the next business year (rule 74). The company shall regularly hold conference calls or similar information events for analysts and investors; if demand is high, also on a quarterly basis. As a minimum requirement, the information documents (presentations) used shall be made available to the public on the website of the company. Other events of relevance for the capital market such as annual general meetings shall be made accessible on the company's website, if the costs are reasonable, in the form of audio and video transmissions (rule 75). Rules 74 and 75 of the Corporate Governance Code are not mandatory.

**25 Remuneration of directors**

Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions between the company and any director?

According to section 78 of the Stock Corporation Act, the supervisory board shall ensure the total remuneration of the members of the management board (salaries, profit participation, insurance payments, commissions and ancillary considerations) be proportionate to the duties of each member of the management board and to the situation of the company. The same shall be applied mutatis mutandis to pensions, payments to surviving dependants and services of a similar kind.

The supervisory board appoints the members of the management board for a maximum term of five years. An appointment of a member of the management board for a specific longer period or for an indefinite period shall be effective for a period of five years. An appointment may be renewed. However, such renewed appointment shall require a written confirmation by the chairman of the supervisory board to become legally effective. These provisions apply mutatis mutandis to the employment contract.

A loan may be granted to members of the management board and executives of the company only if explicitly approved by the supervisory board. The members of the management board and operations managers who are entitled either to employ or to dismiss other employees in the enterprise or a division thereof or to whom a Prokura or a general power of attorney has been granted, shall be deemed executives. The company may grant loans to legal representatives or executives of controlled or controlling enterprises only after explicit approval by the supervisory board of the controlling company. Such approval may be granted in advance for certain loans but not for a period of more than three months. The approving resolution shall also regulate interest and repayment of any loan. The granting of a loan shall be deemed equal to an approved withdrawal exceeding the amount of reimbursement, in particular, the approval of withdrawals of advances on reimbursements to which the withdrawer has a right. The above does not apply to loans the amount of which do not exceed one month's salary.

According to section 95/5/12 of the Stock Corporation Act, the conclusion of agreements between members of the supervisory board and the company or subsidiaries of the company for a non-insignifi-

cant consideration requires the approval of the supervisory board. The same applies for agreements with enterprises in which the respective member of the supervisory board has an economic interest.

**26 Remuneration of senior management**

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions between the company and senior managers?

The members of the management board may, in return for their services, be granted a share of the profits, which shall consist of a share of the annual surplus (Stock Corporation Act, section 77).

According to section 78 of the Stock Corporation Act, the supervisory board shall ensure that the total remuneration of the members of the management board (salaries, profit participation, compensation for expenditure, insurance payments, commissions and ancillary considerations of any kind) be proportionate to the duties of each member of the management board and to the situation of the company. The same shall apply mutatis mutandis to pensions, payments to surviving dependents and services of a similar kind. In the event that bankruptcy proceedings have been opened as to the assets of the company and the receiver has terminated the employment agreement of a member of the management board, this member may demand compensation for any damages resulting from the termination of the employment relationship only within a time period of two years after the termination.

The members of the management board shall not be entitled to carry on a trade or to enter into any business transactions on his or her own account or on account of others that fall within the company's scope of business unless the supervisory board gives its approval thereto. Moreover, they may not act as general partner for any other trading company. If a member of the management board violates this prohibition, the company shall be entitled to claim damages or instead demand that the member turns over to the company the transactions entered into on his or her own account and any remuneration earned from transactions made on the account of others or to assign any rights to such remuneration. Any such claims of the company shall accrue when the remaining members of the management board and of the supervisory board learn of the cause of action and shall bear a three-month statute of limitations. If the claim is not brought to the attention of the other members, the statute of limitations shall be five years and start to run at the time the cause of action accrues (Stock Corporation Act, section 79). In relation to section 80 of the Stock Corporation Act, a loan may be granted to members of the management board and executives of the company only if explicitly approved by the supervisory board. The company may also grant loans to legal representatives or executives of controlled or controlling enterprises only after explicit approval of the supervisory board of the controlling company. Such approval may be granted in advance for certain loans or types of loans but not for a period of more than three months. The granting of a loan shall be deemed equal to an approved withdrawal exceeding the amount of reimbursement, in particular the approval of withdrawals of advances on reimbursements to which the withdrawer has a right. This regulation shall not be applied to loans the amounts of which do not exceed one month's salary. A loan granted in violation of this section shall be repaid without any delay, notwithstanding any agreements to the contrary, unless the supervisory board subsequently approves the loan.

**27 D&O liability insurance**

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Insurance is permitted. As far as listed companies are concerned, members of the management board and sometimes also members of the supervisory board have directors and officers insurance protection.

The company can pay the insurance premium. Premiums paid by the company, however, count as consideration to the respective board member and increase taxable income.

**28 Indemnification of directors**

Are there any constraints on the company indemnifying directors in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

In all regular cases, the liability of members of the management board and the supervisory board is towards the company. The company can only waive such liability claims against members of the respective board and can only conclude a settlement agreement in that respect:

- five years after the claim has arisen (such restriction does not apply if the liable member is unable to meet its payment obligations and settles the creditors' claims in order to avoid insolvency);
- if the shareholders' meeting accepts such waiver or settlement; and
- if there is no objection by a minority of 20 per cent or more of the registered share capital.

Under these same conditions, the company may indemnify a board member.

**29 Employees**

What role do employees play in corporate governance?

The Works Council is entitled to nominate one-third of the members of the supervisory board. The members of the supervisory board nominated by the Works Council have the same rights as the other members, except that in order to protect the interests of the shareholders, the appointment and removal of the members of the management board or the chairman and deputy chairman of the supervisory board require a 'dual majority', a majority of the supervisory board as a whole and the capital representatives. This provision prevents members nominated by the Works Council from playing a key role in the appointment of the chairman of the supervisory board and the members of the management board in instances where the capital representatives are deadlocked.

## Disclosure and transparency

**30 Corporate charter and by-laws**

Are the corporate charter and by-laws of companies publicly available? If so, where?

All stock corporations and limited liability companies are registered in the commercial register. The commercial register is open for public inspection without the need to show a specific legal interest or reason. The articles of association as well as the annual balance sheets are available in the commercial register.

Each Austrian superior court and, for the state of Vienna, the Commercial Court of Vienna, keeps a commercial register.

**31 Company information**

What information must companies publicly disclose? How often must disclosure be made?

**Update and trends**

On 1 June 2008, innovations in corporate governance entered into force in Austria pursuant to the Commercial Code Amendment Act 2008, which incorporated Directives 2006/43/EC and 2006/46/EC, thereby requiring joint stock companies, within the meaning of section 243b(1) of the Commercial Code, to prepare an annual corporate governance report. This shall apply only to companies whose shares are admitted for trading on a regulated market (as defined in article 1(2) of the Stock Exchange Act) or which exclusively issue securities other than shares on such a market and whose shares are traded over a multilateral trading system with the knowledge of the company. The reporting requirement therefore also applies to SEs but not to limited liability companies. The report must be prepared by the legal representatives of the company within the first five months of the business year and submitted to the supervisory board, who must examine the report and answer to the general meeting. The report must be signed by all legal representatives of the company.

The Commercial Code standardises the minimum contents of a corporate governance report. The report must refer to a corporate governance code that is officially acknowledged in Austria or on a respective stock exchange and stipulate where such code is publicly available. If the joint stock corporation deviates from the corporate governance code, it must state on which specific points it deviates and on what grounds. If the company decides not use any existing code, the reasons for this must be stated. The report must also contain the composition and the function of the management and supervisory board and any supervisory board committees.

As set out in the preamble of the Corporate Governance Code (to examine the code annually with regard to national and international developments and if required to amend it), an amendment of the Corporate Governance Code was introduced and is applicable to business years starting after 31 December 2008. This implements the rules regarding the new corporate governance report referred to above. The obligation to consider the Corporate Governance Code shall be included in the corporate governance report and shall be disclosed on the website of the company. The amended Corporate Governance Code also specifies article 243b(2) of the Commercial Code with regard to the composition and operation of the management and the supervisory board and their committees. Thus the corporate governance report shall provide details on the management board as of, inter alia, the date of first appointment and the end of their period of function. Similar disclosure requirements shall also apply to the members of the supervisory board.

Further amendments in the revised Corporate Governance Code particularly refer to improved transparency in relation to the remuneration of management, whereby rule 31 requires the publication of the fixed and performance-related remuneration of management in the corporate governance report and is formulated as a comply-or-explain rule instead of, as previously, a recommendation rule. This amendment leads to a duty of the company to explain why details on remuneration and bonuses paid to the management have not been disclosed. Other important amendments of the Corporate Governance Code provide more diversity with respect to the members of the supervisory board. In this context, the general meeting shall consider the internationality of the members of the supervisory board, the representation of both genders and the age demographic for the appointment of the supervisory board members. According to the amended Corporate Governance Code, nobody should be appointed as a supervisory board member who has been sentenced for a criminal offence which would call their professional credibility into question.

The implementation of Directives 2006/43/EC and 2006/46/EC is intended to make it easier to access information about the practices of the management of companies, including a description of the most important features of the risk management systems that are implemented and internal control procedures in relation to accounting practices, due to the new reporting duties. Regulations concerning disclosure requirements for off-balance sheet transactions have also been introduced by the Commercial Code Amendment Act 2008 whereby the type, purpose and financial implications of business not recorded in the financial statement needs to be stated in the enclosure to the liabilities recorded in the financial statement, insofar as the risks and advantages which arise from such business are significant and the disclosure of such risks and advantages is necessary in assessing the financial situation of the company. Furthermore, certain amendments of the Corporate Governance Code can also be seen as a reaction to the financial crisis since they shall improve the transparency of management's remuneration and strengthen the independence of supervisory board's members.

Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies must be implemented in Austria by 3 August 2009. This will be effected by means of the Austrian Stock Corporation Amendment Act 2009, which shall strengthen shareholders' rights, introduce online voting rights and, moreover, lead to an extension of the minimum appeal deadline from 14 to 30 days for ordinary general meetings and to 21 days for extraordinary general meetings. Such extension is necessary to allow more thorough collection of information before the date of the general meeting. Listed companies shall maintain an internet site and publish all relevant documents and all counter motions and amendment motions made in the general meeting. A further innovation of the Austrian Stock Corporation Amendment Act 2009 refers to the material effective date for participation at the general meeting. Currently someone can only exercise his or her shareholder rights if he or she registered as a shareholder on the date of the general meeting. In the future a record date shall apply as the effective date for share ownership. This equates to the end of the tenth day before the general meeting. These amendments, in particular the strengthening of shareholder rights, should improve the legal framework and ensure the smooth functioning of the Austrian capital market.

Within the first five months of the fiscal year, the management board has to prepare the annual balance sheet together with a report on the state of the company, the profit and loss statement and the proposal for profit distribution to be presented to the supervisory board. With the entry into force of the Austrian Commercial Code Amendment Act 2008, the legal representatives of a company within the meaning of section 243b of the Commercial Code are now also required to prepare a corporate governance report, pursuant to section 127 of the Stock Corporation Act, and to submit this to the supervisory board along with the annual financial statements and the proposal for the distribution of profits. The supervisory board approves the reports and the annual financial statements are formally confirmed. The management board has to deposit the financial statements together with the audit certificate with the commercial register without delay. The management of a large stock corporation (as defined by law) is required to publish without delay the financial statements and the

audit certificate in the official gazette. Similar obligations exist with regard to consolidated financial statements and consolidated reports on the state of the group.

All entries on the commercial register are publicly disclosed. The Corporate Governance Code obliges corporations to disclose all financial information via the internet.

Key disclosure requirements due to implementation of the transparency directive in Austria include the following:

- issuers (ie, legal entities whose securities are admitted to trading on a regulated market) shall make public their annual reports consisting of the audited financial statements, the management report and a qualified opinion by the persons responsible within the issuer related to these documents at the latest four months after the end of each financial year;
- the issuers of shares or debt securities shall make public a half-yearly financial report comprising the condensed set of financial statements, an interim management report and a qualified opinion issued by the persons responsible within the issuer;
- issuers of shares admitted to trading on a regulated market and provided that such issuer does draw up quarterly reports pursuant to IFRS shall make public an interim management statement during the first and during the second six-month period of the financial year. Such statement shall provide an explanation of material events and a general overview of the financial position of the issuer during the relevant period;
- issuers whose securities are admitted to trading on a regulated market shall publish an 'annual document' containing all information or containing references to all information that has been published in the last 12 months in a member state or third-party state pursuant to obligations of community law or domestic laws;
- furthermore, notification and publication obligations relating to the acquisition or disposal of major holdings or of major proportions of voting rights exist as soon as certain thresholds are exceeded; and
- issuers of financial instruments shall inform the public as soon as possible of insider information that directly concerns the issuer.

If the issuer's securities are admitted to trading on the Vienna Stock Exchange the information mentioned above must be transmitted to the Vienna Stock Exchange, to the Austrian Financial Market Authority (FMA) and to the Oesterreichische Kontrollbank (OeKB) for the purpose of storage. Publication of this information shall be effected via an electronic information system to be determined by FMA (probably Bloomberg or Reuters).

## Hot topics

**32 Say-on-pay**

Do shareholders have an advisory or other vote regarding executive remuneration?

The members of the supervisory board may be granted remuneration in relation to their services and in accordance with the situation of the company. If remuneration is not granted in the articles of association, the shareholders' meeting decides on whether and which remuneration is granted. If such remuneration is granted by the articles of association any change to the articles of association by which such remuneration would be reduced may be adopted by a simple majority of the votes cast at the shareholders' meeting. Any remuneration to members of the first supervisory board for their services can only be authorised by the shareholders' meeting. Such resolution shall only be passed at the shareholders' meeting that also decides on the discharge of the first supervisory board. According to comply-or-explain rule 51 of the Corporate Governance Code, the remuneration granted to supervisory board members shall be published in the corporate governance report.

The supervisory board, which is exclusively competent for the remuneration of the members of the management board, shall ensure that the total remuneration of the members of the management board (salaries, profit participations, compensation for expenditures, insurance payments, commission and ancillary considerations of any kind) be proportionate to the duties of each member of the management board and to the situation of the company. The same shall be applied mutatis mutandis to pensions, surviving dependents and services of a similar kind. Furthermore, the supervisory board may grant the members of the management board in return for their service a share in the profits, which shall consist of a share of the annual surplus.
In case of stock options granted, the number and distribution of the options granted, the exercise prices and the respective estimated values at the time they are issued and upon exercise shall be reported in the annual report. The total remuneration of the management board for a business year must be reported in the notes to the financial statements. In addition, the corporate governance report shall, pursuant to comply-or-explain rule 30 of the Corporate Governance Code, contain the following information.

- The principles applied by the company for granting the management board performance-linked payments, especially regarding the performance criteria; moreover, any major changes versus the

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previous year must also be reported.
- The relationship of fixed to performance-linked components of total compensation of the management board.
- The principles of the company retirement plan for the management board and the conditions.
- The principles applicable to eligibility and claims of the management board of the company in the event of termination of the function.
- The existence of any possible D&O insurance, if the costs will be borne by the company.

Rule 31 of the Corporate Governance Code recommends to disclose the fixed and performance-linked remuneration components for each individual member of the management board in the corporate governance report.

**33 Proxy solicitation**

Do shareholders have the ability to nominate directors without incurring the expense of proxy solicitation?

In Austrian stock corporations, shareholders cannot nominate directors of the management board. Members of the management are nominated and appointed by the supervisory board. Rules 41 and 42 of the Corporate Governance Code stipulate that the supervisory board shall set up a nomination committee that submits proposals to the supervisory board for filling mandates that become free in the management board and deals with issues of successor planning.

Directors of the supervisory board are appointed by the shareholders' meeting by simple majority (the articles of association may stipulate a higher quorum or any other requirement). The law does not prescribe any rules of procedure (eg, nomination of candidates) for the appointment of directors of the management board. In principle, the meeting has to vote on any person nominated by any shareholder but in practice the articles of associations stipulate that only directors that are supported by a certain share of the nominal share capital may be voted for.