



PRACTICAL LAW

MULTI-JURISDICTIONAL GUIDE 2012/13

CORPORATE GOVERNANCE AND DIRECTORS' DUTIES

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Essential legal questions answered
in key jurisdictions

Analysis of critical
legal issues



Austria



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CORPORATE ENTITIES

1. What are the main forms of corporate entity used in your jurisdiction?

The main corporate entities in Austria are the:

- Limited liability company (*Gesellschaft mit beschränkter Haftung*) (GmbH). These are private companies, mainly of small and medium size, as this allows shareholders to have more influence.
- Stock corporation (*Aktiengesellschaft*) (AG). These are mainly large companies with a large capital requirement.
- *Societas Europaea* (SE).

Only stock corporations and SEs can be listed on the stock exchange (listed companies). Unless otherwise stated, the term company refers to limited liability companies, stock corporations and SEs (which are likely to play a more important role in the future), as these are most relevant to corporate governance and directors' duties.

LEGAL FRAMEWORK

2. What is the regulatory framework for corporate governance and directors' duties?

Corporate governance and directors' duties are regulated by:

- **Statute.** Regulations on corporate structure, internal organisation, duties and liabilities of the management and supervisory boards and their directors, accounting responsibility, and corporate restructuring are governed, in particular, by the:
 - Stock Corporation Act 1965 (*Aktiengesetz*);
 - Limited Liability Company Act 1906 (*GmbH-Gesetz*);
 - SE Directive 2001 (*SE-Verordnung*);
 - SE Act 2004 (*SE-Gesetz*).

Other relevant legislation includes the:

- General Civil Code 1811 (*Allgemeines Bürgerliches Gesetzbuch*), which deals with general regulations on liability;
- Business Code (*Unternehmensgesetzbuch*) (UGB) (former Commercial Code 1979 (*Handelsgesetzbuch*)), which sets out substantive accounting provisions;

- Labour Constitution Act 1974 (*Arbeitsverfassungsgesetz*), which provides for employee representatives on the supervisory board.

Listed companies are also subject to, among others, the:

- Stock Exchange Act 1989 (*Börsegesetz*);
- Takeover Act 1998 (*Übernahmegesetz*);
- Issuer Compliance Regulation 2002 (*Emittenten-Compliance-Verordnung*);
- Capital Market Act 1991 (*Kapitalmarktgesetz*).

- **A company's constitution.** This is the articles of association and procedural rules for the management and supervisory boards (articles).

- **The Austrian Code of Corporate Governance 2002, as revised lastly in January 2012 and July 2012 (Code).** This provides Austrian companies with a framework for corporate management and control. The Code applies primarily to Austrian listed companies. However, it covers the general standards of good corporate management in international business practice as well as most of the important provisions of Austrian company, securities and capital markets law, EU recommendations and the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance.

In addition, relevant case law also forms part of the regulatory framework relating to corporate governance and directors' duties.

3. Has your jurisdiction adopted a corporate governance code?

Austria has adopted a corporate governance code (see *Question 2*). The code covers the following areas:

- Shareholders and the general meeting.
- Co-operation between the supervisory board and the management board.
- Board composition and committees.
- Transparency and auditing.

The code contains three types of provisions:

- L-provisions, which are mandatory provisions of law.
- C-provisions, which are comply or explain provisions.
- R-provisions, which are recommendations of best practice that are not subject to comply or explain requirements.



The Code is only mandatory for listed stock corporations and listed SEs that have committed themselves to complying with it (Code companies), although unlisted companies are also advised to comply with it.

The commitment to the Code is a prerequisite for Austrian companies for entry to the Prime Market at the Vienna Stock Exchange (Prime Market).

The code is based on the comply or explain principle. Since 2004, companies listed on the Prime Market must include a statement (currently, in the corporate governance report) about the compliance or non-compliance with the Code. For financial years starting after 31 December 2008 the following Austrian companies must prepare a corporate governance report:

- Companies whose shares are permitted in regulated markets (*section 1, para 2, BörseG*).
- Companies that issue securities other than shares and whose shares are traded through a "multilateral trading system" (*section 1, para 9, WAG*).

The report must contain at least the following information:

- Designation of a Corporate Governance Code generally recognised in Austria or at the respective stock exchange.
- Where the relevant Corporate Governance Code is publicly available.
- If the relevant Corporate Governance Code deviates from the comply or explain rules of the Code, an explanation of the provisions concerned and the reasons for the deviation. If the company decides not to adhere to the Code, the reasons for it.
- The composition and working procedure of the management board and of the supervisory board and its committees.
- The measures taken to promote women to the management board, supervisory board and top management positions.
- The total remuneration of each member of the management board and the principles of remuneration policy.

The obligation to observe the Code must be included in the corporate governance report. The corporate governance report must be published on the website of the company.

Non-compliance with the Code may result in criminal liability, as some provisions are under a specific criminal law, and civil liability. Liability under the title prospectus or due to "special relations under capital market law" is controversial. There is liability in any case for distribution of advertising under the Code.

The response to the Code in the Austrian capital market is positive (*see code report 2011 www.aktienforum.org*). Compliance with the C- and R-Provisions of the Code is evaluated periodically (at least every three years), by an external institution and an audit report must be published in the corporate governance report (*R-Provision 62, Code*).

75% of ATX-companies and 55.3% of the companies listed in the Prime Market provide for this external evaluation. In 2011, 95.2% of the C-Provisions were followed by the ATX-companies.

Complete compliance is, however, rather rare (in 2011, only five of the 42 companies listed in the Prime Market were fully compliant). It is common to exclude individual provisions, with the reasons for exclusions provided. Currently, there are no plans to reform the comply-or-explain principle.

BOARD COMPOSITION AND REMUNERATION OF DIRECTORS

4. What is the management/board structure of a company?

Structure

All companies must have a management board (*Vorstand* for stock corporations and two-tiered SEs, *Verwaltungsrat* for unitary SEs and *Geschäftsführung* for limited liability companies).

Stock corporations must have a two-tiered structure comprising a management board and a supervisory board (*Aufsichtsrat*) with supervisory directors. The supervisory board is responsible for:

- Appointing and dismissing the managing directors.
- Supervising the management board.
- Approving certain (important) transactions.

An SE formed in Austria can have a one or two-tiered board structure.

Limited liability companies typically have a unitary board structure, but must establish a supervisory board if they reach a certain size. Limited liability companies sometimes have an advisory board (*Beirat*), the responsibilities of which are set out in the articles.

Supervisory boards of companies governed by the Code with more than five shareholder-appointed or elected members must establish:

- A nomination committee to nominate new members of the management and supervisory boards, and to form a succession plan.
- A compensation committee to make proposals regarding compensation for managing directors.

Management

Companies are managed by the management board (*see above, Structure*). The company's board has ultimate responsibility for the management of the company, and is responsible for managing the company on a day-to-day basis. The scope of the management board's power of attorney cannot be limited.

Board members

Managing directors are known as *Geschäftsführer* for limited liability companies or *Vorstandsmitglieder* for stock corporations and two-tiered SEs.

Employees' representation

Employees are entitled to representation on the supervisory board of companies through a works council. A works council is mandatory in companies with at least five employees.



For every two supervisory directors elected or appointed by the shareholders (see *Question 8*), the works council can appoint one of its members. If the number elected or appointed by the shareholders is uneven, the works council can appoint an additional member.

Number of directors or members

The number of managing directors is stated in the articles. The minimum number is usually one. Banks and other related businesses must have at least two directors. There is no maximum number of directors.

The number of members of the supervisory board is also defined in the articles. The minimum number is three (exclusive of employees' representatives). For stock corporations, the maximum number of supervisory directors that can be elected or appointed by the shareholders is 20 (excluding employee representatives appointed by the works council (see *above, Employees' representation*)).

For private companies, there is no maximum number of supervisory directors.

For companies governed by the Code, the maximum number of supervisory board members (excluding the employee's representatives) is ten (*C-Provision 52, Code*).

5. Are there any general restrictions or requirements on the identity of directors?

Age

Directors must be at least 18 years old. The articles can impose a maximum age limit (provided that it complies with age discrimination law).

Nationality

There are no nationality restrictions for directors.

Gender

The nomination committee or the entire supervisory board must present proposals to the general meeting for appointments to vacant positions on the supervisory board. In this context aspects of diversity of the supervisory board with respect to the internationality of the members, the representation of both genders and the age structure must be reasonably taken into account (*L-Provision 52, Code*).

6. Are non-executive, supervisory or independent directors recognised or required?

Recognition

Non-executive directors (that is, directors that are not employees of the company) are recognised.

Board composition

There can be no non-executive directors on the management board. However, the supervisory board can only comprise non-executive directors, except for the employee representatives appointed by the works council (see *Question 4, Employees' representation*).

Independence

The majority of the supervisory board members must be (in the opinion of the supervisory board) independent of the company and its management, unless appointed by the works council (see *Question 4, Employees' representation*). A board member is deemed to be independent if he does not have any business or personal interests in the company or its management board that constitute a material conflict of interest and that may influence his behaviour. The supervisory board must define the criteria that show independence (based on this general principle) and publish them in the corporate governance report (*C-Provision 53, Code*).

Companies with a free float (that is, widespread shareholdings not concentrated in the hands of a small number of major shareholders) of more than 20% of the company's share capital must have at least one independent member of the supervisory board who is not a shareholder with a stake of more than 10% (*C-Provision 54, Code*). Companies with a free float of over 50% must have at least two members of the supervisory board who meet these criteria (*C-Provision 54, Code*). The members that meet these criteria must be listed in the corporate governance report.

A member of the management board of a stock listed company cannot become a member of the supervisory board before the end of a two-year cooling-off-period (*L-Provision 55, Code*). An exception is where the member's election is the result of a proposal of shareholders who hold more than 25% of the voting rights of the company. The supervisory board cannot consist of more than one former member of the management board for which the two-year cooling-off-period has not yet expired. A former member of the management board cannot become chairman of the supervisory board until two years have expired (*section 86 para 4(2), Aktiengesetz*).

Members of the supervisory board must not have more than eight mandates as supervisory board members for listed companies. The function of chairman counts as two mandates (*L-Provision 56, Code*). Under the Stock Corporation Act, the maximum number of mandates as a supervisory board member for non-listed companies is ten and as a supervisory board member for listed companies eight, with the function of chairman counting as two mandates (*section 86, Stock Corporation Act*).

Members of the supervisory board, holding a position on the management board of a listed Code company, cannot hold more than four mandates on the supervisory boards of stock corporations not belonging to the same corporate group. The position of chairman counts as two mandates (*C-Provision 57, Code*).

Further guidance on the independence of board members is provided in the guidelines in Annex 1 of the Code (Independence Guidelines). In particular, a supervisory board member must not:

- Have served as a member of the management board in the past five years.
- Maintain or have maintained in the past year any significant business interests in the company.
- Have acted as auditor of the company or have owned a share in the auditing company.
- Be a member of the management board of another company in which a member of the management board of the company is a supervisory board member.



- Be a member of the supervisory board for longer than 15 years. This does not apply to members who are shareholders or represent the interests of shareholders.
- Be a close relative of a member of the management board.

Duties and liabilities

Members of the supervisory board are generally subject to the same duties and liabilities as members of the management board (*section 99, Aktiengesetz*) (see *Question 16*).

7. Are the roles of individual board members restricted?

The roles of the management board and supervisory board are strictly separate and the same person cannot hold a position on both boards at the same time.

For Code companies, more detailed provisions are contained in the Independence Guidelines (see *Question 6, Independence*).

8. How are directors appointed and removed? Is shareholder approval required?

Appointment of directors

Stock corporations and SEs. Managing directors are appointed by a simple majority of the votes cast by both (double majority):

- All the supervisory directors (including employee representatives (see *Question 4, Employees' representation*)).
- All the supervisory directors elected or appointed by the shareholders (excluding employee representatives).

Supervisory directors are either:

- Elected by shareholders at a shareholders' meeting (by a simple majority vote).
- Appointed by individual shareholders, holding registered shares with limited transferability, who have the right to appoint supervisory directors. The number of supervisory directors to be appointed cannot exceed one-third (listed companies) or one-half (non-listed companies) of the total number of all supervisory directors (excluding employee representatives).

Limited liability companies. Managing directors and supervisory directors are elected by a simple majority vote at a shareholders' meeting. In addition, a shareholder can be appointed as a managing director by the articles (shareholding managing director).

Removal of directors

Stock corporations. A managing director can only be removed during his term of appointment, if the supervisory board calls for the early resignation of the chairman for material reasons (such as violation of duties, inability to perform their duties, or vote of no confidence by the general meeting).

A managing director can challenge his removal in court, claiming lack of cause. His removal remains valid until the decision in his favour is final and incontestable.

A managing director's service contract must be terminated separately from his removal.

Supervisory directors can be removed without cause at any time by a shareholders' resolution, with a 75% majority of the votes cast (unless the articles state otherwise).

SEs. A managing director can be removed during his term of appointment without cause by a 75% majority of the shareholders' votes.

Limited liability companies. Unless otherwise stated in the articles, directors can be removed without cause at any time by a shareholders' resolution passed by a:

- Simple majority, for managing directors.
- 75% majority of votes cast, for supervisory directors.

The articles can state that shareholding managing directors appointed by the articles can only be removed with cause.

9. Are there any restrictions on a director's term of appointment?

Stock corporations

The maximum terms of appointment are:

- Five years for managing directors. The supervisory board elects a chairman for a maximum period of five years.
- Between four months and four years and eight months and five years for supervisory directors, depending on when the annual shareholders' meeting for the election and re-election of supervisory directors takes place during the financial year. As this is usually held in April or May every year, the average maximum service period of a supervisory director is five years.

Terms of appointment can be renewed indefinitely.

Limited liability companies

There is no minimum or maximum term for managing directors. They are usually appointed for an indefinite period.

Supervisory directors can be appointed for a maximum period ranging between four months and four years, and eight months and five years, depending on when the annual shareholders' meeting for the election and re-election of supervisory directors takes place during the financial year.

10. Do directors have to be employees of the company? Can shareholders inspect directors' service contracts?

Directors employed by the company

Companies usually employ managing directors through a service contract. However, this is not mandatory. Directors of stock corporations are not considered employees of the company under most employment law provisions.

Supervisory directors cannot be employees of the company (except for representatives appointed by a works council (see *Question 4, Employees' representation*)).



Shareholders' inspection

Shareholders in stock corporations and European companies are not entitled to examine managing directors' service contracts. In these companies, a managing director's service contract is concluded between the managing director and the company (represented by the supervisory board or, more likely, a supervisory board committee with no works council representatives).

In limited liability companies, the shareholders represent the company when concluding a service contract with a managing director. Therefore, they know the details of the directors' service contracts.

11. Are directors allowed or required to own shares in the company?

Directors are allowed but not required to own shares in the company.

In listed stock corporations and SEs, share option plans are common. The procedure for implementing a share option plan is regulated by law and requires supervisory board approval. Shareholders' approval is required for the company to obtain shares (for example, by a share capital increase or repurchasing shares in the market) for a share option plan.

Transactions by directors involving the company's shares are subject to restrictions and reporting requirements (see *Question 23*).

If a share option plan is proposed in Code companies, the performance criteria must be set in advance and may include the performance of stock indices, share price targets or other suitable benchmarks. Retroactively changing performance goals (repricing) must be avoided. For the duration of a share option plan, but at the latest until the end of the membership of the board of directors, directors must hold an appropriate volume of shares in the company. For a share option plan, a waiting period of at least three years must be fixed. A waiting and/or holding period of at least three years must be defined in a stock transfer programme. The general meeting must pass any resolutions and/or changes to share option plans and/or stock transfer programmes for management board members (*C-Provision 28, Code*). The number and distribution of the options granted, the exercise prices and the respective estimated values at the time of issue and on exercise must be reported in the annual report (*L-Provision 29, Code*).

12. How is directors' remuneration determined? Is its disclosure necessary? Is shareholder approval required?

Determination of directors' remuneration

In stock corporations, managing directors' remuneration (that is, salary, profit sharing, travel allowances, insurance premiums and other benefits) is determined by the supervisory board, which must make sure that managing directors' remuneration is reasonable in relation to the:

- Director's scope of work.
- Director's responsibility and personal performance.
- Attainment of the corporate goals.

- Size and economic situation of the company.
- Common remuneration.

In addition, the variable remuneration components must:

- Be linked, above all, to sustainable, long-term and multi-year performance criteria (*L-Provision 26a, Code* and *section 78 para 1, Aktiengesetz*).
- Include non-financial criteria.
- Not entice persons to take unreasonable risks.

For the variable remuneration components, measurable performance criteria must be fixed in advance. In addition, maximum limits for the amount or a percentage of the fixed remuneration components must be fixed. Precautions must be taken to ensure that the company can reclaim variable remuneration components if it becomes clear that these were paid out only on the basis of obviously false data (*C-Provision 27, Code*).

When concluding contracts with management board members, care must be taken to ensure that severance payments on premature termination of a service contract will not exceed two years' annual pay and that no more than the remaining term of the employment contract is remunerated. On premature termination of a management contract for a material reason, for which a management board is responsible, no severance payment will be made. Any agreements reached in relation to severance payments on premature termination of a managing director's service contract must take into account the circumstances under which that management board member left the company and the economic situation of the company (*C-Provision 27a, Code*).

In limited liability companies and unitary SEs, the managing directors' remuneration is determined by the shareholders at a shareholders' meeting.

Supervisory directors' remuneration can be determined by the articles or by shareholder resolution. Remuneration must be reasonable in relation to the supervisory directors' duties and the financial situation of the company.

Disclosure

Code companies must report the total remuneration of the management board for a business year in the notes to the financial statements (*L-Provision 29, Code*). In addition to the information required by law, the corporate governance report must contain the following information (*L-Provision 29, Code*):

- The principles applied by the company for granting the management board variable remuneration.
- The total remuneration of each member of the management board (*section 239 para 1(4), UGB*).
- The methods of determining the fulfilment of the performance criteria.
- The maximum limits determined for the variable remuneration.
- The shares held in the company and periods planned under *C-Provision 28* (see *Question 11*).
- Any major changes against the previous year.



Code companies must also disclose each director's fixed and variable remuneration separately in the corporate governance report (*C-Provision 31, Code*).

Shareholder approval

The approval of shareholders in stock corporations is not required for the managing directors' remuneration.

MANAGEMENT RULES AND AUTHORITY

13. How is a company's internal management regulated? For example, what is the length of notice and quorum for board meetings, and the voting requirements to pass resolutions at them?

Management board

The management board is a collective body, meaning that legal responsibility for governing the business of the company is borne equally by all members of the management board. Different areas of responsibility can be assigned and this is common practice. Unless the articles state otherwise, decisions are made by a simple majority vote. If a chairman is appointed to the management board, he must have the casting vote in the event of a tie, unless the articles provide a different procedure. The management board is not legally required to hold formal board meetings and management issues are often dealt with informally.

The procedural rules for the management board are set out in the articles.

Supervisory board

The supervisory board must meet on a regular basis; at least four times a year. The materials and documents required for a supervisory board meeting must be made available generally at least one week in advance. Decisions of the supervisory board are reached by a simple majority, unless the articles provide otherwise. Minutes must be taken of supervisory board meetings. Written resolutions passed by postal votes without a board meeting are only valid if no board member objects to the procedure.

Further details for the quorum and board meeting conduct can be set out in the rules of procedure for the supervisory board.

In addition to quarterly meetings, Code companies should hold additional meetings whenever necessary. The number of meetings must be published in the corporate governance report (*C-Provision 36, Code*).

14. Can directors exercise all the powers of the company or are some powers reserved to the supervisory board (if any) or a general meeting? Can the powers of directors be restricted and are such restrictions enforceable against third parties?

Directors' powers

The management board is responsible for governing the business of the company. It must act jointly, unless the articles allow individual representation. Authorisation to represent the company

must be registered in the public company register (*Firmenbuch*), which is maintained by the district courts of first instance for commercial matters (*Landesgerichte*).

Restrictions

The scope of the management board's powers is unlimited and cannot be restricted in relation to third parties. Only certain transactions concerning the existence of, and major structural changes to, the company (for example, mergers and dissolutions) require shareholder approval to be valid and binding against third parties.

Certain transactions (such as large investments) require supervisory board approval (*section 95 (5), Stock Corporation Act*). The restrictions can be extended and amended by the articles or a supervisory board resolution.

A managing director is only liable to the company and his violation of a company's internal restrictions is not enforceable against third parties, unless they were, or should have been, aware of the wrongdoing.

Supervisory directors do not represent the company in relation to third parties and can only act on the company's behalf in relation to transactions or conflicts between the company and managing directors.

15. Can the board delegate responsibility for specific issues to individual directors or a committee of directors? Is the board required to delegate some responsibilities, for example for audit, appointment or directors' remuneration?

The management board can delegate board duties to individual managing directors. However, all managing directors have a duty to supervise reasonably all areas of the company business, and are jointly responsible for the company's overall management.

The supervisory board can set up committees for special tasks, such as:

- Personnel (to conclude contracts for services with the managing directors).
- Corporate strategy and planning.
- Nomination and succession planning.
- Audit.

Committees cannot be set up for:

- Supervising the management board.
- Convening a shareholders' meeting.
- Reporting to a shareholders' meeting about the annual accounts.

Committees can be limited to preparatory tasks or can be authorised to pass resolutions. If the supervisory board consists of more than five directors elected by the shareholders, it must set up an audit committee to examine and prepare for the approval of the annual accounts by the supervisory board.



DUTIES AND LIABILITIES OF DIRECTORS

16. What is the scope of a director's duties and personal liability to the company, shareholders and third parties?**General duties**

A director must perform his duties with the diligence of a prudent business person. A managing director is liable for losses resulting from his failure to fulfil his duties, unless he can prove that he was sufficiently diligent. Examples of breaches of duties are:

- Repayment of share capital.
- Delayed application for starting insolvency proceedings.
- Severe breach of the articles.
- Failure to obtain supervisory board approval.

There is no statutory limitation of liability. Limited liability companies can restrict managing director's liability to a certain extent (see Question 17). Supervisory board approval does not release a managing director from liability.

Theft and fraud

Theft and fraud are criminal offences and result in a director's personal liability.

Securities law

Securities legislation provides numerous disclosure and insider trading provisions. If breached, a director can be personally liable (criminally and civilly).

Insolvency law

Managing directors must file a petition of insolvency without undue delay but no later than 60 days from the company becoming insolvent (as defined in the Insolvency Act). A managing director is personally liable to third party creditors for losses arising from late filing. On 1 July 2010 the Austrian Bankruptcy Reform entered into force. The reform facilitates compositions in bankruptcy proceedings.

Health and safety

A managing director is responsible and liable for the company's compliance with health and safety, and environmental, laws. He can delegate this responsibility, and liability, to an employee with sufficient authority.

Environment

See above, *Health and safety*.

Anti-trust

A managing director can be liable to the company or third parties for losses (such as fines imposed on the company by the authorities) caused by his breaches of anti-trust law.

Cyber-crime

See above, *General duties*.

Other

A managing director is personally liable for tax and social security contributions that cannot be collected by the tax authorities or social security agency due to his negligence.

17. Can a director's liability be restricted or limited? Is it possible for the company to indemnify a director against liabilities?

Liability cannot be limited in relation to third parties.

A stock corporation can waive a managing director's liability, at the earliest, five years after the loss occurs and only with shareholders' approval.

Limited liability companies can waive director's liability for losses caused negligently but not losses caused intentionally. Waivers apply for liability to the company but not to third parties or on the company's insolvency.

18. Can a director obtain insurance against personal liability? If so, can the company pay the insurance premium?

Insurance against personal liability is permitted (but not for intentionally caused losses) and is increasingly common. The company can and usually does pay the insurance premium, which is considered to be a benefit in kind.

19. Can a third party (such as a parent company or controlling shareholder) be liable as a de facto director (even though such person has not been formally appointed as a director)?

A third party can only be liable as a managing director, even though not formally appointed, if he acts as a managing director.

TRANSACTIONS WITH DIRECTORS AND
CONFLICTS**20. Are there general rules relating to conflicts of interest between a director and the company?****Managing directors**

Managing directors have a strict duty not to work or conduct their own business in the same field of activity as the company (non-competition duty). Managing directors must carry out their duties with the diligence of a prudent businessman. This general rule is quite broad and must be concretised by case law.

In relation to stock corporations, supervisory board approval is required for a managing director to be a supervisory director in a company outside the company's corporate group.

Supervisory directors

Supervisory directors have no specific non-competition duty. However, they cannot use internal information about the company, except to fulfil their duties.

21. Are there restrictions on particular transactions between a company and its directors?

Transactions between a company and its managing directors must be at arm's length. Loans to managing directors require



supervisory board approval. When dealing with a managing director, the supervisory board represents the company. Contracts between the company and members of its supervisory board entitling them to more than trivial remuneration are subject to supervisory board approval. This also applies to contracts with companies in which a supervisory board member has a considerable interest (*L-Provision 48, Code*). These contracts must be published in the corporate governance report (*C-Provision 49, Code*). The annual remuneration of the supervisory board directors must be published for each member separately in the corporate governance report (*C-Provision 51, Code*).

A shareholding management board director in a single share company must record in writing all transactions between the company and himself.

22. Are there restrictions on the purchase or sale by a director of the shares and other securities of the company he is a director of?

Stock corporations and SEs

Directors can purchase and sell shares as part of, or separate from, a share option plan. These transactions by directors or their close relatives must be reported to the Federal Supervisory Authority for Financial Markets (*Finanzmarktaufsicht*), if the total value of shares bought or sold exceeds EUR5,000 (all purchases or sales in one calendar year are considered one transaction). Code companies must also publish information on these transactions, which can also be processed through the Supervisory Authority for Financial Markets (*L-Provision 19, Code*).

The details of share option plans must be published in the company's annual report.

Directors are bound by insider trading regulations which, if breached, can result in personal liability and criminal proceedings.

Limited liability companies

There are no restrictions on the purchase and sale of a company's shares by directors.

DISCLOSURE OF INFORMATION

23. Do directors have to disclose information about the company to shareholders, the public or regulatory bodies?

Certain events (such as a change of directors or in share capital, and corporate restructurings) must be published. Certain documents (such as the articles and annual reports) must be filed with the company register.

A listed company must promptly publish details of events occurring in its field of activity or business environment if they are likely to affect share prices significantly, unless non-publication can be justified in the interest of the company. Disclosure requirements also apply for the repurchase of shares, takeovers and changes of voting interests.

Stock corporation shareholders can only request information about issues listed on the managing directors' agenda for a

shareholders' meeting, and can inspect the annual report 14 days before an annual shareholders' meeting.

One or more private company shareholders can request information from the managing directors in a shareholders' meeting and can inspect the annual report 14 days before an annual shareholders' meeting. The articles can limit the right to request information if the company has a supervisory board.

COMPANY MEETINGS

24. Does a company have to hold an annual shareholders' meeting? If so, when? What issues must be discussed and approved?

Stock corporations and SEs

Stock corporations and SEs must hold an annual shareholders' meeting within eight months after the end of the company's fiscal year. A general meeting must be convened at the latest on the 28th day before the ordinary general meeting, or at the latest on the 21st day before the general meeting by an official announcement, unless the bye-laws prescribe other longer deadlines. The announcement convening the general meeting and the information stipulated by the Companies Act must be made available on the company's website as of the 21st day before the general meeting (*L-Provision 4, Code*). The candidates for the supervisory board elections including all declarations according to the Companies Act must be disclosed by the company on its website at the latest on the 5th working day before the general meeting (otherwise, the persons concerned will not be included in the elections) (*L-Provision 5, Code*).

The resolutions passed at the general meeting and the information required by the Companies Act must be disclosed on the company's website at the latest on the 2nd working day after the general meeting (*L-Provision 6, Code*).

The annual accounts must be presented and discussed (after they have been approved by the supervisory board). Shareholder resolutions must be passed on:

- Distribution of profits and discharge of the board (if any).
- Approval of the managing and supervisory directors' business activities.
- Appointment of auditors.
- Appointment of supervisory directors (if necessary).
- Issues requiring shareholder approval (if any).

Limited liability companies

Limited liability companies must hold an annual shareholders' meeting to:

- Approve the annual accounts and financial statements.
- Decide on the distribution of profits and discharge of the board (if any).
- Approve the management board's and supervisory board's business activities.
- Vote on issues requiring shareholder approval (if any).



25. Can shareholders call a meeting or propose a specific resolution for a meeting? If so, what level of shareholding is required to do this?

Stock corporations

One or more shareholders holding at least 5% (or less if provided by the articles) of the issued share capital can require additional items to be added to a shareholders' meeting agenda or require a shareholders' meeting to be called. If the management board does not convene the meeting, the shareholders can apply to a court for authority to convene it.

Shareholders who hold 1% of the issued share capital can make proposals regarding any point of the agenda up to seven days before the general meeting. The proposals must be published on the company's website.

Limited liability companies

One or more shareholders holding at least 10% of the issued share capital can require additional items to be added to an annual shareholders' meeting agenda or require a shareholders' meeting to be called. If the management board does not convene the meeting, the shareholders can convene it themselves (without court authorisation).

MINORITY SHAREHOLDER ACTION

26. What action, if any, can a minority shareholder take if it believes the company is being mismanaged and what level of shareholding is required to do this?

Stock corporations and SEs

One or more shareholders holding at least 5% of the issued share capital can require the calling of a shareholders' meeting or the placing of additional items on a shareholders' meeting agenda (see *Question 25*).

One or more shareholders holding at least 10% of the issued share capital can:

- Require a special external auditor to be appointed.
- Require the company to assert damages claims against directors or other shareholders.
- Require the appointment of a different auditor.
- Require a shareholders' meeting to be postponed if they do not agree with some or all of the annual report.
- Apply to a court to remove a supervisory director.

Limited liability companies

One or more shareholders holding at least 10% of the issued share capital can:

- Require a special external auditor to be appointed to audit the annual report.
- Require the company to assert damages claims against directors or other shareholders.
- Require the convening of a shareholders' meeting (see *Question 25*).

- Place additional items on the agenda of a shareholders' meeting.
- Apply to a court to remove a supervisory director.

In any company, one or more shareholders holding at least 25% plus one share of the issued share capital can block a decision requiring a 75% majority of shareholders' votes (for example, changes to the articles and decisions to merge).

INTERNAL CONTROLS, ACCOUNTS AND AUDIT

27. Are there any formal requirements or guidelines relating to the internal control of business risks?

Companies must meet detailed bookkeeping and accounting standards (*Commercial Code*). Management and supervisory boards (and private company shareholders) have clearly defined accounting duties (*Limited Liability Company Act* and *Stock Corporation Act*). The management board is responsible for implementing appropriate bookkeeping and accounting standards. In stock corporations and two-tier European companies, the supervisory board must approve the annual accounts. The supervisory board can delegate the preparation of this approval to an audit committee (and must do so, if the company is listed or the supervisory board has more than five shareholder-appointed or -elected members). The supervisory board can (or must, if the audit committee is mandatory) consult with the auditor attending the supervisory board meetings. A financial expert must be a member of a mandatory audit committee.

A shareholders' meeting must approve a private company's annual accounts.

"Big" listed companies as defined by the Business Code or companies in which at least one characteristic feature of a big company is present more than five years in a row (for example, the same audit company audits more than five years in a row) must establish (in addition to the supervisory board) a special audit committee to monitor the auditors, the annual accounts and the financial accounting process in general. This audit committee is also responsible for internal risk management. One member of this committee must be a financial expert (*L-Provision 40, Code*).

28. What are the responsibilities and potential liabilities of directors in relation to the company's accounts?

Stock corporations and SEs

The management board must prepare annual accounts in compliance with bookkeeping standards, standards for valuing assets and accounting rules. The annual accounts comprise:

- A balance sheet.
- A profit and loss statement.
- A management report on the financial situation of the company.
- Notes to the accounts.

The annual accounts must be published and filed with the company register.



The supervisory board (in listed Code companies also the audit committee, or in one-tier SEs, the administrative board) is responsible for the accuracy of the annual accounts and must review and approve them (see *Question 27*). It must propose a candidate to be the company's auditor, who is elected by the annual shareholders' meeting (see *Question 30*). An audit committee, if mandatory (see *Question 27*), must review any group accounts.

Limited liability companies

Small limited liability companies only need to file a shortened version of the annual accounts containing balance sheet details with the company register. A private company is small if it meets two of the following criteria:

- Its annual balance sheet total is no more than EUR4.84 million.
- Its annual revenue is no more than EUR9.68 million.
- It has a maximum of 50 employees on an annual average.

Other private companies must publish full annual accounts (see above, *Stock corporations and SEs*).

The annual accounts must be prepared by the management board, reviewed by the supervisory board (if any) and approved at an annual shareholders' meeting.

29. Do a company's accounts have to be audited?

Stock corporations and SEs

The company's annual accounts must be audited and approved by the auditor.

Limited liability companies

The company's annual accounts must be audited, unless the company is small and not required to establish a supervisory board (see *Question 4*).

30. How are the company's auditors appointed? Is there a limit on the length of their appointment?

Auditors must be nominated by the supervisory board and appointed at a shareholders' meeting.

If the auditor earned more than 30% of his total revenue in the last five years from auditing the company or its affiliates, or another company that holds at least 20% of the company's shares, he cannot be the company's auditor.

In listed companies and companies with either a balance sheet total exceeding EUR96.3 million or annual revenues exceeding EUR192.5 million, an auditor cannot audit the accounts if:

- He earned more than 15% of his total revenue in the last five years from auditing the company and its affiliates, or another company that holds at least 20% of the company's shares.
- He has audited the company for the last five years (although another auditor working for the same firm can be used (internal rotation)).

31. Are there restrictions on who can be the company's auditors?

Section 271 of the Commercial Code sets out detailed restrictions. The auditor must not:

- Hold any shares of the company or its affiliates.
- Have kept the books or prepared the annual accounts of the company.
- Have worked with the company's internal auditing department.
- Have provided estimation or actuarial services to the company.
- Be, or have been within the last 24 months, a director, legal representative, manager, or employee of the company or an affiliated company or another company that holds at least 20% of the company's shares.
- Have assumed management functions or participated in the selection of the company's legal representatives or its top employees in the accounting department.
- Be suspected of being biased.

In companies with either a balance sheet total exceeding EUR96.3 million or annual revenues exceeding EUR192.5 million, an auditor cannot be appointed if he:

- Provided legal or tax consulting services with significant influence on the accounts to the company during the financial year to be audited.
- Helped develop, install and implement reporting systems in the company.

The auditor must be a certified chartered accountant.

Regular quality inspections must be carried out on the standard of audit of the annual accounts (*Federal Act on Quality Assurance for the Audit of Annual Accounts (Bundesgesetz über die Qualitätssicherung bei Abschlußprüfungen)*) (A-QSG). This legislation requires auditors to take the necessary measures to ensure a high quality of audit and continuous improvement. External auditing companies must carry out quality inspections every three or six years, depending on the type of company being audited (the rules are set out in the A-QSG).

32. Are there restrictions on non-audit work that auditors can do for the company that they audit accounts for?

Auditors can do any work for the company, provided they do not violate the provisions set out in *Questions 30 and 31*.

33. What is the potential liability of auditors to the company, its shareholders and third parties if the audited accounts are inaccurate? Can their liability be limited or excluded?

The auditor is liable to third parties (after annual accounts are published with his approval attached), and to the company, for losses resulting from the wilful or negligent failure to audit the annual accounts diligently and impartially.



For negligence, liability to the company is limited to:

- EUR2 million, for small and medium companies.
- EUR4 million, for large companies.
- EUR8 million, for companies where the balance sheet total exceeds EUR96.3 million or annual revenues exceed EUR192.5 million.
- EUR12 million, for companies where the balance sheet total exceeds EUR192.5 million or the revenues exceed EUR380.5 million.

The Supreme Court has held that these limits apply by analogy to liability to third parties (*OGH 27.11.2001, 5 Ob 262/01t*). The courts have not yet decided whether these are the overall limits or whether they apply to the company and third parties separately.

CORPORATE SOCIAL RESPONSIBILITY

34. Is it common for companies to report on social, environmental and ethical issues? Please highlight, where relevant, any legal requirements or non-binding guidance/best practice on corporate social responsibility.

Expenditures relating to social, environmental and ethical issues must be explained in the notes to the annual accounts. As companies have a responsibility toward society, the preamble of the Code was supplemented. It is recommended that appropriate voluntary measures and initiatives be taken to reconcile work and family life.

COMPANY SECRETARY

35. What is the role of the company secretary in corporate governance?

The Austrian legal framework does not provide for a function of company secretary.

INSTITUTIONAL INVESTORS AND SHAREHOLDER GROUPS

36. How influential are institutional investors and other shareholder groups in monitoring and enforcing good corporate governance? Please list any such groups with significant influence in this area.

Some of the most important institutions include the:

- Aktienforum (www.aktienforum.org).
- Bundesministerium für Finanzen and/or Regierungsbeauftragter für Kapitalmarkt (www.bmf.gv.at).
- Bundesministerium für Wirtschaft, Familie und Jugend (www.bmwfj.gv.at).
- Institut Österreichischer Wirtschaftsprüfer (www.iwp.or.at).
- Kammer der Wirtschaftstreuhänder (www.kwt.or.at).
- Kapitalmarkt Initiative (www.wienerborse.at).
- Oesterreichische Kontrollbank (www.oekb.co.at).

- Finanzmarktaufsicht (www.fma.gv.at).
- ÖIAG (www.oig.co.at).
- Oesterreichische Nationalbank (www.oenb.co.at).
- Österreichischer Rechtsanwaltskammer Tag (www.oerak.at).
- Österreichische Vereinigung für Finanzanalyse und Asset Management (www.oevfa.at).
- Wiener Börse (www.wienerborse.at).
- Wirtschaftskammer Österreich (www.wko.at).

REFORM

37. Please summarise any proposals for reform and state whether they are likely to come into force and, if so, when.

Code of Corporate Governance to 2nd Stability Law (2. *Stabilitätsgesetz*, 2. *StabG* BGBl II 35/2012)

Due to the 2nd Stability Law there was an amendment of several regulations of the Stock Cooperation Act and the Business Code. The main issues were the adequateness of remuneration of members of the management board. In addition, there was an increase of the cooling-off-period for former members of the management board who cannot become a member of the supervisory board of a stock listed company, an amendment of qualifications of members of the supervisory board and a more balanced composition of supervisory board (diversity, reliability). The Business Code was amended to account for these changes and most of the changes became effective as of 1 July 2012.

Austrian Code of Corporate Governance revision January 2012

Due to national and international developments the Austrian working committee on Corporate Governance decided to amend the Code. The amended C- and R-provisions become effective for financial years starting after 31 December 2011. The main issues were further developments of diversity-rules, new rules for improvement of co-operation between the supervisory board and the auditor, anti-corruption issues and an increase of the cooling-off-period (a former member of the management board cannot become chairman of the supervisory board before the end of a two-year cooling-off-period).

Green paper on European Corporate Governance Frame (COM(2010) 284/3)

The green paper on European Corporate Governance Frame may result in two further recommendations, that is, in connection with the supervisory board and the comply or explain principle.

ONLINE RESOURCES

W www.ris.bka.gv.at

Description. The Legal Information System of the Republic of Austria (RIS) is a computer-assisted information system on Austrian law, which is co-ordinated and operated by the Austrian Federal Chancellery. It contains a selection of Austrian laws in English.

W www.corporate-governance.at

Description. This is the website of the Austrian working group for corporate governance.



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Qualified. Austria, 1990

Areas of practice. Employment and labour law; banking; finance and capital markets; employment law aspects of corporate restructuring; privatisations; management employment contracts; directors' and officers' liability; acquisition and disposition of companies; commercial and corporate law; arbitration and corporate litigation.

Recent transactions

- Member of the executive committee of the Vienna Bar Association, Vienna Law Society, the Austrian Society for Labour and Social Security Law, the Working Group for Austrian Corporate Governance, and the European Employment Lawyers Association (EELA).
- Supervisory board member at various companies

Qualified. Austria, 2005

Areas of practice. Employment and labour law; employment law aspects of corporate restructuring; management employment contracts; trusts and foundations; internet law.