

THE CORPORATE  
GOVERNANCE  
REVIEW

SEVENTH EDITION

**Editor**  
Willem J L Calkoen

THE LAWREVIEWS

# THE CORPORATE GOVERNANCE REVIEW

The Corporate Governance Review

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This article was first published in The Corporate Governance Review - Edition 7  
(published in March 2017 – editor Willem J L Calkoen)

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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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[www.TheLawReviews.co.uk](http://www.TheLawReviews.co.uk)

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Enquiries concerning editorial content should be directed  
to the Publisher – [gideon.roberton@lbresearch.com](mailto:gideon.roberton@lbresearch.com)

ISBN 978-1-910813-51-5

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

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# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA

A&L GOODBODY

BÄR & KARRER AG

BHARUCHA & PARTNERS

BREDIN PRAT

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# PREFACE

I am proud to present this new edition of *The Corporate Governance Review* to you.

In this seventh edition, we can see that corporate governance is becoming a more vital and all-encompassing topic with each year that passes. We all realise that the modern corporation is one of the most ingenious concepts ever devised. Our lives are dominated by corporations. We eat and breathe through them, we travel with them, we are entertained by them, most of us work for them. Most corporations aim to add value to society and they very often do. Some, however, are exploiting, polluting, poisoning and impoverishing us. A lot depends on the commitment, direction and aims of a corporation's founders, shareholders, boards and management and employees. Do they show commitment to all stakeholders and to long-term shareholders, or mainly to short-term shareholders? There are many variations on the structure of corporations and boards within each country and between countries. All will agree that much depends on the personalities and commitment of the persons of influence in the corporation.

We see that everyone wants to be involved in 'better corporate governance': parliaments, governments, the European Commission, the US Securities and Exchange Commission (SEC), the Organisation for Economic Co-operation and Development (OECD), the UN's Ruggie reports, the media, supervising national banks, more and more shareholder activists and other stakeholders. The business world is getting more complex and overregulated, and there are more black swans, while good strategies can quite quickly become outdated. Most directors are working diligently, many with even more diligence. Nevertheless, there have been failures in some sectors, so trust has to be regained. How can directors do all their increasingly complex work and communicate with all the parties mentioned above?

What should executive directors know? What should non-executive directors know? What systems should they set up for better enterprise risk management? How can chairs create a balance against imperial CEOs? Can lead or senior directors create sufficient balance? Should most non-executive directors understand the business? How much time should they spend on their function? How independent must they be? What about diversity? Should their pay be lower? What are the stewardship responsibilities of shareholders? What are the pros and cons of shareholder rights plans?

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards. We see a large influence on 'norms' by codes and influential investor groups.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, far-sighted boards have 'selected engagements' with stewardship shareholders to create trust.

What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better ‘tone from the top’? Should they put big signs on their buildings emphasising integrity, stewardship and respect?

Interest in corporate governance has been increasing since 1992, when shareholder activists forced out the CEO at General Motors and the first corporate governance code – the Cadbury Code – was written. The OECD produced a model code and many countries produced national versions along the lines of the Cadbury ‘comply or explain’ model. This has generally led to more transparency, accountability, fairness and responsibility. However, there have been instances where CEOs gradually amassed too much power or companies have not developed new strategies and have produced bad results – and sometimes even failure. More are failing since the global financial crisis than previously, hence the increased outside interest in legislation, further supervision and new corporate governance codes for boards, and stewardship codes for shareholders and shareholder activists. The European Commission is developing a regulation for this area as well.

This all implies that executive and non-executive directors should work harder and more as a team on policy, strategy and entrepreneurship. More money is lost through lax or poor directorship than through mistakes. On the other hand, corporate risk management is an essential part of directors’ responsibilities, and sets the tone from the top. How can directors do their important work well without being petrified of attacks from shareholders’ regulations and the press?

Each country has its own measures; however, the chapters of this book also show a convergence. The concept underlying the book is of a one-volume text containing a series of reasonably short, but sufficiently detailed, jurisdictional overviews that permit convenient comparisons, where a quick ‘first look’ at key issues would be helpful to general counsel and their clients.

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen, in time, as an essential reference work in our field. To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law and best practice by reading about the laws and practices of others. Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

**Willem J L Calkoen**

NautaDutilh  
Rotterdam  
March 2017

# AUSTRIA

*Martin Abram and Clemens Ph Schindler*<sup>1</sup>

## I OVERVIEW OF GOVERNANCE REGIME

Austrian listed companies are incorporated in the form of a joint-stock corporation (JSC) or – less frequently – a European company (SE).<sup>2</sup> The most relevant sources of law for listed companies are:

- a* the Stock Corporation Act or the Societas Europaea Act and the SE Regulation, which set forth the organisational framework for the company;
- b* the Stock Exchange Act, which regulates disclosure obligations, as well as the rules on insider trading, market manipulation and directors' dealings;
- c* the Takeover Act, which sets forth the framework for public takeover bids;
- d* the Commercial Code, which contains the applicable Austrian accounting rules;
- e* the Accounting Control Act, which is aimed at ensuring that financial and other information published by listed companies complies with national and international accounting standards;
- f* the (non-binding) Corporate Governance Code, which contains best practice rules and recommendations for listed companies; and
- g* regulations and circulars by the Austrian Financial Market Authority.

As regards the Corporate Governance Code, it is principally non-binding and only applies to listed JSCs or SEs that have committed themselves to complying with the Corporate Governance Code; however, such a commitment is a prerequisite for entry to the prime market of the Vienna Stock Exchange.

Listed companies are subject to the supervision of the Financial Market Authority (in particular regarding insider trading, market manipulation and directors' dealings), the Takeover Commission (regarding takeover bids) and the Austrian Financial Reporting Audit Panel (for audits pursuant to the Accounting Control Act, unless the audits are made by the Financial Market Authority).

## II CORPORATE LEADERSHIP

Most Austrian-based listed companies have a two-tier board structure (consisting of a management board and a supervisory board), even though the two-tier structure is only

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1 Martin Abram and Clemens Ph Schindler are partners at Schindler Rechtsanwälte GmbH.

2 Societas Europaea.

mandatory for JSCs – SEs may choose between a one- or two-tier structure. As there are only a few companies that have opted for a one-tier structure, the following overview will focus only on the two-tier structure.

## **i Board structure and practices**

### ***Management board***

#### *Role*

The management board is responsible for managing the operations of the company, taking into account (as the Stock Corporation Act provides) the interests of the shareholders, the employees and the public good. In performing its function, the management board is not subject to instructions by the supervisory board or the shareholders; however, certain decisions (such as the determination of business principles and the establishment or closure of business lines or production branches) and transactions (such as the sale or acquisition of shares or real estate, the granting and taking up of loans exceeding certain thresholds, investment above certain thresholds) are subject to the consent of the supervisory board. These consent requirements are based on the Stock Corporation Act, but can (and typically are) made more specific or be expanded in the rules of procedure for the management board or – less frequently for listed companies – in the articles of association. Certain transactions and decisions (e.g., acquisition of treasury stock, issuance of new shares or bonds, mergers, spin-offs or dissolution) require the prior consent of the shareholders' meeting. Further, the management board may decide, or be required (see Section V.i, *infra*), to ask the shareholders' meeting for instructions on or approval of certain transactions.

#### *Composition*

According to the law, the management board can have one or more members. For certain regulated businesses (such as financial institutions or insurance companies), at least two members need to be appointed. In practice, listed JSCs have more than two members.

As a general rule, any two management board members together can represent the company, except if the articles of association allow for single signing authority and the appointment resolution bestows such single signing authority on a board member.

The signing authority of each board member is published in the Companies Register; in business dealings, third parties can rely on this information in the Companies Register (if acting in good faith), even if the management board members fail to comply with internal restrictions on their representation powers.

#### *Chairperson*

If two or more management board members are appointed, the supervisory board typically also appoints the CEO of the company as the chairperson of the management board. In the event of a tied vote, the chairperson has the deciding vote, except if the articles of association provide for otherwise. In addition to the specific tasks delegated to him or her by (typically) the by-laws, the chairperson of the management board also is responsible for the preparation, convocation and documentation of the meetings of the management board. However, the chairperson is not entitled to give instructions to the other board members.

### *Delegation of tasks and committees*

Even though the Stock Corporation Act provides that the operations of a JSC are managed by the members of the management board collectively, it is customary (and recommended by the Corporate Governance Code) that the various members of the management board have specific areas of responsibility (i.e., they would each be responsible for certain departments). This allocation is established either in the articles of association or the by-laws of the management board (which are adopted by the supervisory board) or by the management board itself. Even when certain management tasks are allocated exclusively to certain management board members, the other management board members are still responsible for proper supervision of the due performance of these tasks. Certain tasks cannot be delegated to individual board members (such as decisions on the fundamental business policy of the company or the convocation of general meetings where the company's equity is equal to or lower than its stated capital). It is not customary for the management board to establish committees. It has to be noted that the allocation of tasks among the members of the management board does not dispense the management board members from keeping themselves informed of (and obtaining information about) developments and activities in areas allocated to other management board members or from acting if they perceive any deficits.

### ***Supervisory board***

#### *Role*

The supervisory board is tasked with the control and monitoring of the management board. In performing its functions, the supervisory board is not bound to instructions by the management board or the shareholders. The supervisory board can request reports of the management board and can inspect the books and records of the company. The supervisory board needs to hold a meeting at least every calendar quarter.

#### *Composition*

According to law, the supervisory board must have at least three and no more than 20 members elected or nominated by the shareholders. For listed companies, the Corporate Governance Code recommends a maximum of 10 supervisory board members elected or nominated by the shareholders.

#### *Representation of the company*

Neither the supervisory board nor any of its members are entitled to represent the company, except in connection with the conclusion, amendment or termination of a director's agreement and legal proceedings of the company against the members of the management board. In such cases, the supervisory board is represented by its chairperson.

#### *Chairperson*

The supervisory board is required to elect from its midst a chairperson and (at least one) vice chairperson. Even though this means that a representative delegated by the employees' council could also be so elected, in practice these positions are predominately taken up by supervisory board members elected or nominated by the shareholders. Besides certain administrative duties (such as the convocation of the supervisory board meetings, the preparation of the agenda), the chairperson of the supervisory board also takes the chair of the (annual or

extraordinary) general meeting, is entitled to demand a report from the management board even without the support of other supervisory board members and is required to sign certain applications of the company with the Companies Register.

#### *Delegation of tasks and committees*

The Stock Corporation Act allows for (and in one case mandates), and the Corporate Governance Code recommends, the establishment of committees of the supervisory board. Each committee established must have at least three members. For listed companies, the establishment of an audit committee is mandatory; in addition, the Corporate Governance Code recommends the creation of a nomination and compensation committee. The mandatory audit committee is basically responsible for the monitoring of the company's accounting process, the internal control systems and the audit of the financial statements (and related documents), including the preparation for their approval. The audit committee is also tasked with proposing the auditor of the company to the general meeting and with monitoring the independence of the appointed auditor. One member of the audit committee must be a person with special knowledge and practical experience in finance and accounting and reporting. If established, a remuneration and nomination committee is responsible for negotiating and approving directors' agreements, determining general policies for the remuneration of the management board, preparing nominations for the appointment of new management board members (including successor planning) as well as for the appointment of new supervisory board members.

#### ***Remuneration of the management board***

As mentioned above, the remuneration of the members of the management board is decided by the supervisory board (or the compensation committee, if any).

In determining the compensation for a management board member (which includes payments, bonuses, stock options or benefits in kind), several aspects have to be taken into account. The compensation should be appropriate both for the tasks allocated to the board member and the overall economic situation of the company. The compensation should include a fixed and variable component; as regards the criteria for the variable component, they should be chosen so as not to incentivise inappropriate risks and should not exclusively be based on financial figures. If management board members receive stock options, the vesting period must not be less than three years and vesting should be based on long-term, measurable and sustainable criteria. There should be contractual safeguards implemented in the directors' agreements to clawback variable payments in the event the pay-out decision was based on obviously false data. Finally, the management board members should not be entitled to redundancy payments if their director's agreement is terminated on important grounds; also redundancy payments should in any case be no more than two years' salary. The same principles also apply to senior management.

The remuneration of the management board has to be published both in the annual financial statements (on an aggregate basis) as well as the annual corporate governance report (on an individual basis, including the split between fixed and variable remuneration). The annual financial statements also have to disclose the number of stock options granted to the management board members.

### ***Remuneration of the supervisory board***

The remuneration of the members of the supervisory board is either determined in the articles of association of the company or (more frequently) by a decision of the general meeting. Remuneration for supervisory board members in Austria is relatively low compared with other countries (although a certain trend to raise the remuneration can be reported for the recent past), and usually comprises of a base remuneration (which is typically higher for the chairperson, vice chairperson and committee members) and a meeting fee (which will only be paid to members attending the meeting). The remuneration of each supervisory board member is published annually in the corporate governance report of listed companies. While it is possible for supervisory board members to participate in stock option programmes, the Corporate Governance Code does not recommend such participation.

### ***Board and company practice in takeovers***

When faced with a takeover offer, the boards of the target company are bound by the objectivity principle set forth in the Takeover Act. This means that they are barred from taking any measures that would prevent the shareholders from taking a free and duly informed decision about the offer.

Both boards of a JSC are required to publish a reasoned statement regarding the offer, which is subject to a mandatory review by an independent expert. The statement has to contain, *inter alia*, an assessment of (1) the consideration offered by the bidder; (2) the expected consequences of a successful takeover for the company, its employees (in particular the terms and conditions of employment and working conditions) and creditors; (3) the strategic goals pursued by the bidder; and (4) information on whether the members of the management board and the supervisory board recommend shareholders to accept the offer. If such a recommendation is deemed by the boards to be inappropriate, they are obliged to state arguments both for and against the acceptance of the offer.

## **ii Directors**

### ***Management board***

#### *Appointment*

Members of the management board are appointed by the supervisory board for a period of up to five years. It is possible (and customary) to renew an appointment, with the renewed term again being subject to the five-year limit. According to the Corporate Governance Code, the supervisory board is required to define profiles for the respective management board members and an appointment procedure as a basis for the appointment decision. There are currently no special rules aiming at promoting diversity or appropriate representation of women in Austria (unlike, for example, in Germany), although the Austrian government has published its intention to introduce such rules (mainly for listed companies) in 2018. Supervisory board members may not be appointed management board members of the same company; for certain regulated industries, candidates for the management board need to fulfil additional criteria or pass a ‘fit and proper’ test before they can be appointed.

#### *Dismissal*

Members of the management board can be dismissed by the supervisory board before the end of term only on important grounds, in particular if the board member has materially

breached his or her duties, the board member is unable to properly carry out his or her duties (both for health reasons or lack of required skills or knowledge) or the shareholders adopted a vote of no-confidence (except if the vote was adopted for obviously inappropriate reasons).

### *Duties*

As a general matter, the members of the management board of an Austrian company owe to the company (not the shareholders or any other constituents) the following duties: (1) the duty of care, requiring members to exercise the level of care of a proper and diligent person in similar circumstances (which includes an obligation to be reasonably informed about areas allocated to other board members and articulate any concerns they may have); (2) the duty of loyalty, requiring members to act in the best interest of the corporation (taking into account the interest of its shareholders, employees and the public good) and not in their own interest; (3) the duty of confidentiality; and (4) a duty not to compete.

### *Liability*

Wilful or negligent failure to comply with these duties results in the personal liability of the responsible board members, unless the general meeting has lawfully approved the measure resulting in the damage. As regards the duty of care, not every decision or transaction that results in a loss for the company is automatically deemed a breach. Based on the business judgement rule, which was recently included in statutory law, management board members are allowed to assume risks provided that the risks are not outside normal business practice or inappropriate given the economic situation of the company. A JSC may waive or settle its damage claims with an affirmative shareholder vote of 80 per cent after five years, or even before that with an affirmative vote of all shareholders.

### *Conflicts of interest*

As a general rule, management board members shall take their decisions without being influenced by their own interests or the interests of controlling shareholders. If a management board member has a material personal interest in transactions of the company (or its subsidiaries) or other conflicts of interest, he or she has to inform the supervisory board and the other management board members without delay. Any transactions of the company with a management board member (or its related persons or entities) need to be on arm's-length terms, have to meet industry standards and have to be approved by the supervisory board. For other conflicts of interest not involving such transactions, the management board member should not participate in any discussions of the management board concerning the topic and be excluded from any information flow in this respect. There are also statutory provisions and recommendations in place aimed at preventing (or limiting) potential conflicts of interest: The aforementioned non-compete duty prohibits management board members from operating other businesses, becoming supervisory board members in non-affiliated companies, becoming general partners of (entrepreneurial) partnerships or engage in business transactions in the company's field of business, except – in each case – with the consent of the supervisory board. The Corporate Governance Code also recommends that management board members should not sit on more than four (or chair more than two) supervisory boards of non-affiliated companies, even with the supervisory board's approval. The Corporate Governance Code also recommends implementing similar restrictions for senior management. Finally, management board members are prohibited from becoming

supervisory board members of the same company for a period of two years following the end of their term on the management board, unless they were nominated by shareholders holding more than 25 per cent of the total voting rights of the company.

Conflicts of interest may also arise in connection with any dealings by a management board member (or its related persons or entities) in the stock of the company (director's dealings). In this respect, management board members are required to report such trades to the Financial Market Authority within five banking days; the Financial Market Authority maintains a publicly accessible database for the reported trades. Additionally, listed companies are required to issue internal compliance guidelines that deal with the handling of, and the monitoring of access to, potential insider information. These internal compliance guidelines and their implementation are monitored by the Financial Market Authority.

### ***Supervisory board***

#### *Appointment*

Members of the supervisory board are elected by the shareholders meeting, usually at an annual general meeting; the articles of association can also bestow nomination rights to shareholders (for up to one-third of the total number of supervisory board members). Supervisory board members are elected for a limited term, which has to expire – by law – at the latest with the completion of the fifth annual general meeting after their election. Re-elections are permissible. No term limitations are mandated for nominated supervisory board members. The Stock Corporation Act provides that shareholders should consider the following aspects when electing supervisory board members: (1) the professional and personal qualifications of the candidates, (2) that the composition of the supervisory board (and the respective professional qualifications of its members) adequately accounts for the structure and business of the company and (3) diversity, appropriate age structure and internationality as well as appropriate representation of women on the supervisory board. Persons already holding multiple supervisory board positions (i.e., 10 positions in non-listed companies or eight positions in listed companies (with positions as chairman counting double) – or a combination thereof) may not run for further supervisory board positions in listed companies. Also, persons holding managerial functions in the JSC or any of its affiliated companies may not be elected to the supervisory board.

The employees' council (if established) of a listed JSC is entitled to delegate employee representatives to the supervisory board. For every two supervisory board members elected or nominated by the shareholders, the employees' council can delegate one representative. If the number of supervisory board members elected or nominated by the shareholders, is uneven, the number of representatives to be delegated by the employees' council is calculated based on the next highest even number (e.g., if there are seven supervisory board members elected or nominated by the shareholders, the employees' council can delegate four representatives).

#### *Dismissal*

Members of the supervisory board can be removed from office during their term of appointment by a shareholders' resolution that requires a 75 per cent majority of the votes cast, unless the articles of association provide for otherwise. Members of the supervisory board delegated by the employees' council can be recalled at any time by the employees' council.

### *Duties*

Members of the supervisory board are in principle subject to the same duties as the members of the management board, which are scaled down to reflect that fact that the supervisory board members are mainly tasked with the monitoring and review of the conduct of the management board. One exception is that supervisory board members are not explicitly prohibited from competing with the company. Any actual competition will, however, always be under scrutiny under the duty of loyalty to the company.

### *Liability*

The liability standards applicable to management board members also apply to supervisory board members.

### *Conflicts of interest*

In principle, the provisions regarding conflicts of interest of management board members also apply to supervisory board members, except that supervisory board members are not subject to a statutory non-compete obligation. In this respect, the Corporate Governance Code recommends supervisory board members not to assume functions on the boards of competing companies. As a precautionary measure, candidates running for a position on the supervisory board have to present to the general meeting information on all positions they hold and all other circumstances that could give rise to potential conflicts of interest. Supervisory board members are also subject to the same director's dealing requirements as members of the management board and are typically also covered by the internal compliance guidelines of the company.

## **III DISCLOSURE**

Listed companies are required to prepare (consolidated) annual financial statements and half-yearly financial report. In most cases, listed companies also prepare quarterly reports. The financial statements and reports have to be prepared in accordance with IFRS. In addition, listed companies also have to prepare stand-alone annual reports in accordance with Austrian GAAP.

The annual financial statements need to be audited by an independent auditor or auditing firm appointed by the general meeting based on a recommendation of the audit committee. Any auditor or auditing firm proposed as the annual auditor has to provide a statement to the general meeting confirming that neither of the statutory exclusion reasons apply, and disclosing its business dealings with the company during the past business year.

Listed companies also have to publish a corporate governance report together with the annual financial statements. Besides certain information on the organisation, composition and remuneration of the boards of the company, and on the measures to promote appropriate representation of women on the management board, the supervisory board and in executive positions, the report in particular has to include a corporate governance statement. This statement has to include information whether – and if so in what form – the company deviates from any 'comply or explain' rules of the Corporate Governance Code.

Additionally, listed companies and their directors are subject to various disclosure requirements under the Stock Exchange Act, such as publication of directors' dealings and *ad hoc* disclosure. *Ad hoc* disclosure is aimed at preventing insider trading and requires listed companies to publish without undue delay any non-public information relating to the issuer

that could have a material impact on the market price of the securities of the company. Finally, shareholders of listed companies are faced with a statutory obligation to notify the company and the Financial Market Authority, if their shareholdings (whether direct or indirect) exceed certain thresholds (starting at 4 per cent, unless the articles of association lower the threshold to 3 per cent).

#### **IV CORPORATE RESPONSIBILITY**

Corporate responsibility and compliance have become important topics in recent years, in particular in connection with corruption scandals and highly publicised criminal proceedings against management board members regarding anticompetitive practices. As a consequence, listed companies have introduced compliance codes and installed compliance officers. These compliance codes materially influence the daily corporate life and usually emphasise the ‘tone from the top’ principle. Many companies have also established whistle-blowing hotlines. The establishment of such hotlines, however, is only possible after the company has received the consent of the Austrian Data Protection Authority. This permission is no mere formality, and usually requires the listed company to adhere to certain impositions by the Data Protection Authority; additionally the Data Protection Authority also demands that the company conclude a shop agreement with the employee’s council regarding the hotline before granting its permission.

#### **V SHAREHOLDERS**

##### **i Shareholder rights and powers**

Shares in JSCs have – except for limited exceptions provided by law – equal rights (i.e., equal voting, dividend and information rights). The Stock Corporation Act expressly prohibits ‘golden shares’ (i.e., shares with multiple or disproportionately higher voting rights). However, it is permissible for the articles of association to introduce maximum voting rights or staggered voting rights. Also, a JSC may issue non-voting preferred shares based on a shareholder resolution, whereas the nominal amount of such non-voting shares may not exceed one-third of the aggregate stated capital of the JSC.

Shareholders in listed companies have no direct influence on the management board and are not permitted to issue instructions or otherwise direct the management board. Their influence is limited to certain reserved decisions, which fall into the following three categories. First, certain decisions (such as changes of the articles of association, the appointment of supervisory board members, the appropriation of distributable profit, acquisition of treasury stock, issuance of new shares or bonds, mergers, spin-offs or dissolution) require a shareholder resolution by operation of law. Second, the management board or the supervisory board may put certain decisions to the shareholders, if no agreement can be reached among the boards. Third, there is an obligation to put certain fundamental business decisions to a vote by the shareholders; this requirement is not based on a statutory obligation, but on a doctrine developed by the German Supreme Court, which was also followed by the Austrian Supreme Court.

Other rights of the shareholders include the right to demand a convocation of a shareholder meeting and the right to put certain matters on the agenda of a general meeting convened shareholder meeting (which requires the requesting shareholders to hold at least 5 per cent of the stated capital, unless the articles of association provide for a lower

threshold) and the right to demand a special audit of the company (which requires the requesting shareholders to hold at least 10 per cent of the stated capital). All shareholders are entitled to request information on all items on the agenda in a shareholders' meeting, and are furthermore entitled to request that any of their statements (and the responses thereto) are recorded verbatim in the meeting minutes.

Dissenting shareholders are entitled to object to resolutions passed at a shareholders meeting and can (if an objection was made) file for annulment or rescission of a resolution with the competent court in limited circumstances.

## **ii Shareholders' duties and responsibilities**

Shareholders of a JSC (both controlling and minority) are subject to a fiduciary duty requiring them not to directly causing harm to the company in the exercise of their shareholder right. Shareholders' resolutions breaching fiduciary duties may be contested and may give raise to damage claims against the JSC and its shareholders. Shareholders breaching this fiduciary duty may also be subject to damage claims by the company.

There are no specific duties for institutional investors above the general duties applicable to all shareholders. Also, there is no code of best practice for shareholders of Austrian listed companies.

## **iii Shareholder activism**

Shareholder activism has traditionally not played an important role in Austria (unlike Germany). More recently, Austrian activist shareholders as well as the Austrian Shareholder Association have taken a more active role in representing free float shareholders.

Proxy battles do occur, but not very frequently. The most recent example was an (initially unsuccessful) proxy battle at the general meeting of Conwert SE, where minority shareholders tried to have two candidates elected to the board. This attempt was initially thwarted as the chairman of the meeting decided to suspend the voting rights of certain shareholders owing to alleged violations of the Takeover Act, which led to the election of two candidates proposed by the board. The minority shareholders then initiated legal proceedings aiming at the annulment of this election. Ultimately, the minority shareholders prevailed, as Conwert decided not to continue its objection against the legal proceedings.

As mentioned before, shareholders in Austrian listed companies have no direct say as regards the remuneration of the directors, with the exception of stock option or transfer schemes, the introduction of which requires a vote of the shareholders. This regime is, however, expected to change once the amendment of the EU Shareholder Directive is finally passed, following the political agreement announced in December 2016.

## **iv Contact with shareholders**

Under Austrian law, listed companies are in general required to treat all shareholders in an equal manner. Therefore, as a matter of principle, any direct communication with shareholders is a sensitive matter and is only possible if an objective justification exists. Such an objective justification may exist, for example, if a listed company intends to acquire a business owned by one of its shareholders. In such cases, it is standard market practice to insist on a comprehensive secrecy agreement (which sometimes includes standstill covenants). In such cases, listed companies typically impose internal restrictions so that only a limited

number of persons (usually the management board, selected senior managers) have access to such information. If the transaction requires the consent of the supervisory board, the matter is sometime delegated to a committee of the supervisory board to ensure confidentiality.

Selective meetings with individual shareholders usually take place during corporate roadshows or capital market days. Additionally, several Austrian listed companies do schedule investor's calls, typically around the publication of financial information by the company. To avoid allegations of unequal treatment of shareholders, the presentations given during such events and recordings of investor calls are made publicly available on the website of the company.

## **VI OUTLOOK**

On 1 January 2016, an amendment of the Criminal Code came into effect dealing with balance sheet fraud and misrepresentation. There is still a great deal of uncertainty as to the effect of these new provisions on listed companies and their auditors. In this regard, it has to be noted that business decisions of the management boards of listed companies seem to be scrutinised more and more under criminal law aspects. Recent judgments of the Austrian Supreme Court have resulted in a high degree of uncertainty whether certain business decisions could constitute fraud or embezzlement, and further clarifications by the courts would be welcome. On the other hand, the inclusion of the business judgement rule gives management boards more robust grounds for defence.

A recurring topic of discussion is the lack of 'say on pay' statutory provisions for listed companies in Austria. Current expectations are that Austria will not enact rules similar to the German system on its own, but rather wait for the adoption of the amendment of the EU Shareholder Directive.

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