GETTING THE DEAL THROUGH

Corporate Governance

Board structures and directors' duties in 38 jurisdictions worldwide

Contributing editors: Ira Millstein and Holly Gregory

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Sources of corporate governance rules and practices

1 Primary sources of law, regulation and practice

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

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

2 Responsible entities

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

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

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

The rights and equitable treatment of shareholders

3 Shareholder powers

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

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

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

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

4 Shareholder decisions

What decisions must be reserved to the shareholders?

The following decisions require resolution by the shareholders:

- appointment of members of the supervisory board and of auditors of the corporation;
- amendment of the articles of association;
- filing of claims against the management board or the supervisory board or shareholders;
- approval of the annual financial statements, if the management board and the supervisory board refer the matter to the shareholders' meeting or if the supervisory board does not approve the annual financial statements as submitted by the management board;

- distribution of profits and release from liability of the management board and supervisory board for a specific fiscal year;
- increase and decrease of the share capital; and
- reorganisation matters (spin-offs, mergers, etc).

5 Disproportionate voting rights

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

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

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

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

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

6 Shareholders' meetings and voting

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

Shareholders' meetings are called by the management board. The convocation must be published and must state, inter alia, the name of the company as well as the time and place of the meeting. Pursuant to the Austrian Stock Corporation Amendment Act 2009, which implemented EU Directive No. 2007/36 on the exercise of certain rights of shareholders in listed companies, the last publication of the convocation must be made no later than 28 days before the date of the ordinary general meeting and apart from that not later than 21 days before the meeting, unless the articles of association provide a longer period. The articles of association of the company may also provide or can authorise the management board to provide that the shareholders attend the general meeting by means of electronic communication to exercise particular or all of their rights.

7 Shareholders and the board

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

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

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

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

8 Controlling shareholders' duties

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

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

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

9 Shareholder responsibility

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

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

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

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

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

Corporate control

10 Anti-takeover devices

Are anti-takeover devices permitted?

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

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

11 Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

Pursuant to the Stock Corporation Act, an increase in the nominal capital by issuing new shares may only be passed by a majority of at least three-quarters of the capital represented at the time of the passing of the resolution. The articles of association may replace such majority by another capital majority and may impose additional requirements. In the case of so-called authorised capital, the articles of association may authorise the management board, for a period of no more than five years following registration of the company, to increase the nominal capital up to a certain par value by issuing new shares against contributions. Such authorisation may also be given by an amendment to the articles of association for a period of no more than five years after registration of such amendment. The resolution of the general meeting requires a majority of at least three-quarters of the nominal capital represented at the time the resolution is adopted.

In the case of a capital increase, the shareholders have a pre-emptive right according to which each shareholder, upon their request, shall be apportioned new shares in proportion to his or her shareholding in the previous nominal capital. The pre-emptive right may only be excluded in whole or in part in the resolution regarding the capital increase whereby the resolution shall require a majority of at least three-quarters of the nominal capital represented at the time the resolution is adopted, unless the articles of association require a higher capital majority and provide for additional requirements. Since the entry into force of the Stock Corporation Amendment Act 2009, such resolution may only be passed if such exclusion has been explicitly announced in the agenda.

12 Restrictions on the transfer of fully paid shares

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

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

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

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

13 Compulsory repurchase rules

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

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

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

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

14 Dissenters' rights

Do shareholders have appraisal rights?

Since corporate restructuring usually encroaches upon the rights of the shareholders, Austrian corporate law provides provisions to safeguard the interests of shareholders as in the case of a stock corporation and a limited liability company. A stock corporation may be merged with a limited liability company by means of a transfer of the stock corporation's assets to such limited liability company by way of universal succession against the issuance of company shares. In such a case, the law provides objecting shareholders of the company being acquired with a right of withdrawal.

If a company being acquired has a different legal form than the acquiring or the new company, the merger agreement or a draft of this agreement must also contain the terms of the cash compensation offered by the acquiring or new company, or third party, to the shareholder of the company being acquired. The shareholder of the com-

pany being acquired who has appealed against the merger resolution in writing is entitled, regarding the acquiring or new company, or the third party offering the cash compensation, to appropriate cash compensation upon surrender of its shares if it has been a shareholder from the time the resolution was adopted by the shareholders' meeting up to and including the time when the right was asserted. The right to appropriate cash compensation can be excluded or restricted in a company agreement of a limited liability company. The right can be excluded or restricted by amending the company agreement if all shareholders agree to the amendment.

Legal protection instruments are also provided for in the event of a demerger that does not maintain existing ratios. The law on demergers provides a right of withdrawal to those shareholders who have not agreed to the articles of association and who do not hold the same ratio of shares in all of the companies resulting from the demerger. To this end, cash compensation must be fixed in the demerger plan. The shareholders concerned can have the size of said cash compensation reviewed by the courts.

The responsibilities of the board (supervisory)

15 Board structure

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

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

16 Board's legal responsibilities

What are the board's primary legal responsibilities?

The supervisory board is bound to supervise the management of the company. At any time, the supervisory board can request a report from the management board concerning company matters, including the company's relations with other companies in the group. This request may be raised by a single member of the supervisory board. If the management board refuses to grant the request, however, the request can only be sustained if another member of the supervisory board also requests a report. The supervisory board may also inspect and review all books and documents of the company, including its assets, in particular, cash assets and its stock of securities and goods. Certain transactions can only be effected by the management after approval of the supervisory board. The obligation of the management board to obtain prior approval from the supervisory board does not, however, affect the validity of the mentioned transaction as regards third parties, but may make the management board liable for any damages resulting from it.

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

17 Board obligees

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

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

18 Enforcement action against directors

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

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

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

19 Care and prudence

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

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

20 Board member duties

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

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

21 Delegation of board responsibilities

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

The management board is responsible for the management of the company. However, the management board may grant special power of attorney to employees for certain cases of daily business. The

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

22 Non-executive and independent directors

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

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

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

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

23 Board chairman and CEO

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

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

24 Board committees

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

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

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

25 Board meetings

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

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

26 Board practices

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

Pursuant to the Stock Corporation Act the candidates for election to the supervisory board for a listed company shall be announced and presented on the website of the company five days prior to the shareholders' meeting together with declarations of the candidates regarding their professional skills, professional or comparable functions and any circumstances that might give rise to concerns regarding their impartiality, otherwise the respective person may not be included in the ballot. According to the Corporate Governance Code, a calendar of corporate financial events shall be posted at least two months before the beginning of the new business year on the website of the company. This shall contain all dates of relevance for investors and other stakeholders for the next business year (rule 74). The company shall regularly hold conference calls or similar information events for analysts and investors; if demand is high, also on a quarterly basis. As a minimum requirement, the information documents (presentations) used shall be made available to the public on the website of the company. Other events of relevance for the capital market such as annual general meetings shall be made accessible on the company's website, if the costs are reasonable, in the form of audio and video transmissions (rule 75). Rules 74 and 75 of the Corporate Governance Code are not mandatory.

27 Remuneration of directors

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

According to section 78 of the Stock Corporation Act, the supervisory board shall ensure the total remuneration of the members of the management board (salaries, profit participation, insurance payments, commissions and ancillary considerations) be proportionate to the duties of each member of the management board and to the situation of

the company. The same shall be applied mutatis mutandis to pensions, payments to surviving dependants and services of a similar kind.

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

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

According to section 95/5/12 of the Stock Corporation Act, the conclusion of agreements between members of the supervisory board and the company or subsidiaries of the company for a non-insignificant consideration requires the approval of the supervisory board. The same applies for agreements with enterprises in which the respective member of the supervisory board has an economic interest.

28 Remuneration of senior management

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

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

In the event that bankruptcy proceedings have been opened as to the assets of the company and the receiver has terminated the employment agreement of a member of the management board, this member may demand compensation for any damages resulting from the termination of the employment relationship only within a time period of two years after the termination.

The members of the management board shall not be entitled to carry on a trade or to enter into any business transactions on his or her own account or on account of others that fall within the company's scope of business unless the supervisory board gives its approval thereto. Moreover, they may not act as general partner for any other trading company. If a member of the management board violates this prohibition, the company shall be entitled to claim damages or instead demand that the member turns over to the company the transactions entered into on his or her own account and any remuneration earned from transactions made on the account of others or to assign any rights to such remuneration. Any such claims of the company shall accrue when the remaining members of the management board and of the supervisory board learn of the cause of action and shall bear a three-month statute of limitations. If the claim is not brought to the attention of the other members, the statute of limitations shall be five years and start to run at the time the cause of action accrues (Stock Corporation Act, section 79). In relation to section 80 of the Stock Corporation Act, a loan may be granted to members of the management board and executives of the company only if explicitly approved by the supervisory board.

29 D&O liability insurance

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

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

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

30 Indemnification of directors and officers

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

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

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

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

31 Exculpation of directors and officers

To what extent may companies preclude or limit the liability of directors and officers?

Each year the shareholders' meeting resolves upon the discharge of the members of the management board and the supervisory board. Under certain conditions, the resolution upon the discharge may exceptionally be regarded as an implied waiver of liability claims if the other prerequisites are given and, further, if the shareholders have knowledge at the time the resolution was passed regarding the facts leading to the obligation to pay damages or compensation, or if they must have had such knowledge after having carefully inspected the documents made available to them. However, the assumption of an implied waiver requires a severe examination since the discharge is deemed a vote of confidence and in cases of doubt is not a waiver.

32 Employees

What role do employees play in corporate governance?

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

Update and trends

The Stock Corporation Amendment Act 2009 and the EU recommendation on the regime for the remuneration of directors of listed companies necessitate adjustments to the Austrian Corporate Governance Code, which were implemented by the code 2010. With respect to the Stock Corporation Amendment Act 2009, the new code stipulates that the announcement of the convocation of a general meeting must be published at least 28 days prior to the ordinary general meeting and apart from that, no later than 21 days before the meeting, unless the articles of association provide for longer periods. The invitation and the documents pursuant to the Austrian Stock Corporation Act must be made available on the company's website 21 days prior to the general meeting. Greater transparency shall also be achieved regarding the election proceedings of the supervisory board members as proposals for the election of members of the supervisory board together with declarations pursuant to the Austrian Stock Corporation Act must be published on the company's website no later than five working days prior to the general meeting, otherwise the person in question will not be allowed to be included in the ballot. The resolutions adopted at the general meeting and the documents required under the Austrian Stock Corporation Act must be published on the company's website no later than two working days after the general meeting. Moreover, rule 15 stipulates that the management board is responsible for the implementation of its resolutions and takes suitable precautions to ensure that the company complies with and observes all relevant laws.

The amendments to the Corporate Governance Code also contain provisions for the implementation of the EU remuneration recommendation. Pursuant to rule 27, the following principles are observed when concluding contractual agreements with the management board: the remuneration of the management board is based on the scope of their duties, the responsibilities they shoulder and the personal achievements of individual members, as well as on the achievement of company objectives and the financial position of the company. Remuneration is comprised of fixed and variable components. The variable components are based, in particular, on sustainable and long-term performance and these components may not be an incentive for members to take inappropriate risks. Certain ceilings for measurable performance criteria as well as fixed or percentage-based remuneration components (or both) must be fixed in advance with regard to variable remuneration components.

Rule 27 is formulated as a comply-or-explain rule, as is rule 27a. Pursuant to the latter rule, with respect to contractual agreements with the management board, care must be taken to ensure that compensation (severance) payments made to an individual board member on premature termination without good cause of his or her contract do not exceed more than two years' compensation and not more than the compensation which would be due during the remaining period of the employment contract. No compensation is to be paid in the event that a member of the management prematurely terminates his or her management contract for good cause. On the premature termination of the contract of a board member, the agreements reached regarding compensation (severance) payments shall take into consideration the circumstances under which the member of the management board in question leaves his or her position, as well as the financial position of the company.

Furthermore, the content of the corporate governance report, which needs to be prepared by joint stock companies within the meaning of section 243(b) of the Commercial Code, has been enlarged in the course of the Corporate Governance Code revision. The additional information refers to the remuneration of the management board.

Pursuant to the comply-or-explain rule 43, the supervisory board shall establish a remuneration committee, the chairman of which is always the chairman of the supervisory board. The remuneration committee examines the content of employment contracts entered into with members of the management board and reviews the remuneration policy for members of the management board at regular intervals. At least one member of the remuneration committee has knowledge and experience in the field of remuneration policy. If the remuneration committee employs the services of an adviser, it must be ensured that this advisor does not also advise the management board on questions relating to remuneration. The chairman of the supervisory board informs the general meeting once a year regarding the principles of the remuneration system.

Disclosure and transparency

33 Corporate charter and by-laws

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

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

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

34 Company information

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

Within the first five months of the fiscal year, the management board has to prepare the annual balance sheet together with a report on the state of the company, the profit and loss statement and the proposal for profit distribution to be presented to the supervisory board. The legal representatives of a company within the meaning of section 243b of the Commercial Code are also required to prepare a corporate governance report and to submit this to the supervisory board along with the annual financial statements and the proposal for the distribution of profits. The supervisory board approves the reports and the annual financial statements are formally confirmed. The management board has to deposit the financial statements together with the audit certificate with the commercial register without delay. The management of a large stock corporation (as defined by law) is required to publish without delay the financial statements and the audit certificate in the official gazette. Similar obligations exist with regard to consolidated financial statements and consolidated reports on the state of the group.

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

Key disclosure requirements include the following:

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

- issuers of financial instruments shall inform the public as soon as possible of insider information that directly concerns the issuer.

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

Hot topics

35 Say-on-pay

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

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

The supervisory board, which is exclusively competent for the remuneration of the members of the management board, shall ensure that the total remuneration of the members of the management board (salaries, profit participations, compensation for expenditures, insurance payments, commission and ancillary considerations of any kind) be proportionate to the duties of each member of the management board and to the situation of the company. The same shall be applied mutatis mutandis to pensions, surviving dependents and services of a similar kind. Furthermore, the supervisory board may grant the members of the management board in return for their service a share in the profits, which shall consist of a share of the annual surplus.

In case of stock options granted, the number and distribution of the options granted, the exercise prices and the respective estimated values at the time they are issued and upon exercise shall be reported in the annual report. The total remuneration of the management board for a business year must be reported in the notes to the financial statements. In addition, the corporate governance report shall, pursuant to comply-or-explain rule 30 of the Corporate Governance Code, contain the following information:

- the principles applied by the company for granting the management board performance-linked payments, especially regarding the performance criteria, the methods by means of which fulfilment of the performance criteria is determined, the specific upper limits for variable remuneration, and specified own contributions and periods pursuant to rule 28; moreover, any major changes versus the previous year must also be reported;
- the relationship of fixed to performance-linked components of total compensation of the management board;
- the principles of the company retirement plan for the management board and the conditions;
- the principles applicable to eligibility and claims of the management board of the company in the event of termination of the function; and
- the existence of any possible D&O insurance, if the costs will be borne by the company.

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

36 Proxy solicitation

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

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

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

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