

AUSTRIAN CODE OF CORPORATE GOVERNANCE

November 2002

Disclaimer: The English translation of the Austrian Corporate Governance Code serves for information purposes only. The exclusively binding version shall be the German text.

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Preface

In the past few years, corporate governance codes have been drafted in many countries addressed specifically to enterprises that raise funds through capital markets. These sets of rules, which lay down the principles of good corporate governance, are viewed by investors as a major source of guidance.

In Austria, the Austrian Institute of Certified Public Accountants (Institut Österreichischer Wirtschaftsprüfer - IWP) and the Austrian Association for Financial Analysis and Asset Management (Österreichische Vereinigung für Finanzanalyse und Asset Management - ÖVFA) took it upon themselves to prepare drafts for an Austrian Code of Corporate Governance.

An Austrian Working Group for Corporate Governance consisting of representatives of IWP, ÖVFA, listed companies, investors, Wiener Börse and academia drew up this uniform Austrian Code of Corporate Governance on the basis of these two drafts. Special attention was devoted to ensuring that all of the involved interest groups were integrated into the process through a very broad and transparent discussion of the issues.

During the two public posting periods numerous valuable inputs were received, which were discussed in detail and have been largely incorporated into the Code. The fact that not all proposals found their way into the Code lies in the nature of the discussion process, but these proposals may serve as a good basis for future revisions.

This voluntary self-regulatory initiative is designed to reinforce the confidence of investors by improving reporting transparency, the quality of cooperation between supervisory board, management board and shareholders, and by taking long-term value creation into account. The Austrian Code of Corporate Governance, therefore, is a milestone in the drive to develop and invigorate the domestic capital market.

October 2002

A handwritten signature in black ink, appearing to read 'R. Schenz', with a stylized flourish at the end.

DI Dr. Richard Schenz

Chairman of the Austrian Working Group for Corporate Governance
Special Government Representative for the Capital Market

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I. Preamble

The Austrian Code of Corporate Governance provides Austrian corporations with a framework for the management and control of enterprises. It covers the standards of good corporate management common in international business practice as well as the most important provisions of Austrian corporation law that are of relevance in this context. A general overview of Austrian corporation law is given in the Annex.

The Code aims to establish a system of management and control of companies and groups that is accountable and is geared to creating sustainable, long-term value. This objective best serves the needs of all parties whose well-being depends on the success of the enterprise.

The Code is designed to increase the degree of transparency for all stakeholders.

This Code primarily applies to Austrian stock listed companies. It is based on the provisions of Austrian corporation law, securities law and capital markets law as well as on the principles set out in the OECD Principles of Corporate Governance. It is also recommended that companies not listed on stock exchanges follow this Code to the extent that the rules are applicable.

Companies voluntarily undertake to adhere to the principles set out in the Austrian Code of Corporate Governance as amended.

All listed companies are therefore called upon to make a public declaration of their commitment to the Code and to have their adherence to the rules stipulated therein monitored by an external institution on a regular and voluntary basis, and to report the findings to the public.

Generally, the Code will be reviewed once a year taking relevant national and

international developments into consideration, and will be adapted if required.

The English version of the Code is a translation from the German. The German version shall be binding in the event of a dispute.

Notes to the Code

In addition to the most important statutory requirements under Austrian law, the Code also contains rules which are considered common international practice. Non-compliance with these rules must be explained and the reasons stated. The Code also contains rules that go beyond these requirements and should be applied on a voluntary basis.

The Code comprises the following categories of rules:

1. Legal requirement (L): This rule refers to mandatory legal requirements¹.
2. Comply or explain (C): This rule is to be followed; any deviation must be explained and the reasons stated in order to be in compliance with the Code.
3. Recommendation (R): The nature of this rule is a recommendation; non-compliance with this rule requires neither disclosure nor explanation.

¹ Certain legal provisions apply only to companies listed on the stock exchange in Austria. These rules are to be interpreted as a C rule for companies not listed on the stock exchange. The wording of the L rules does not necessarily match the exact wording of the respective laws, but has been adapted to match the terminology of the Code. It is not the intention of the authors to change the interpretation of statutory provisions.

For rules that apply not only to the listed company itself, but also to its associated group companies, the term “enterprise” is used instead of “company”. The special rules applicable to banks and insurance companies shall not be affected by the Code.

II. Shareholders and the General Meeting

1. All shareholders are to be treated equally under the same conditions. The requirement to treat all shareholders equally shall apply, in particular, to institutional investors, on the one hand, and to private investors, on the other hand. **L**

2. Shares are to be construed in accordance with the principle of *one share – one vote*. **C**

3. In the interests of treating all shareholders equally, the articles of incorporation of a company shall contain a clause excluding the applicability of the maximum permissible reduction of 15% on the purchase price in the case of mandatory bids, which is allowed under the Takeover Act. **R**

4. A general meeting must be convened at least three weeks in advance. **C**
The invitation to the general meeting, the announcement of the agenda, the motions and documents to be presented to the shareholders, which must be made available from the date the meeting has been convened for inspection by the shareholders, as well as any other motions or counter motions from shareholders that have been brought to the attention of the company in a timely manner shall be made available on the company's website for downloading at least one week in advance.

5. The candidates for the election of the supervisory board shall be announced and presented one week prior to the general meeting. **R**

6. The voting results of the general meeting as well as any changes to the articles of incorporation of the company are to be disclosed immediately on the website of the company. **C**

7. The company supports its shareholders in participating in general meetings and in exercising their rights as far as possible. This is to be considered when planning the venue and time of the general meeting, when defining the requirements of participation and the exercising of voting rights, and with respect to the right to be heard and receive information. **R**

8. **Acceptance or rejection of takeover bids shall be decided solely by the shareholders. The management board and the supervisory board are required to present a balanced analysis of the opportunities and risks of an offer to the persons addressed by the takeover bid.** **L**

III. Cooperation between the Supervisory Board and the Management Board

- 9. The management board shall provide the supervisory board periodically and in a timely manner with comprehensive information on all relevant issues of business developments including an assessment of the risks prevalent and the risk management in place at the company and at group companies in which it has major shareholdings. If an event of major significance occurs, the management board shall immediately inform the chairperson of the supervisory board; furthermore, the supervisory board shall be immediately informed of any circumstances that may have a material impact on the profitability or liquidity of the company (special report). Ensuring that the supervisory board is supplied with sufficient information is a joint task of the management board and the supervisory board. Members of the boards and the staff members involved are obliged to maintain strict confidentiality.** L
- 10. Under the principles of good corporate governance, an enterprise's management is conducted through open discussions between the management board and the supervisory board as well as within these bodies themselves.** C
- 11. The management board shall agree on the strategic direction of the enterprise with the supervisory board and shall periodically discuss the progress made on implementing the strategy.** L
- 12. The materials and documents required for a supervisory board meeting are to be made available generally at least one week before the respective meeting.** C

IV. Management Board

Scope of Competence and Responsibilities of the Management Board

- 13. The management board shall have sole responsibility for managing the enterprise and shall endeavour to take into account the interests of the shareholders, of the employees and the public good.** L

- 14. Fundamental decisions shall be reached by the entire management board. Such decisions shall include, in particular, the concrete formulation of goals of the enterprise and the definition of the enterprise's strategy. In the case of significant deviations from projected figures, the management board shall immediately inform the supervisory board.** L

- 15. The management board shall be responsible for the implementation and the effectiveness of the decisions it takes.** L

- 16. The management board shall be made up of several persons, with one member acting as the chairperson of the management board. Internal rules of procedure of the management board shall define the distribution of responsibilities and the mode of cooperation between management board members.** C

- 17. The management board shall have overall responsibility for communications tasks that significantly impact the image of the enterprise as perceived by stakeholders, and may receive support in carrying out these tasks from the relevant departments of the enterprise.** C

18. Depending on the size of the enterprise, a separate staff unit is to be set up for internal auditing, which shall report to the management board, or the task of conducting internal audits may be contracted out to a competent institution. At least once a year, a report on the auditing plan and any material findings is to be presented to the Accounting Committee set up by the supervisory board (Audit Committee, Financial Reporting and Audit Committee). **C**

Rules Governing Conflicts of Interest and Self-dealing

19. **Members of the management board, the supervisory board and senior management shall report any purchases or sales of shares in the company within seven days to the company and to the financial market authority, stating the volume held. The buying and selling of stocks where the market value of the change in the portfolio does not exceed EUR 10,000 is exempt from this rule; all stocks bought or sold within one calendar year shall be added together.** **L**
20. **As a measure to prevent insider dealings, the company shall issue internal guidelines governing the passing on of information and shall monitor compliance with the said rules. The company shall apply the provisions of the Compliance Decree for Issuers promulgated by the Financial Market Authority.** **L**
21. The management board shall take measures to ensure that the provisions of the Compliance Decree for Issuers are implemented throughout the entire enterprise as far as economically reasonable. **R**

- 22. The management board shall make its decisions without being influenced by its own interests or the interests of controlling shareholders, on the basis of the facts and in compliance with applicable laws. L**
- 23. The members of the management board must disclose to the supervisory board any material personal interests in transactions of the company and group companies as well as any other conflicts of interest. Furthermore, they shall also immediately inform the other members of the management board. L**
- 24. All transactions between the company or a group company and the members of the management board or any persons or companies with whom the management board members have a close relationship must be in line with common business practice. The transactions and their conditions must be approved in advance by the supervisory board with the exception of routine daily business transactions. L**
- 25. Statutory non-competition clauses applicable to management board members and senior management shall not be repealed by the supervisory board. C**
- 26. Approval by the supervisory board or the competent committee is required before a management board member may accept a position on the board of an enterprise outside the group such as on a supervisory board, management board or a position as a managing director. The approval of the management board is required for any sideline business undertaken by senior management. C**

Compensation of Members of the Management Board

- 27.** The compensation of management board members shall be determined **C**
by the scope of the member's tasks, degree of responsibility and the extent to which the company's performance targets have been achieved, as well as by the economic situation of the company. Compensation consists of a fixed salary and a performance-linked component. The performance-linked component shall be geared, above all, to long-term performance measurements. These principles shall also apply to the compensation paid to senior management accordingly.
- 28.** If a stock option scheme is proposed, the parameters of comparison to **C**
be applied shall be defined in advance and may include, for example, the performance of stock indices, share price targets or other suitable benchmarks. Retroactively changing performance goals (repricing) is to be avoided. All changes are to be disclosed and explained. Blocking periods and exercise periods as well as the timeframe for exercising stock options are to be defined. When defining a stock option scheme, the goal of achieving sustainable value creation by the enterprise shall be kept in mind. Decisions on the introduction of stock option schemes and any changes relating to such schemes shall be taken at the general meeting.
- 29. The number and distribution of the options granted, the exercise **L**
prices and the respective estimated values at the time they are issued and upon exercise shall be reported in the annual report. ²**

² This is a brief version of the provisions of the Austrian Commercial Code, §239 Section 1 Figure 5. For precise details on implementation, please refer to this provision.

- 30.** In addition to the statutory requirement to report the total remuneration of the management board, the fixed and performance-linked components of the remuneration are also to be disclosed in the annual report. **C**
- 31.** The compensation of the management board is to be reported separately for each member. **R**

V. Supervisory Board

Scope of Competence and Responsibilities of the Supervisory Board

- 32. The supervisory board shall be responsible for overseeing the management board and shall provide support to the management board in governing the enterprise and, in particular, shall assist in making decisions of fundamental significance.** L
- 33. The supervisory board appoints the members of the management board and has the right to terminate their employment.** L
- 34. The supervisory board shall adopt internal rules of procedure for its work, which shall contain stipulations regarding the disclosure and reporting obligations of the management board, including subsidiaries, unless these obligations are defined in the internal rules of procedure of the management board.** C
- 35. In accordance with the Austrian Stock Corporation Act, the supervisory board shall formulate in concrete terms a list of business transactions that are subject to its approval, and depending on the size of the enterprise, shall define the appropriate limits on amounts; this shall also apply to any major transactions concluded by subsidiaries that are of relevance to the group.** L
- 36. The statutory provisions according to which the supervisory board must meet at least once every three months shall be understood as a minimum requirement. Additional meetings must be held as required; if necessary, the items on the agenda may be discussed and decided without the participation of the management board members.** C

- 37.** The chairperson of the supervisory board shall prepare the meetings of the supervisory board and shall regularly communicate with the chairperson of the management board in particular, and discuss the strategy, the course of business and the risk management of the enterprise. **C**

Appointment of the Management Board

- 38.** The supervisory board shall define a profile for the management board members that takes into account the enterprise's business focus and its situation, and shall use this profile to appoint the management board members in line with a pre-defined appointment procedure. **C**

Furthermore, the supervisory board shall also give due attention to the issue of successor planning. Nomination to the management board for the last time must be made before the age limit defined in the articles of incorporation is reached.

Committees

- 39.** The supervisory board shall set up expert committees from among its members depending on the specific circumstances of the enterprise and the number of supervisory board members. These committees shall serve to improve the efficiency of the work of the supervisory board and shall deal with complex issues. Each chairperson of a committee shall report periodically to the supervisory board on the work of the committee. The supervisory board shall ensure that a committee has the authorisation to take decisions in urgent cases. **C**

- 40.** The supervisory board shall set up an accounting committee (audit committee) irrespective of statutory regulations. Where supervisory boards have fewer than six members (including employees' representatives), this function may be assumed jointly by all members. **C**

The accounting committee shall be responsible for the accounting and auditing issues of the company and of the group. This committee shall evaluate the audit reports of the auditor of the financial statements and shall report to the supervisory board on its findings.

- 41.** The chairperson of the accounting committee may not be a former member of the management board. **R**

- 42.** The supervisory board shall set up a strategy committee. Where supervisory boards have fewer than 6 members (including employees' representatives) this function may be assumed jointly by all members. **C**

A strategy committee shall prepare decisions of fundamental significance in cooperation with the management board, and if necessary also consult with experts, and shall present these decisions to the entire supervisory board.

- 43.** The supervisory board shall set up a human resources committee and the chairperson of this committee shall always be the chairperson of the supervisory board. Where supervisory boards have fewer than six members (including employees' representatives) this function may be assumed jointly by all members. The human resources committee may be identical with the strategy committee. **C**

The human resources committee shall deal with human resources issues of the management board members and also with successor planning. The human resources committee shall decide on the content of employment contracts with management board members and on their compensation³. Moreover, the human resources committee shall be responsible for reaching decisions on any sideline business of management board members.

Rules Governing Conflicts of Interest and Self-dealing

- 44.** When reaching decisions, supervisory board members must not act in their own interests or in the interests of persons or enterprises with whom they have close relationships if such behaviour conflicts with the interests of the enterprise or serves to attract business opportunities to the said member that otherwise would have gone to the enterprise. **L**
- 45.** Supervisory board members may not assume any functions on the boards of other enterprises which are competitors of the company. **C**

³ The rights of co-determination of employees' representatives shall apply to all committees of the supervisory board; the only committee that may be set up without employees' representatives is the committee responsible for the employment contracts with the management board members.

46. If a supervisory board member finds himself or herself in a conflict of interest, he or she shall immediately disclose this to the chairperson of the supervisory board. If the chairperson of the supervisory board finds himself or herself in a conflict of interest, he or she shall immediately disclose this to his or her deputy. **C**
47. The granting of loans by the enterprise to members of the supervisory board shall not be permitted outside the scope of its ordinary business activity with the exception of routine daily business transactions. **C**
48. All members of the supervisory board shall acknowledge and consent to the Compliance Decree for Issuers in writing. **C**
49. Contracts, in particular, consulting contracts concluded by the enterprise with individual members of the supervisory board or with companies closely related to the members of the supervisory board shall require the approval of the entire supervisory board with the exception of routine daily business transactions. The content of any such contracts and fees shall be reported in the annual report. **C**

Compensation of Members of the Supervisory Board

50. **The compensation of supervisory board members shall be fixed by the general meeting or shall be set out in the articles of incorporation, and shall be commensurate with the responsibilities and scope of work of the members as well as with the economic situation of the enterprise.** **L**

Qualifications of Members and Composition of the Supervisory Board

- 51.** When appointing the supervisory board, the general meeting shall take due care to ensure the adequate personal qualification of the supervisory board members as well as a balanced composition of expert know-how on the supervisory board as a whole. **C**

In the case of companies with a free float of more than 25%, at least one member of the supervisory board shall represent the interests of the group of shareholders owning the free float.

The number of members on the supervisory board (without employees' representatives) shall be ten at most.

- 52.** To ensure the independence of the advisory and monitoring tasks of the supervisory board, not more than two former members of the management board or senior management may be appointed to the supervisory board. **C**

- 53.** Not more than one quarter of the shareholders' representatives on the supervisory board may be related by family (direct offspring, spouses, parents) or may have a similar close relationship with other members of the board. **R**

- 54.** Supervisory board members may not hold more than eight positions on the supervisory boards of listed companies (position of chairperson counts twice). **C**

A person holding a position on the management board of a listed company may not hold more than four positions on the supervisory boards (position of chairperson counts twice) of stock corporations not belonging to the group. Investments in major shareholdings are not considered non-group corporations.

A nomination to the supervisory board must be made for the last time before the age limit defined in the articles of incorporation is reached.

- 55.** Members of the management boards of different companies may not be members of the supervisory boards of each other's companies (cross representation). **R**
- 56.** If a member of a supervisory board fails to personally attend more than half of the meetings of the supervisory board, this fact shall be stated in the report of the supervisory board. **C**

Co-determination

57. The co-determination rights of employees' representatives on the supervisory board form part of the statutory Austrian system of corporate governance in addition to the co-determination rights at the operational level in the form of works councils. The employees' representatives are entitled to appoint to the supervisory board of a stock corporation one member from among their ranks for every two members appointed by the general meeting (but not external members from the trade union). (Statutory one-third parity rule.) L

If the number of shareholder representatives is an odd number, then one more member is appointed as an employee representative. The one-third parity representation rule also applies to all committees of the supervisory board.

Employees' representatives shall exercise their functions on an honorary basis and their appointment may be terminated at any time only by the works council (central works council).⁴

The rights and obligations of employees' representatives shall be the same as those of shareholders' representatives; this shall apply, in particular, to the right to receive information and to monitoring rights, to the obligation to act with due diligence and to maintain secrecy and to their liability for failure to comply. In the event of personal conflicts of interest, employees' representatives shall abstain from voting, the same being applicable to shareholders' representatives.

⁴ A committee may be set up without employees' representatives for dealing with the employment contracts of the management board members.

VI. Transparency and Auditing

Transparency of Corporate Governance

- 58.** The obligation to comply with the Austrian Code of Corporate Governance shall be included in the annual report and disclosed on the company's website. A report shall be published once a year regarding compliance with the Code, including explanations on deviations from the Code. Every shareholder shall have the right at the annual general meeting to request information on such annual explanations. **C**
- 59.** The management board shall be responsible for reporting on implementation and compliance with the Code of Corporate Governance at the enterprise. **C**

The individual bodies that are the addressees of the respective rules are responsible for compliance with the principles of corporate governance and for giving explanations on deviations therefrom.

Financial Reporting and Disclosure

- 60.** The company shall disclose – as soon as it gains knowledge thereof – any changes in the shareholder structure, if, as a consequence of the acquisition or disposal of shares in the company, the percentage of shares representing voting rights held by a shareholder reaches, exceeds or falls below the thresholds of 5 percent, 10 percent, 15 percent, 20 percent, 25 percent, 30 percent, 35 percent, 40 percent, 45 percent, 50 percent, 75 percent or 90 percent. **L**

- 61.** The company shall disclose on its website and in the annual report – if it has knowledge thereof – the current shareholder structure broken down by geographical origin and type of investor, any cross-holdings, the existence of syndicate agreements, restrictions on voting rights, registered shares and their related rights and restrictions. Current changes in voting rights (according to Item 60) shall be disclosed without delay on the website of the company. **C**
- 62.** The company shall draw up consolidated financial statements and quarterly reports according to internationally recognised accounting standards (International Financial Reporting Standards, IFRS⁵ or United States Generally Accepted Accounting Principles, US-GAAP). **C**
- 63.** The annual and quarterly reports shall contain explanations by the management board on the causes and effects of any material changes or deviations affecting the current and/or subsequent business years as well as information on material deviations from profit targets and strategy goals announced by the company to date. **C**
- 64.** The enterprise shall establish communication structures that go beyond the legal mandatory requirements to meet information needs in a timely and adequate manner. The company shall disclose any new facts communicated to financial analysts and similar addressees at the same time to all shareholders. **C**

⁵ The IFRS comprise the International Accounting Standards, IAS. As of 2005 consolidated financial statements according to IFRS shall be mandatory for listed stock corporations with their registered office in the EU.

- 65.** The company shall publish consolidated financial statements and the management's discussion and analysis of operations for the group within four months of the end of the reporting period, and quarterly reports within two months of the end of the reporting period, in German and English, and shall make these reports available on its website. The individual financial statements required by the Austrian Commercial Code shall be published at the same time in German. **C**
- 66.** In the notes to the financial statements, the company shall state in detail potential risks such as sector risk, geographic risks, risks related to interest rates, currencies, derivative instruments and off-balance sheet transactions, and shall also describe the risk management instruments used by the enterprise. **C**

Investor Relations and the Internet

- 67.** The company shall disclose without delay any new facts relating to the field of activity of the enterprise if such facts have an impact on the assets and financial situation of the enterprise or on the business of the enterprise and therefore may substantially affect the price of the company's shares (ad hoc disclosure). **L**
- 68.** The company shall appoint a contact person for investor relations and shall disclose this person's name and contact numbers and address on the company's website. **C**

- 69.** The management board shall disclose without delay any ad hoc reports received pursuant to Article 91a of the Stock Exchange Act regarding the acquisition and sale of shares by management board members or supervisory board members on the company's website. This information shall remain on the website for at least three months. **C**
- 70.** A calendar of corporate financial events shall be posted immediately after completion of the current business year on the website of the company and shall subsequently also be published in the annual report. This shall contain all dates of relevance for investors and other stakeholders for the next business year; these may be, among others, the release of the annual and quarterly reports, annual general meetings, ex-dividend day, dividend payment day and investor relations activities. **C**
- 71.** 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. **R**

- 72.** The company shall disclose simultaneously on its website all financial information on the enterprise that has been published through other media (e.g. printed reports, press releases, ad hoc reports). If additional information is available only on the Internet, this fact must be specifically pointed out. If only excerpts of published documents are made available on the website, this fact must also be stated and the source where the full document can be obtained must be indicated. The documents shall bear the date on which they were posted on the Internet. **R**

Audit of the Financial Statements

- 73.** The audit of the consolidated financial statements shall be conducted according to internationally recognised auditing principles (International Standards of Auditing, ISA, or US - Generally Accepted Auditing Standards, US-GAAS). **C**
- 74.** **The independence of the auditor is essential for conducting a thorough and unbiased audit. The auditors shall ensure that any additional business relationships with the enterprise to be audited, such as consulting contracts, do not hinder its economic independence.** **L**
- 75.** **The auditor shall immediately inform the chairperson of the supervisory board of any reasons potentially constituting grounds for exclusion or partiality that become evident in the course of the audit unless these are immediately eliminated.** **L**

- 76.** Before presenting a proposal for the appointment of an auditor, the accounting committee shall request a declaration by the designated auditor regarding any professional, financial or other relationships that may exist between the auditor and related parties as well as between the board members and principal auditors on the one hand, and the enterprise and its board members, on the other hand. **C**

The declaration shall moreover explain the scope of any services provided to the enterprise in the preceding business year, especially consulting services, and also state which services have been contractually agreed for the following year.

- 77.** In addition to the statutory auditor's report and the obligation to make a statement, the auditor shall submit a management letter to the management board pointing out the weaknesses of the enterprise. The management letter shall be brought to the notice of the chairperson of the supervisory board. The chairperson shall be responsible for ensuring that the management letter is dealt with by the supervisory board. **C**

- 78.** In addition, the auditor shall make an assessment of the effectiveness of the company's risk management based on the information and documents presented and shall report the findings to the management board. This report shall also be brought to the notice of the chairperson of the supervisory board. The chairperson shall be responsible for ensuring that the report is dealt with by the supervisory board. **C**

- 79.** When making a proposal for the appointment of an auditor, the supervisory board shall also take into account whether or not the auditor submits to a peer review on a regular basis or conducts any other type of quality assurance procedures. **R**

Annex

Brief Overview of the Austrian Corporation Act

The following section contains a brief, and thus incomplete, overview of the main provisions of the Austrian Stock Corporation Act. The section has been written with the intent to make the Code easier to understand. This overview is not suitable for answering questions related to legal issues.

The Organisation of a Stock Corporation under Austrian Law

The organisational structure of Austrian stock corporations rests on three bodies: the general meeting, the supervisory board and the management board. This organisational structure is designed to ensure the separation of powers. The annual general meeting elects a supervisory board for a maximum period of five years, but may prematurely terminate this appointment by a qualified majority (the articles of incorporation may reduce this requirement to a simple majority). The supervisory board elects a chairperson for a maximum period of five years; it is possible for the supervisory board to call for the resignation of the chairperson prematurely for material reasons (violation of duties, vote of no confidence by the general meeting). The management board is solely responsible for running the company and shall not be subject to instructions from the annual general meeting nor from the supervisory board. Certain transactions specified by law shall be subject to the prior approval of the supervisory board; monetary limits may be defined in the articles of incorporation or in the internal rules of business. The management board may present of its own accord, or, in the case of transactions subject to approval, the supervisory board may present motions for approval to the general meeting; this is a step usually taken in cases of fundamental restructuring of the enterprise (e.g. disposal of major divisions of the company).

Shareholders and the General Meeting

Shareholders are to be treated equally unless there are legitimate reasons justifying a differentiation, which may be the case, for example, in certain relationships between group companies. The rights of shareholders are exercised at the general meeting. At

least once a year, an annual general meeting must be held (at the latest eight months after the end of the preceding business year).

An extraordinary general meeting may be convened at any time by the management board, the supervisory board or by a minority shareholder owning 5% of the shares.

Shareholders have the right to ask questions and submit motions for approval at general meetings regarding all items on the agenda. Currently, there is no statutory obligation to announce in advance the motions prepared by the management board for the approval of the general meeting.

Basically, the general meeting shall decide by a simple majority of the votes cast. The law prohibits shares with more than one voting right. So-called non-voting preferred shares may be issued for which voting rights are suspended as long as preferred dividends are paid out in full (including any subsequent payments). In cases where the subscription rights of holders of preferred shares are to be altered, a special vote must be taken by the holders of preferred shares. Furthermore, the articles of incorporation may also limit the maximum voting rights that a single shareholder may have, regardless of the percentage of shares he or she holds in the company. In recent years, a clear tendency has emerged towards the principle of one share – one vote.

At ordinary general meetings, the management board reports on the situation of the enterprise (and questions may be asked in this context) and submits the motion to distribute the profits as approved by the supervisory board. The shareholders are bound by the net profit reported on the balance sheet when deciding the profit distribution, thus the management board and the supervisory board ultimately have the final say in the dividend policy. Furthermore, the approval of the reports and activities of the management board and of the supervisory board are items on the agenda of annual general meetings, though such approval constitutes only an expression of trust and does not release the board members from potential liability. The general meeting elects the members of the supervisory board and the auditor of the financial statements. The general meeting passes resolutions on changes to the articles of incorporation

(generally by a three-quarter majority) and company transformation measures (e.g. mergers, split-ups, also generally by a three-quarter majority).

The Supervisory Board

The supervisory board consists of at least three and at the most twenty persons (depending on the share capital). Moreover, employees' representatives (group employees' representatives) are entitled to (but not obliged) to delegate one employees' representative for every two shareholders' representative to the supervisory board. Apart from this, the law prohibits members of the management board or employees from holding positions on the supervisory board as shareholders' representatives (except in connection with the co-determination rights of employees' representatives).

Decisions of the supervisory board are reached by a simple majority, and the employees' representatives do not have a special status.

A major role is played by the chairperson of the supervisory board who is responsible for the organisation of the supervisory board, its meetings and its collaboration with the management board.

The supervisory board must meet on a regular basis (at least four times a year). The annual projections and quarterly reports as well as special reports in cases of looming crises must be presented to the supervisory board. The supervisory board may at any time conduct exhaustive audits itself or may commission experts to conduct such audits. The supervisory board is responsible for approving the annual financial statements and thus indirectly decides the amount of the dividend to be distributed. The consolidated financial statements must be presented to the supervisory board. The supervisory board may request that experts take part in its meetings. The auditor of the financial statements appointed by the company shall be invited to participate in the meetings of the audit committee.

The Management Board

The supervisory board takes decisions autonomously on the election and thus the selection of management board members, and on the establishment of the position of chairperson of the management board. If a chairperson is appointed to the management board, the chairperson shall have the casting vote unless a different procedure has been defined in the articles of incorporation for decisions of the management board in the event of a tie. Unlike German law, Austrian law does not prescribe the appointment of an employees' representative to the management board.

The management board is a collective body, meaning that by law responsibility for governing the business of the company is borne equally by all members of the management board. Differentiated assignment of responsibility is possible and is common practice (usually defined by the supervisory board). This is done by defining the areas of responsibility for each of the board members in the internal rules of procedure. If the areas of responsibility are divided among the members of the management board, each board member shall bear primary responsibility for his or her assigned area, although the other members shall still be under the obligation to constantly monitor and address any deficiencies they perceive in the other areas of responsibility. In the case of measures having a material impact as, for example, business transactions that must be presented to the supervisory board for approval, the collective responsibility of the management board shall be mandatory and indivisible.

Capital Increases and Subscription Rights

In the case of capital increases and the issuance of rights to new issues (bonds with attached warrants, convertible bonds), existing shareholders shall have subscription rights, which the general meeting may only exclude by a three-quarter majority vote if this move is justified by the facts of the case (e.g. in the case of contributions in kind).

This resolution shall be announced separately and shall require a written statement by the management board explaining the reasons and shall also be presented to the court that keeps the commercial register of companies.

The management board may be authorised to increase the share capital of the company within a defined scope with the approval of the supervisory board without requiring the prior approval of the general meeting (authorised capital). This authorisation shall be limited to a period of five years, but may be prolonged repeatedly by the general meeting. Here as well, special reporting obligations apply if subscription rights are to be excluded. It may be assumed that relevant reasons exist for excluding subscription rights in the case of new issues for stock option schemes for employees, management-level staff or members of the boards of the company. It is also possible to authorise the issue of options on new issues exclusively to this group of persons with the prior authorisation of the general meeting. In this case, the management board shall be subject to extensive reporting obligations.

Share Buybacks

The acquisition of own shares is subject to substantial restrictions. The law permits the general meeting of a listed company to authorise the management board for a period of 18 months to repurchase up to 10% of the company's own shares. If this repurchase option is exercised, extensive disclosure requirements apply.

The Capital Market

Austrian capital market legislation has passed into law the EU Directives on the prohibition of insider dealings, ad hoc disclosure and the reporting of acquisitions or disposals of shares exceeding certain thresholds; in some cases Austrian law has gone even beyond the minimum standards of the Directives.

Companies listed on the Vienna Stock Exchange are still subject to the obligation to make a mandatory bid in cases in which the controlling interest in a company changes. This is assumed to be the case if shares amounting to 30% of a company's share capital are acquired. The mandatory bid that must be made after this change in the controlling interest in a company must correspond as a minimum to the average stock market price of the share during the last six months or to the highest price of the last 12 months paid by the party gaining the controlling interest less a discount of 15%, if the price is higher than the aforementioned average.

The 15% discount may be excluded in the articles of incorporation and a number of listed companies have made use of this option. In the event of a takeover bid, the management board and the supervisory board are under the strict obligation to act impartially. The takeover procedure is accompanied and monitored by the Takeover Commission, an independent public authority. A mandatory bid is also required if a shareholder owning a percentage of between 30% and 50% buys 2% or more of the shares of a company within one year (creeping in). Further information is available on the website of the Takeover Commission, www.takeover.at. Sections of the Takeover Act also apply to voluntary takeover bids even if there is no change in controlling interest.

Groups and Company Transformations

Although Austrian company law does mention the concept of the group company, unlike German law it does not have a detailed legal framework applicable to all aspects of groups. The formation of a group does not automatically lead to the liability of the parent company for the entire group. Likewise, when forming a group company, there is no statutory obligation to make a tender offer to outside shareholders unless the provisions of the Takeover Act apply. In the case of combinations or split-ups of enterprises, special rights are granted to minority shareholders, in particular, a minority shareholder owning 1% or EUR 70,000 in par value stock, has the right to demand that the appropriateness of the conversion ratio (in the case of split-ups) offered in the tender offer be examined by a special court procedure. If the decision to correct the offer is reached, all shareholders benefit.

Austrian company law does not contain provisions explicitly regulating attempts to “squeeze out” minority shareholders. However, various mechanisms exist that allow a shareholder owning 90% of the stock to squeeze out the remaining minority shareholders by offering them a cash tender offer within the scope of a transformation of a company. In this case as well, the cash tender offer is subject to an examination by the courts.

The Austrian Stock Exchange Act does not have any provisions for the delisting of a company. In practice, a company may be delisted on the grounds that it no longer fulfils trading requirements, in particular, that the required minimum amount of tradable shares no longer exists. A delisting currently does not call for a mandatory offer to outside shareholders.

Further information and relevant links are available at:

www.corporate-governance.at