Austria

Georg Schima and Birgit Vogt-Majarek
Kunz Schima Wallentin

www.practicallaw.com/1-503-4216

EMPLOYEE PARTICIPATION

1. Is it common for employees to be offered participation in an employee share plan?

Share options are one of the principal incentive tools used by employers to encourage loyalty in employees.

Employee share plans have become more common among larger businesses due to more favourable tax and social security regulations as a result of statutory changes, such as the Capital Market Offensive Act 2001 (*Kapitalmarktoffensivegesetz*). However, this has changed since April 2009, and from that time tax advantages only apply to options that are non-transferable and that were granted before 1 April 2009 (*see Questions 4 to 7*).

Employee share plans are not common in small and medium-sized companies, which account for 99.6% of all companies and provide 65% of all jobs in Austria.

Large companies (particularly public limited companies) are increasingly regarding employee share plans as important for reinforcing management's long-term commitment and motivation.

Start-up companies are especially motivated to offer employee share plans to improve their liquidity. Employee share plans are a means of equity financing, and therefore allow companies to obtain funds for investment purposes and make it easier for them to meet their financial liabilities. Employee share plans are often introduced when a company makes an initial public offering (IPO), either for the management only or for all employees. The plans have differing aims:

- Management plans aim to create incentives to improve business results and share prices.
- Plans for all employees aim to promote long-term commitment to the company and provide an additional benefit for employees.

Plans that cover all employees also bring other benefits. For example, employees who participate in the plans generally treat company resources with more care and have a greater understanding of certain company decisions, such as reductions in benefits or business-related dismissals.

2. Is it lawful to offer participation in an employee share plan where the shares to be acquired are shares in a foreign parent company?

A foreign parent company can offer participation in an employee share plan to an Austrian-resident employee without restriction.

Employees are permitted to hold shares in foreign parent companies, regardless of whether the companies are listed on a recognised stock or investment exchange.

SHARE OPTION PLANS

3. Please list each type of share option plan operated in your jurisdiction (if more than one).

Austrian law does not lay down rules for any particular type of share option plan. They need only comply with the general rules set out in certain statutes, including:

- The Stock Corporation Act 1965 (*Aktiengesetz*), which includes the Stock Option Act 2001 (*Aktienoptionsgesetz*).
- The Income Tax Act 1988 (*Einkommensteuergesetz*).

No particular types of share option plan have emerged in practice. Instead, companies offer individual plans that are within the scope of the existing law. There are tax advantages that only apply to options that are non-transferable and that were granted before 1 April 2009 (*see Questions 4 to 7*).

4. In relation to the share option plan:

- **What are the plan's main characteristics?**
- **Which types of company can offer the plan?**
- **Is this type of plan popular? If so, among which types of company is this plan particularly popular?**

Share option plan

Main characteristics. An option can be granted for a price or, more commonly in practice, granted freely as a bonus. The members of the board of directors and the supervisory board (which is made up of non-executive directors who are responsible for appointing and supervising the board members) can also receive share options as remuneration.

All executives or, less often, all employees are typically offered the right to purchase a certain number of shares at an agreed exercise price within a certain period or at a certain point in time, provided that a condition (exercise hurdle) agreed in the contract is achieved (*see Question 6, Share option plan: Exercisable only on conditions being met*). An exercise hurdle is common, but not obligatory.

Either new or existing shares can be transferred to an employee when an option is exercised. It is unclear whether options expire without the employee receiving any financial benefit if the employee leaves the company either:

- Before the term in which the agreed conditions must be met has passed.
- Without having exercised the option.

However, the plan rules usually specifically address this issue.

An employee who participates in a share option plan does not generally incur any financial risks. If the shares do not do as well on the market as expected, the option need not be exercised. The potential economic benefit that exercising the option could bring, however, has considerable motivational effect.

In share option plans for members of the board of directors, it is increasingly common to require a minimum investment of a certain number of shares on the managers' part as a precondition for participating in a share option plan. The Austrian Code of Corporate Governance 2002 (its most recent version dates from January 2010) (*Österreichischer Corporate Governance Kodex*) (Code) recommends an appropriate investment by managers (this is a C-regulation, meaning. the regulation must be complied with or else the company must explain its reasons for non-compliance).

Share option plans for managers generally do not usually allow the option to be exercised for much longer than a year after they have left the company, since the former managers would then benefit from price developments or business achievements that no longer result from their work. As a result, option holders face a genuine risk that the shares bought, either on credit or with their own funds, could decline in price. However, this factor is not relevant to other employees who cannot influence business performance in the same way.

Options can either:

- Be transferred or traded as business assets.
- Be non-transferable (non-negotiable).

Tax advantages only apply to non-transferable options that are granted before 1 April 2009 and that cannot be exercised within one year of their grant. It is also common for participants in share option plans to be prohibited from engaging in hedging (that is, attempting to minimise risks by, for example, purchasing a put option on company shares to establish an offsetting position). Shares that are purchased under an option plan are freely transferable, but it is possible to specify a holding period in the relevant contract.

Types of company. All companies, whether or not they are listed, can offer share option plans.

Popularity. Share option plans are increasing in popularity but are not popular with small and medium-sized businesses (*see Question 1*). Share acquisition plans are more popular than share option plans.

5. In relation to the grant of share options under the plan:

- **Can options be granted on a discretionary basis or must they be offered to all employees on the same terms?**
- **Is there a maximum value of shares over which options can be granted, either on a per-company or per-employee basis?**
- **Must the options have an exercise price equivalent to market value at the date of grant?**
- **What are the tax and social security obligations arising from the grant of the option?**

Share option plan

Discretionary/all-employee. Share option plans can be granted on a discretionary basis. However, there are certain tax advantages on exercise that only apply where all, or certain groups, of a company's employees are entitled to the share options (*see Question 7, Share option plan: Tax/social security on exercise*).

It is necessary to consider the principle of equal treatment (that is, differences must be based on objective criteria of remuneration, length of service, position, and so on) when granting share options.

Maximum value of shares. The total number of company shares that employees, officers and directors of a company or an affiliated company can acquire by exercising share options must not exceed 20% of the company's existing share capital (*Article 159, para 5, Stock Corporation Act*). This applies only to Austrian-incorporated companies.

Market value. The exercise price does not have to be equivalent to the market value.

Tax/social security. The tax treatment depends on whether transferable or non-transferable options are granted:

- **Transferable options.** Transferable options that are granted as a bonus or at below market value are subject to tax and social security payments at the time of grant. This is because the employees receive a taxable benefit-in-kind from their employment.

  The value of the benefit-in-kind is deemed to be the sum that the employee would have had to pay to acquire the option on the free market. The tax authorities calculate the value of a transferable share option as a lump sum, unless the option is listed on the stock exchange (in which case, the exchange price is used to determine the value).

  This lump-sum valuation leads to higher taxation than is chargeable on a non-transferable option and imposes a tax liability before the employee has realised any benefit from the option. It is therefore not advisable to grant transferable options.
- **Non-transferable options.** Under the Austrian tax reform law 2009 (*Steuerreformgesetz 2009*) there are no tax advantages for non-transferable options granted after 31 March 2009. For non-transferable options granted before 1 April 2009 the following applies:

- tax is not due at the time of grant. This is because they effectively have no market value and are not considered to be assessable business assets. Instead, they are subject to tax at the time of exercise;
- social security contributions are not payable (*Article 49, para 3, no. 18 d General Social Security Code*).

This new legislation reflects the critical or even hostile attitude towards share options (especially for executives) that governments not only in Austria but in the whole of Europe and worldwide have adopted as a result of the global financial crisis and the collapse of some major players in the financial sector.

6. In relation to the vesting of share options:

- **Can the company specify that the options are only exercisable if certain performance or time-based vesting conditions are met?**
- **Are any tax/social security contributions payable when these performance or time-based vesting conditions are met?**

Share option plan

Exercisable only on conditions being met. A company can specify performance conditions that must be met before an option can be exercised, including the company's shares reaching a certain market price, the company achieving revenue targets or satisfying an exercise hurdle calculated in relation to a share index (*see Question 4, Share option plan: Main characteristics*).

Tax and social security advantages for non-transferable share options granted before 1 April 2009 only apply if it is agreed that the option cannot be exercised for at least one year after being granted (*see Question 7, Share option plan: Tax/social security on exercise*). There are no other statutory requirements imposing a minimum waiting period (often referred to as an exercise blocking period, lock-up period or lock-in period) before options can be exercised. However, initial waiting periods are advisable. They should generally be for a minimum of three years, to encourage achievement of the performance target over a longer, sustained period. In practice, options typically vest progressively over a two- to five-year period.

Plans can also specify blocking periods during which an option cannot be exercised. These are designed to prevent option holders from taking advantage of insider knowledge to determine when to exercise the option and sell the shares (such as in the month before the annual report is published). However, this is not required by law.

Tax/social security. Tax and social security contributions are not payable when exercise conditions are fulfilled for non-transferable options granted before 1 April 2009. Tax and social security contributions are payable for options that were not transferable at the time that they were granted but later become transferable (at the time they become transferable). The employer must withhold tax and social security contributions from the employee's salary and pay them to the authorities.

7. Do any tax or social security implications arise when the:

- **Option is exercised?**
- **Shares are sold?**

Share option plan

Tax/social security on exercise. Under the Austrian tax reform law 2009 there are no tax advantages for non-transferable options granted after 31 March 2009.

Tax is not due on the exercise of transferable options because it has already been paid on grant or at vesting.

Tax and social security contributions for non-transferable options granted before 1 April 2009 are due on exercise of the option. These contributions must be withheld and paid by the employer. The difference between the value of the shares on the date of grant and the value on the date of exercise is tax-privileged under certain conditions. The financial benefit derived from non-transferable options over shares in the employer's company or a company that is part of the same business group qualifies for a tax advantage if (*Article 3, para 1, lit 15c, Income Tax Act*):

- The options are granted to all employees or to certain groups of employees (these groups can be freely chosen provided that the principle of equal treatment is observed).
- The options cannot be exercised until at least one year after grant.
- The value of the shares under option at the time of grant does not exceed EUR36,400 (as at 1 August 2010, US$1 was about EUR0.77) per calendar year per employee.

The maximum amount of the benefit that qualifies for a tax advantage is the difference between the:

- Value of the shares at grant.
- Value of the shares at exercise.

This amount is exempt from tax at the time of exercise to an extent that depends on the time that has lapsed since grant: 10% is exempt from tax for every full year since grant, with a maximum tax exemption of 50% for an option that is not exercised until five years or more after grant. An example of how the exemption may work in practice is as follows:

- Value of the shares at grant (30 June 2007): EUR30,000.
- Value of the shares at exercise (30 June 2012): EUR50,000.

The amount that qualifies for a tax advantage will therefore be the difference between the two: EUR20,000. As the shares are exercised five years after grant, 50% of this (EUR10,000) is tax free.

Employees must pay tax on the residual amount at the time of exercise provided that their employer deposits their shares with (*Article 3, para 1, lit 15c, Income Tax Act*):

- An Austrian credit institution.
- A trustee appointed jointly by the employer and the works council.

In any event, if tax is not payable on the time of exercise it is payable on the earlier date of the sale of the shares, the cessation of employment or 31 December of the seventh year after the grant of the options.

The shares must be deposited for each full year for which the 10% tax exemption is sought. Evidence of this deposit must be provided to the employer every year by 31 March. Social security contributions are not payable on the amount exempt from tax. In the example above, an employee could defer tax until 31 December 2014 on the remaining EUR10,000. At that stage, another tax exemption (which is primarily used for share acquisition plans) can be used to reduce the tax due (*see Question 10, Employee share acquisition plan: Tax/social security: Annual allowance*).

Tax/social security on sale. Gains realised when selling the shares are taxed if a year or less has passed between their acquisition and the sale. The employee is responsible for paying the correct taxes. No social security contributions need to be paid.

This new legislation reflects the critical or even hostile attitude towards stock options (especially for executives) that governments not only in Austria but in whole Europe and worldwide have adopted as a result of the global financial crisis and the collapse of some major players in the financial sector.

8. Please list each type of share acquisition or purchase plan operated in your jurisdiction (if more than one).

Austrian law does not set out rules for particular types of share acquisition or purchase plans.

9. In relation to the share acquisition or purchase plan:

- **What are the plan's main characteristics?**
- **Which types of company can offer the plan?**
- **Is this type of plan popular? If so, among which types of company is this plan particularly popular?**

Employee share acquisition plan

Main characteristics. Employee share acquisition plans are the most common form of equity remuneration. This type of plan is most commonly introduced when a company goes public with an IPO. In such a case, the listed company can offer all employees, or certain groups of employees, shares in either:

- The company that employs them.
- A company that belongs to the same business group as its employer.

Unlike share option plans, the shares are acquired either immediately or within a short time of the offer. They are usually offered at a special price and under an agreement that specifies a holding period in which they must not be sold to others.

In order to gain tax advantages the holding period must be at least five years.

The shares give the same rights (including voting rights) as other shares, and dividends are paid regardless of a shareholder's status as an employee. If employees deposit the shares with an Austrian credit institution they qualify for the annual tax-free allowance (*see Question 10, Employee share acquisition plan: Tax/social security*). The tax-free allowance described for share option plans does not apply (*see Question 7, Share option plan: Tax/social security on exercise*).

Types of company. All companies, whether or not they are listed, can offer employee share acquisition plans.

Popularity. Employee share acquisition plans are increasing in popularity among larger businesses, but are not popular in small and medium-sized businesses (*see Question 1*). Share acquisition plans are more popular than share option plans because of the more favourable tax treatment.

10. In relation to the initial acquisition or purchase of shares:

- **Can entitlement to acquire shares be awarded on a discretionary basis or must it be offered to all employees on the same terms?**
- **Is there a maximum value of shares that can be awarded under the plan, either on a per-company or per-employee basis?**
- **Must employees pay for the shares and, if so, are there any rules governing the price?**
- **Are any tax/social security contributions payable when the shares are awarded?**

Employee share acquisition plan

Discretionary/all-employee. The entitlement to acquire shares does not have to be offered to all employees on the same terms. The principle of equal treatment, however, must be considered (*see Question 5, Share option plan: Discretionary/all-employee*). However, taxation is affected if the shares are not granted to all or certain groups of employees (*see below, Tax/social security*).

Maximum value of shares. There are no legal restrictions on the number of shares that employees can acquire.

Payment of shares and price. The company can set whatever price it wishes. Shares can also be transferred to the employee free of charge.

Tax/social security. If the shares are acquired at market value, they do not represent a benefit-in-kind from the employment relationship and no tax charge arises. The transfer of shares to employees at no or a reduced cost creates a benefit-in-kind for the employee, which is subject to tax and social security contributions. This is subject to the following:

- **Business assets.** The benefit-in-kind is considered to accrue to employees on transfer of the shares to them, provided that the shares are business assets (that is, they are transferable and so have a market value). However, shares are not business assets if either:
  - the employee has agreed with the employer that he has no disposal rights over the shares as long-term restrictions (that is, five years or longer) have been placed on his right to sell to third parties;

  - the employee has been granted a right of disposal over the shares that is limited in time (for example, during the course of employment).

  Shares can still be business assets where it is agreed that:

  - the employer has a preferential right (to other purchasers) to purchase the shares from the employee at market value; or
  - there is a period in which the shares cannot be sold of five years or less.

  If the employee as owner of the shares has all economic rights of disposal over them, general taxation principles apply (that is, the share acquisition is considered a benefit-in-kind and therefore subject to tax and social security).

- **Annual allowance.** An annual allowance of EUR1,460 that is free from tax and social security contributions applies to benefits that accrue from employees' direct equity participation in shares, provided that both:

  - the shares are in a company that is either the employer or in the same business group as the employer;
  - the benefit is granted to all employees or to a certain group of employees (*see above, Discretionary/all-employee*).

  The tax-free allowance does not apply:

  - if the employees' equity participation is not direct (for example, they have an interest in a fund and the fund has an interest in the employer's company);
  - to the grant of shares to former employees.

  The annual allowance is only available if the employee has held the shares for at least five years, which begins to run from the end of the calendar year in which the shares are acquired. If the employee sells the shares earlier, the employer must pay taxes on the benefits as soon as it becomes aware of the sale. However, the employer can demand that the employee reimburses the amount of tax paid, on the basis that the employer has fulfilled the employee's obligation. By 31 March of every year, the employee must provide a statement showing that the shares remain on deposit with an Austrian credit institution as evidence to the employer that the required holding period is being maintained.

- **Dividends.** A company that pays dividends is subject to dividend withholding tax on its profit of 25%, which must be withheld from dividends paid. No further tax is payable by employees on receipt of dividends.

11. In relation to the vesting of share acquisition or purchase awards:

- **Can the company award the shares subject to restrictions that are only removed when performance or time-based vesting conditions are met?**
- **Are any tax/social security contributions payable when these performance or time-based vesting conditions are met?**

Employee share acquisition plan

Restrictions removed only on conditions being met. Employee share acquisition plans usually involve vesting agreements with the aim of increasing employees' long-term loyalty to the company. Usually, if the employee leaves the company, either voluntarily or before the specified vesting period, the employer will buy the shares back from the employee at the original purchase price, so that the employee gains no benefit from them.

As with share option plans, it is unclear whether the entitlement to acquire shares can expire when the employee leaves the company before the initial waiting period is over if the plan does not specify this (*see Question 4, Share option plan: Main characteristics*).

Tax/social security. If the shares are non-transferable, the fulfilment of vesting conditions does not trigger tax or social security payments. If the entitlement to acquire shares is transferable (business asset), tax and social security payments are due on the fulfilment of vesting conditions. The employer must withhold and pay these contributions.

12. What are the tax and social security implications when the shares are sold?

Employee share acquisition plan

Profits from a sale (that is, the amount by which the sale proceeds exceed the purchase price) are tax-free if the employee owns less than 1% of the share capital (insignificant participation), provided that more than a year passes between the purchase and the sale. If less than one year has passed, the sale is considered to be a speculative venture and the profits are subject to taxation. Profits are always subject to taxation in the case of participation of 1% or more.

PHANTOM OR CASH-SETTLED SHARE PLANS

13. Please list each type of phantom or cash-settled share plan operated in your jurisdiction (if more than one).

There are no specific rules regulating phantom or cash-settled share plans, or particular types of plan.

14. In relation to the phantom or cash-settled share plan:

- **What are the plan's main characteristics?**
- **Which types of company can offer the plan?**
- **Is this type of plan popular? If so, among which types of company is this plan particularly popular?**

Phantom share or share appreciation plans

Main characteristics. Phantom or share appreciation rights are commonly granted but are less popular than share option plans or share acquisition plans. They do not offer employees any real equity interest, but instead treat them financially as though they were participating in a traditional share option plan. This means that employees are treated as though they had acquired a certain number of shares at a particular price. They receive as variable cash payments the difference between the price that they nominally paid for the shares and the current, higher price (this is regulated individually in the plan's rules).

Phantom shares are not covered by the Stock Option Act. This means that there are no restrictions on which companies can offer phantom share plans and which employees they can include, although the principle of equal treatment must be followed (*see below, Types of company* and *Question 5, Share option plan: Discretionary/all-employee*). The plan's details can also be freely chosen.

However, it is possible that the courts may apply some of the provisions in the Stock Option Act to phantom shares by analogy. The Act deals almost exclusively with questions of legal competence for decisions on share-related matters and notification duties. It contains very few provisions on the content or structuring of plans.

Types of company. All companies, whether or not they are listed, can offer phantom or share appreciation plans.

Popularity. Since the goals of long-term loyalty and improving shareholder value can be achieved through these less complex plans, they are quite popular (although no exact statistics on their use are available).

15. In relation to the grant of phantom or cash-settled awards:

- **Can the awards be granted on a discretionary basis or must they be offered to all employees on the same terms?**
- **Is there a maximum award value that can be granted under the plan, either on a per-company or per-employee basis?**
- **Are any tax/social security contributions payable when the award is made?**

Phantom share or share appreciation plans

Discretionary/all-employee. The awards can be granted on a discretionary basis (subject to the principle of equal treatment).

Maximum value of awards. There is no maximum award value.

Tax/social security. The award of phantom shares does not trigger tax or social security payments.

16. In relation to the vesting of phantom or cash-settled awards:

- **Can the awards be made to vest only where performance or time-based vesting conditions are met?**
- **Are any tax/social security contributions payable when these performance or time-based vesting conditions are met?**

Phantom shares or share appreciation plans

Award vested only on conditions being met. The awards can be subject to performance or time-based vesting conditions.

Tax/social security. No tax or social security obligations are triggered purely by vesting.

17. What are the tax and social security implications when the award is paid out?

Phantom shares or share appreciation plans

Tax liabilities arise when a cash payment is made under the award, like any other bonus (*see Question 15, Phantom shares or share appreciation plans: Tax/social security*). The employer must withhold and pay taxes and social security contributions.

INSTITUTIONAL, SHAREHOLDER, MARKET OR OTHER GUIDELINES

18. Are there any institutional, shareholder, market or other guidelines that apply to any of the above plans, and which types of companies are subject to them? What are their principal terms?

The Code makes recommendations for Austrian-listed companies regarding the contractual provisions that should be used or avoided for the above plans. For example, according to rule Nr 28 (*see Question 4*) if a share option programme (or a programme for the preferential transfer of shares) is proposed for management board members, then it must be linked to measurable, long-term and sustainable criteria. It is therefore not possible to change the criteria later (that is, no repricing is possible). A management board member must hold an appropriate volume of shares in the company for the duration of these programmes, but at the latest until the end of the management board member's function, In the case of a share option programme, a waiting period of at least three years must be fixed.

The Code is not binding, but joint stock companies can commit to it and report officially on their compliance (for example, in their annual reports). In that case, if the company deviates from the guidelines, it must report and explain the deviation. 94% of the companies which trade on the Austrian Trading Index (ATX) comply. A consequence of non-compliance may be that an investor would be reluctant to buy the company's shares.

EMPLOYEE REPRESENTATIVES

19. Is consultation or agreement with, or notification to, employee representative bodies required before an employee share plan can be launched?

When operation of an employee share plan is linked to profits, employers can enter into a works council agreement concerning employee profit-sharing (*Article 97, para 1, figure 16, Labour Constitution Act 1974 (Arbeitsverfassungsgesetz)*). Although entering into a works council agreement is voluntary, it is advisable for at least the largest groups of employees to be included under such an agreement, since it is then easier to make and administer uniform changes. If an employee share plan does not operate by reference to profits but instead by reference to, for example, turnover or headcount, the works council agreement forms part of the individual employment contracts. It is recommended that this is set out specifically in writing.

The works council's control, intervention, information or consultation rights do not need to be considered for ordinary employee share plans. This is because the works council does not represent company officers (members of the board of directors) or certain groups of senior executives. The employer only has to:

- Inform the works council about issues that affect employees' economic, social, health or cultural interests.
- Consult with the works council at least once in a quarter about current issues, and the economic and social aspects of general company operations.

However, there is one important right of the works council in relation to employee share plans. The supervisory board must be involved where the company grants share options to board members, as it does when employment contracts are entered into with board members. A remuneration committee of the supervisory board usually takes responsibility for these matters. However, unlike in cases involving employment contracts, the works council has a right to be represented on the remuneration committee when share option plans are being introduced (one-third of the supervisory board members are representatives of the works council).

EXCHANGE CONTROL

20. Do exchange control regulations prevent employees sending money from your jurisdiction to another to purchase shares under an employee share plan?

There are no regulations that prevent employees sending money abroad to purchase shares under an employee share plan.

21. Do exchange control regulations permit employees to repatriate proceeds derived from selling shares in another jurisdiction?

Employees can repatriate proceeds derived from selling shares outside Austria.

INTERNATIONALLY MOBILE EMPLOYEES

22. What is the tax position when:

- **An employee who is resident in your jurisdiction at the time of grant of a share plan award leaves your jurisdiction before any taxable event affecting the award takes place?**
- **An employee is sent to your jurisdiction holding share plan awards granted to him before he is resident in your jurisdiction?**

Resident employee

No tax is payable when non-transferable options are granted before 1 April 2009. In general, tax is payable when options are exercised in Austria (wherever the employee's residence is). The taxable amount is the difference between the value of the shares on the date of grant and the value on the date of exercise, and varies according to the individual employee's tax situation.

The Austrian Federal Ministry of Finance has summarised currently applicable cross-border tax regulations for employee share plans in the position paper EAS 2041. Earnings arising in the year that exercise occurs are subject to tax in Austria to the extent that they accrued in Austria either:

- During the vesting period.
- In the time period between the option having been granted and exercised.

If share options are granted to an employee who is later sent abroad and becomes resident there, then the income from the option in the year of exercise might not be taxable in Austria. In that event the Austrian company must prove that the part of the benefit-in-kind that accrues in the foreign jurisdiction is not subject to Austrian tax or is subject to foreign tax. If the Austrian company cannot provide proof of the foreign tax payment, it must withhold income tax on the full amount. In these circumstances, the employee can then later claim an income tax refund from the competent tax authority for the amount of tax which the Austrian company withheld.

Non-resident employee

In principle, anyone who has his residence or habitual abode in Austria is subject to Austrian income tax, no matter which country the income is paid in. However, Austria has concluded double taxation treaties with several countries.

PROSPECTUS REQUIREMENTS AND OTHER CONSENTS OR FILINGS

23. For the offer of and participation in an employee share plan:

- **What prospectus requirements (if any) must be completed and by when? What exemptions (if any) are available?**
- **What other regulatory consents or filings (if any) must be completed and by when? What exemptions (if any) are available?**

Prospectus requirements

On 17 June 2010 the European Parliament approved the European Commission's proposal for an amendment to Council Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading (Prospectus Directive). The Prospectus Directive aims to make it easier and cheaper for companies to raise capital throughout the EU on the basis of an approval from a competent regulatory authority in one member state and increases protection for investors by guaranteeing that all prospectuses, wherever in the EU they are issued, provide the clear and comprehensive information they need to make investment decisions. A prospectus is a disclosure document, containing key financial and non-financial information that a company makes available to potential investors when it is issuing securities (shares, bonds, derivative securities, and so on) to raise capital and/or when it wants its securities admitted to trading on exchanges.

According to the amended Prospectus Directive, amendments to the Capital Market Act 1992 that transposed the Prospectus Directive into national law must be adapted within 18 months.

The Capital Market Act currently specifies:

- Who must publish a prospectus.
- How the prospectus must be structured.
- Who must approve the prospectus.
- How the prospectus must be made public.

Generally, a public offer requires a prospectus. Even if the group of people addressed is limited (as is the case with share plans), these offers are generally considered to be public under the Capital Market Act. However, there is an exemption from the requirement to publish a prospectus for employee share plans. This applies when an employer, or an undertaking affiliated with that employer, offers, allots or is to allot securities that are already admitted to trading in a regulated market to existing or former directors or employees. The employer or undertaking must make available a document containing information on:

- The number and nature of the securities.
- The reason for and details of the offer.

There are two more general exemptions from the requirement to publish a prospectus which may be useful for employee share plans that do not qualify under the above exemption:

- The offer is addressed to fewer than 100 people.
- The offer amounts to less than EUR10,000 (calculated over a 12-month period).

Usually, an exemption applies and a prospectus is not obligatory.

Other regulatory consents or filings

All market participants who enter into transactions involving listed shares must anonymously notify these transactions to the Financial Market Authority (*Finanzmarktaufsicht*) (FMA) on a daily basis (*Article 64, Securities Supervision Act 2007 (Wertpapieraufsichtsgesetz)*). Market participants are defined as all institutions that must file for registration under Article 64, such as:

- Credit institutions.
- Domestic branches of banks.
- The Austrian National Bank.
- Investment firms, licensed in third countries.

It is important to review regularly ad hoc and other compulsory notifications (for example, relating to directors' dealings). Together with transaction notifications, these can be used as part of a first assessment in any investigation of potential insider trading. Further triggers for such an investigation can be tip-offs from investors, market participants, issuers of securities or the media. The FMA can demand information from all market participants, and particularly from private persons and company officers, if there is a suspicion of (*Standard Compliance Code*):

- Abuse of insider information.
- Market manipulation.
- Frontrunning (that is, a party buys or sells shares, share options or other investment products because it is aware that a future transaction involving a third party is likely to affect the market value of the investment).
- Breaches of the Vienna Stock Exchange's trading rules.

There are no other exchange control restrictions in relation to exercising options.

Directors' dealings. Persons with managerial responsibilities in issuers of financial instruments and those who have a close relationship to them (*see below*) must report to the FMA without delay (*Article 48 d, para 4, Stock Exchange Act*):

- All trading on their account in the company's shares or equivalent securities that are listed on a regular market.
- Any trading in related derivatives.
- Any trading in relation to affiliated companies (as defined by Article 228, para 3 amendment to Commercial Code 1987 (*Unternehmensgesetzbuch*).

Trading with a total value of less than EUR5,000 within one year does not need to be reported or disclosed. When calculating the total value of trading, the transactions of all persons in management positions and those closely related to such persons are aggregated. The disclosure can also be made through the FMA.

Persons with managerial responsibilities at a company are defined as those who either (*Article 48, para 1, figure 8, Stock Exchange Act 1989 (Börsegesetz)*):

- Belong to an administrative, management or supervisory body of the company.
- Are senior executives who are not members of the above bodies, but:
  - regularly have access to inside information relating, directly or indirectly, to the company;
  - have the power to take managerial decisions affecting the company's future developments and business prospects.

There is also a specific definition of those who have a close relationship with persons who have managerial responsibilities at a company issuing financial instruments (*Article 48a, para 1, figure 9, Stock Exchange Act*). Transactions entered into by those in leadership positions act as indicators or signals for the capital market and the same is true for those who are in close relationship to them.

DEVELOPMENTS AND REFORM

24. Please briefly summarise:

- **The main trends and developments relating to employee share plans over the last year.**
- **Any official proposals for reform of the law on employee share plans.**

Trends and developments

The Capital Market Offensive Act 2001 and the Stock Option Act 2001 have made share plans more popular in Austria, but only in large companies (*see Question 1*).

Reform proposals

There have been no reforms since the 2009 tax law reform. No further reforms are currently expected.

CONTRIBUTOR DETAILS

GEORG SCHIMA
Kunz Schima Wallentin
T +43 1 313 74 0
F +43 1 313 74 80
E *georg.schima@ksw.at*
W *www.ksw.at*

Qualified. Austria, 1991

Areas of practice. Employment; incentives and labour law; banking; finance and capital markets; commercial and corporate law; corporate dispute resolution.

Recent transactions

- Representing Meinl Bank AG in approximately 2500 lawsuits filed by private and institutional investors relating to their purchase of shares of former Meinl European Land Ltd (later renamed as Atrium European Real Estate Ltd), a Jersey domiciled corporation listed on the Vienna Stock Exchange.

BIRGIT VOGT-MAJAREK
Kunz Schima Wallentin
T +43 1 313 74 0
F +43 1 313 74 80
E *birgit.vogt@ksw.at*
W *www.ksw.at*

Qualified. Austria, 2002

Areas of practice. Employment; incentives and labour law; commercial and corporate law; banking; finance and capital markets.