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Corporate Governance 2022

Austria: Law & Practice
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Law and Practice

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1. INTRODUCTORY

1.1 Forms of Corporate/Business Organisations

Limited Liability Company (Gesellschaft mit beschränkter Haftung or GmbH)

The limited liability company (GmbH) is one of the most popular forms of business organisations in Austria. It can be established by one or more individuals as well as by legal entities, resident or non-resident, Austrian or foreign citizens. Shareholder liabilities are restricted to their subscribed share capital. Generally, the minimum share capital of a GmbH is EUR35,000.

The capital contribution of each shareholder must be at least EUR70; non-cash contributions are also possible. Each shareholder can only hold one share in a GmbH.

A GmbH is legally established when registered with the companies register (*Firmenbuch*), a procedure that primarily requires the preceding notarisation of the articles of association (*Gesellschaftsvertrag*).

At least one managing director is needed and is appointed by the shareholders.

Under certain circumstances, a supervisory board consisting of at least three board members must also be appointed (eg, if the share capital exceeds EUR70,000 and there are more than 50 shareholders if the average number of employees exceeds 300, etc). A supervisory board may be established voluntarily.

Joint Stock Corporation (Aktiengesellschaft)

A joint stock corporation (*Aktiengesellschaft* (AG)) can be established by one or more shareholders. The minimum share capital is EUR70,000. Contributions in kind are also possible. Shareholders may be individuals or companies. The liability is restricted to the equity capital subscribed by each member.

The AG comes into legal existence at the time of its registration in the companies register. The shares of an AG may be listed on a stock exchange. The share capital can be divided either into par-value or non-par-value shares. Each par-value share must have at least a nominal value of EUR1 or a multiple of it.

The structure of an AG consists of an executive board (*Vorstand*), appointed by a non-executive, separate supervisory board (*Aufsichtsrat*), whose main role is to supervise the executive board. The supervisory board is generally elected by the shareholders' meeting (*Hauptversammlung*).

Societas Europaea (SE)

A "European Company" or "*Societas Europaea*" (SE) is a type of joint stock corporation regulated by EU law. The minimum capital of an SE is EUR120,000. The organisational structure is more flexible than that of an Austrian AG, as the board can be organised following a single-tier or a two-tier system. The shares of an SE may be listed on a stock exchange.

An SE is incorporated in one EU member state and may have branches in other member states. The fact that an SE can operate more easily under a single legal entity facilitates cross-border transactions; the ability to move freely within the EU also has the benefit of permitting companies to move their headquarters with a minimum of formalities.

Partnerships (Personengesellschaften)

A partnership (*Personengesellschaft*) can be established by at least two parties agreeing on a certain legal objective. In general, the partnership agreement does not need to be in written or notarised form, but written contracts are com-

mon. There are different types of partnerships, as follows.

General partnership (OG)
A general partnership can be established for any legal purpose by at least two shareholders, individuals or legal entities. The shareholders are personally, directly and jointly liable without limitation for any debts of the company, extending to their entire private assets. The OG must be registered in the companies register to be established. Every shareholder is individually authorised to manage and represent the OG (except as agreed otherwise between the shareholders).

Limited partnership (KG)
A limited partnership consists of at least two partners, at least one limited partner (Kommanditist) and at least one general partner (*Komplementär*). The general partner has unlimited liability for the partnership's debts like a shareholder of an OG, whereas the limited partner is liable only up to their contractually agreed amount of liability registered in the companies register (*Haftsumme*). The power of representation and management of the KG only applies to the general partner(s), whereas the limited partner is generally excluded from the management of the partnership.

A quite common legal form of an Austrian business organisation is a hybrid between a limited partnership and a private limited company, the so-called "GmbH & Co KG", whereby the general partner is a limited liability company (GmbH).

Civil-law partnership (GesbR)
A civil-law partnership can be founded between two or more shareholders. In practice, they are often used for single-project joint ventures. The *GesbR* has no separate legal entity and is not registered in the companies register. A *GesbR* that exceeds a yearly turnover of EUR700,000 in two subsequent fiscal years or EUR1 million in a single fiscal year must be registered in the companies register as a general partnership or a limited partnership.

Sole Proprietorship (Einzelunternehmer)
A sole proprietorship is the easiest way to establish a business and the most common legal form in Austria. Approximately 70% to 80% of all businesses in Austria are sole proprietorships.

A sole proprietor is a natural person who operates the business in their own name and account (with full personal liability). Any person holding Austrian, Swiss or EEA state citizenship can create a sole proprietorship. Persons from other (non-EEA) countries will need individual permission to conduct trade in Austria.

Branch Office (Zweigniederlassung)
A non-resident business organisation can do business in Austria through a local subsidiary (GmbH or AG) or a branch office. Austrian branch offices of foreign legal entities are required to register with the Austrian companies register. Evidence of the existence of the foreign legal entity must be provided.

In contrast to a subsidiary, there are no capital requirements for a branch office (except in certain sectors, like banking or insurance).

An Austrian branch office has no separate legal personality, liability or share capital. Therefore, the activities of branch offices are not separated from the activities of its corporate headquarters, which remains fully liable for the debts caused by the branch.

Companies with a registered office outside the EU/EEA (European Economic Area) need to appoint a "local representative" for their Austrian branch.

Unless otherwise stated, the term "company" refers to limited liability companies, joint stock

corporations and SEs, as these companies are the most relevant to corporate governance.

1.2 Sources of Corporate Governance Requirements

Statutory Provisions

Regulations on the internal organisation of the company, corporate structure, duties and liabilities of management board members and supervisory boards are governed by:

- the Stock Corporation Act 1965 (*Aktiengesetz*), which determines the – largely mandatory – framework for the organisation of a joint stock corporation, the duties of the corporate bodies, the management board, the supervisory board and shareholders' meeting, as well as the shareholders;
- the Limited Liability Company Act 1906 (*GmbH-Gesetz*);
- the SE Directive 2001 (*SE-Verordnung*); and
- the SE Act 2004 (*SE-Gesetz*).

Further relevant legislation includes:

- the General Civil Code 1811 (*Allgemeines Bürgerliches Gesetzbuch*), which deals with general regulations on liability;
- the Labour Constitution Act 1974 (*Arbeitsverfassungsgesetz*), which provides for employee representatives on the supervisory board; and
- the Business Code (*Unternehmensgesetzbuch* or UGB) (former Commercial Code 1979 (*Handelsgesetzbuch*)).

Listed companies are also subject to:

- the Stock Exchange Act 2018 (*Börsegesetz*);
- the Takeover Act 1998 (*Übernahmegesetz*); and
- the Capital Market Act 2019 (*Kapitalmarktgesetz*).

Company's Constitutional Documents

The articles of association and the bylaws for the management board and the supervisory board also contain regulations on corporate governance.

Austrian Corporate Governance Code 2002 (Last Revised in January 2021)

The Austrian Corporate Governance Code supplements the statutory framework as outlined above. It covers the standards of good corporate management common in international business practice and the most important provisions of Austrian corporate law relevant in this context.

It aims to establish a system of management and control of companies and groups that is accountable and geared to creating sustainable, long-term value.

While the Code is addressed primarily to Austrian listed companies, it is recommended that companies not listed on a stock exchange follow it to the extent that the rules are applicable.

The Code is based on the provisions of Austrian corporation law, securities law and capital markets law, the EU recommendations on the tasks of supervisory board members and on the remuneration of directors, as well as on the principles set out in the OECD Principles of Corporate Governance.

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

Therefore, all Austrian listed companies are called upon to make a public declaration of their commitment to the Code. For a listing with the Prime Market of the Vienna Stock Exchange, a declaration of commitment to the Code is mandatory for Austrian companies.

Companies under foreign jurisdictions listed on the Vienna Stock Exchange are called on to commit themselves to adhere to another recognised corporate governance code or – if that jurisdiction is not a member of the EU or EEA – to the Austrian Corporate Governance Code. The non-mandatory L rules of the Code are, in this case, interpreted as C rules.

Notes to the Code

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

The Code defines the following categories of rules:

- Legal requirement (L) – this rule refers to mandatory legal requirements. However, 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.
- Comply or explain (C) – this rule is to be followed; any deviation must be explained, and the reasons stated to comply with the Code.
- Recommendation (R) – the nature of this rule is a recommendation; non-compliance with this rule requires neither disclosure nor explanation.

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

1.3 Corporate Governance Requirements for Companies With Publicly Traded Shares

See **1.2 Sources of Corporate Governance Requirements**.

As to specific corporate governance requirements for listed companies, see **3. Management of the Company** to **7. Audit, Risk and Internal Controls**.

2. CORPORATE GOVERNANCE CONTEXT

2.1 Key Corporate Governance Rules and Requirements

There are no other key corporate governance rules or requirements to be drawn out in Austria over and above those issues addressed in **2.2 Environmental, Social and Governance (ESG) Considerations**.

2.2 Environmental, Social and Governance (ESG) Considerations

As of now, only large companies have to include an analysis of non-financial key performance indicators in their management report. Even though the law specifically mentions only environmental and employee-related issues, these indicators are supposed to cover virtually any matters beyond financial measurements that influence the company's business. Large companies with more than 500 employees that are public-interest companies must instead publish a non-financial declaration or report. Such declaration or report must include details on various topics, including environmental and social issues relevant to the company's business. It has to describe the concepts pursued by the company, their results, any applied due diligence processes related thereto, key risks and non-financial key performance indicators. It can be based on established frameworks for such reporting. Finally, listed companies must publish a corporate governance report (see **6.2 Disclosure of Corporate Governance Arrangements**).

On 21 April 2021, the European Commission published the draft for the Corporate Sustain-

ability Reporting Directive (CSRD). The CSRD aims to extend the scope and reporting requirements of the already existing Non-Financial Reporting Directive, implemented in Austria through the Sustainability and Diversity Improvement Act ("*Nachhaltigkeits- und Diversitätsverbesserungsgesetz*", *NaDiVeG*), significantly. The CSRD is set to apply to large companies meeting at least two out of the following three criteria:

- 250 employees; and/or
- EUR 40 million turnover; and/or
- EUR 20 million total assets and listed companies on EU regulated markets, except listed micro companies with less than ten employees or with a turnover below EUR 20 million.

The CSRD is to be transposed into national law by 1 December 2022. Once implemented, companies will need to follow detailed EU sustainability reporting standards that require adequate preparation and professional assistance.

3. MANAGEMENT OF THE COMPANY

3.1 Bodies or Functions Involved in Governance and Management

Limited Liability Company

The principal bodies involved in the governance and management of a limited liability company are the managing director(s) (*Geschäftsführer*) and the general shareholders' assembly (*Generalversammlung*). Under certain circumstances, a supervisory board (*Aufsichtsrat*) must be established (see **1.1 Forms of Corporate/Business Organisations**).

Joint Stock Corporation

The principal bodies involved in the governance and management of a joint stock corporation are the management board (*Vorstand*), the supervisory board (*Aufsichtsrat*) and the GSM (*Hauptversammlung*).

SE

Regarding the organisation of an SE, a choice can be made between a dualistic and a monistic system. Common to both systems is the GSM as the body responsible for specific matters set out in the legal provisions. Such competences essentially correspond to the competences of the GSM of a joint stock corporation. In the monistic system, there is only one administrative body.

The dualistic system largely follows the model of the joint stock corporation and consists of a management body and a supervisory body.

3.2 Decisions Made by Particular Bodies

Limited Liability Company

A limited liability company is represented by its managing directors. In addition to representing the company (externally), the managing directors are responsible for internal management, ie, for taking measures of an organisational, commercial, technical and personnel nature necessary to fulfil the purpose of the company. The managing directors are obliged to comply with restrictions in their activity set out by the articles of association or shareholder resolutions (such as rules of procedure).

The general shareholders' assembly is the highest decision-making body of the limited liability company and is formed by all shareholders. It is responsible for all matters which are not removed from its competence by law or the articles of association or fall within the competence of another body. Certain items require a resolution by the shareholder(s), such as the approval of the annual financial statements, the decision whether to grant proxy (*Prokura*), the assertion of compensation claims against the managing

directors or the approval of major investments in a certain amount.

If a supervisory board is to be set up or has been set up voluntarily, it has the task of monitoring the management concerning legality, appropriateness and economic efficiency. Certain transactions listed in the law may only be carried out with the consent of the supervisory board.

Joint Stock Corporation

A joint stock corporation is managed by a management board without instructions and under its own responsibility in such a way as is required for the benefit of the company, considering the interests of shareholders and employees, creditors and the public interest. The management board is the decision-making body of the joint stock corporation and acts without instructions from the shareholders. The management board is responsible for implementing the decisions it makes and takes the measures to secure compliance with any laws of relevance to the company.

In addition to management, the management board is responsible for externally representing the joint stock corporation.

The management board is appointed by a supervisory board, whose main task is to monitor the management regarding legality, appropriateness and economic efficiency. While the supervisory board may not issue any instructions to the management board, the management board must obtain its approval for certain management measures.

In addition, certain transactions require the approval of the GSM (eg, mergers, transfer of the company's entire assets, agreements on a profit pooling arrangement, implementation of specific structural measures). In such cases, the approval of the GSM is required for the transaction to be effective.

3.3 Decision-Making Processes

Managing Directors of a Limited Liability Company

If more than one managing director is appointed, the managing directors manage the business of the limited liability company jointly so that no actions pertaining to the management can be carried out by any one managing director on their own. According to the legal rule, unanimous resolutions are required. The articles of association may – and in practice, most do – provide for a different management competence.

Detailed provisions on the management of the company may also be set out in the bylaws for the managing directors.

General Shareholders' Assembly of a Limited Liability Company

Shareholders of a limited liability company can pass resolutions either by resolution in the general shareholders' assembly or by resolution outside the general shareholders' assembly, eg, in the form of a written circular resolution. Certain matters require passing a resolution in the general shareholders' assembly, such as all resolutions amending the articles of association. Resolutions will be passed by a simple majority of the votes cast unless the law or the articles of association provide otherwise.

Certain resolutions require a majority of three quarters.

Management Board of a Joint Stock Corporation

If more than one member of the management board is appointed, the members of the management board manage the business of the joint stock corporation jointly so that no actions belonging to the management can be carried out

by a single member of the management board on their own. The articles of association may provide for a different management competence. The law does not provide for any provisions on the meetings of the management board.

Usually, provisions regarding the frequency and the decision-making process are set out in the bylaws for the management board.

General Shareholders' Meeting of a Joint Stock Corporation

The decision-making process of the shareholders is based on resolutions adopted in the GSM and recorded by a notary public (see **5.3 Shareholder Meetings**).

Supervisory Board

Resolutions of the supervisory board (of a limited liability company or a joint stock corporation) are passed by vote at the supervisory board meeting. Resolutions may also be passed outside meetings by written vote, provided that no supervisory board member objects to this procedure.

4. DIRECTORS AND OFFICERS

4.1 Board Structure

Limited Liability Company

A limited liability company must have at least one managing director. A higher minimum number can be provided for in special laws or the articles of association. A legal entity or partnership may not be appointed as a managing director.

Joint Stock Corporation

The management board may consist of one or more persons. Special laws may stipulate a certain minimum number. The number of board members is to be included in the articles of association, which can determine a specific range.

A legal entity or partnership may not be appointed as a member of the management board. If several persons are appointed as members of the management board, one of them may be appointed as chairman.

4.2 Roles of Board Members

Limited Liability Company

The duties of the managing directors may be divided between the managing directors in the articles of association or by shareholders' resolution (by implementing bylaws for the managing directors). However, an allocation of competences between several managing directors does not mean that the managing directors may restrict themselves to the respective competence. Even in the case of an allocation of responsibilities, each managing director is obliged to supervise the others.

In addition, all managing directors are responsible for those areas for which overall responsibility is mandatory (bookkeeping, preparing annual financial statements, filing for insolvency).

Joint Stock Corporation

If several management board members are appointed, they generally manage the business jointly according to the principle of majority voting. However, the articles of association may also allow individual management powers. Responsibilities may also be allocated between the members of the management board.

It should be noted, however, that certain tasks and actions of the management board are not transferable and are always the responsibility of the management board as a whole (bookkeeping, preparation of annual financial statements, filing for insolvency).

Unless otherwise stipulated in the articles of association, the vote of the chairman of the management board is decisive in the event of

a tie. The chairman may also be granted a sole decision-making right or veto right in the articles of association.

4.3 Board Composition Requirements/ Recommendations

There are no special requirements regarding the composition of the managing directors of a limited liability company or the management board of a joint stock corporation. A certain minimum number of managing directors/members of the management board may be provided for in special laws (eg, for banks) or in the articles of association.

Composition requirements nevertheless exist for the supervisory board. In general, at least one-third of the members of the supervisory board may be appointed by the works council (employee representatives). The other members are appointed by the shareholders (capital representatives).

4.4 Appointment and Removal of Directors/Officers

Limited Liability Company

Managing directors are appointed by shareholder resolution, for which a simple majority is sufficient. The articles of association may provide a different majority.

In principle, managing directors can be recalled at any time and without the existence of an important reason. The articles of association may provide for additional requirements. Managing directors can also resignor can – in certain cases – be recalled by the court.

Joint Stock Corporation

The management board is appointed by a resolution of the supervisory board. The resolution requires the majority of the capital representatives in the supervisory board and all supervisory board members.

The appointment of a management board member requires acceptance by the management board member to be effective. It is limited to five years. Reappointment is possible.

In urgent cases, management board members may be appointed by the court at the request of a party involved.

The supervisory board may only recall a member of the management board before the end of their term in office for significant reasons. These reasons include serious breaches of duty, the incapacity to manage the company or the loss of confidence by the GSM. The member of the management board may also resign.

4.5 Rules/Requirements Concerning Independence of Directors

Limited Liability Company

A person cannot be both a managing director and a member of the supervisory board. Based on this principle, a supervisory board member may not be a managing director of a subsidiary either.

If the managing director represents the limited liability company when concluding a legal transaction and simultaneously acts in their own name or as an authorised representative of a third party in this transaction, this will constitute a “self-dealing transaction”. Self-dealing transactions are only admissible if they bring benefits to the company, if there is no risk of damage to the company or if the company agrees to the transaction. Prior to concluding a self-dealing transaction, managing directors must obtain supervisory board approval or, if there is no supervisory board, the approval of all other managing directors; otherwise, they will be liable to the limited liability company for the damage arising from the transaction.

If there is only one managing director, they must obtain the consent of the shareholders.

The managing directors are subject to a statutory non-competition clause. Without the consent of the company, they may not do business in the company's field of business, participate as personally liable partners in a company in the same area of business or hold a position in the management or supervisory board of another company.

Joint Stock Corporation

A person cannot be both a member of the management board and a member of the supervisory board. Based on this principle, a member of the supervisory board may not be a member of the management board of a subsidiary either.

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 supervisory board must approve the transactions and their conditions in advance, except for routine daily business transactions.

Without the approval of the supervisory board, members of the management board will not be permitted to operate a business or assume a mandate on the supervisory board of another company unless this company belongs to the group or is associated by a business interest in such a company. Neither will members of the management board be permitted to engage in business dealings in the same branch of the company on their own account or account of third parties or to own other business enterprises as a personally liable partner without the approval of the supervisory board.

A member of the supervisory board cannot be a member of the management board of another company if a member of the management board of the other company is a supervisory board member in the first company (no interlocking), except among associated companies.

4.6 Legal Duties of Directors/Officers

The managing directors/members of the management board are obliged vis-à-vis the company to exercise due managerial diligence in the conduct of their business. Managing directors/members of the management board are required to manage the company in compliance with all relevant laws, always obtain an accurate picture of the company's situation, and take all measures to avoid damage to third parties. In accordance with the statutory Business Judgement Rule, a managing director/member of the management board must not be motivated by unrelated interests and may only act on the basis of appropriate information for the benefit of the company.

4.7 Responsibility/Accountability of Directors

Limited Liability Company

Managing directors who violate their duties are generally jointly and severally liable to the company, but not to the individual shareholders, for the resulting damage. If the actions of the managing directors are based on a shareholders' resolution, they are generally not liable for any resulting damage.

Joint Stock Corporation

Members of the management board who violate their duties are generally jointly and severally liable to the company, but not to the individual shareholders, for the resulting damage. If the actions of the members of the management board are based on a resolution of the general meeting, they are not liable for any resulting dam-

age to the company but only to the company's creditors.

4.8 Consequences and Enforcement of Breach of Directors' Duties

Limited Liability Company

A shareholder resolution is required to assert claims for damages and for the appointment of a representative to conduct litigation if the company cannot be represented by a managing director or the supervisory board. In addition to the assertion of claims for damages, the managing director may be recalled. See **5.4 Shareholder Claims**.

Joint Stock Corporation

The company's claims against members of the management board must be asserted if the GSM resolves to this effect by a simple majority of the votes cast. The same will apply if a minority whose shares together amount to 10% of the share capital demands the assertion of a claim. In general, the supervisory board is authorised to conduct the legal dispute.

However, the GSM may also appoint a special representative. See **5.4 Shareholder Claims**.

4.9 Other Bases for Claims/ Enforcement Against Directors/Officers

In certain exceptional cases, the managing directors/members of the management board may be liable to creditors of the company (eg, false or delayed registrations to the company register, liability for taxes and social security contributions if the managing directors have negligently breached their duties). The personal liability of a managing director/member of the management board may also arise from general tort law. The managing director/member of the management board may be liable if, eg, they violate a law for the protection of creditors and thereby cause damage.

4.10 Approvals and Restrictions Concerning Payments to Directors/ Officers

Determining Remuneration

The remuneration of the managing directors of a limited liability company is determined by the shareholders.

The remuneration of the members of the management board of a joint stock corporation is determined by the supervisory board and – unless a listed company – without any co-determination rights of the shareholders.

In listed joint stock corporations, a remuneration policy and a remuneration report must be prepared, both subject to a vote of the GSM. In addition, the Austrian Corporate Governance Code contains certain other provisions on payments to members of the management board.

The supervisory board has to draw up a remuneration policy for members of the management board, which must promote the business strategy and long-term development of the company. In exceptional circumstances, companies are allowed to derogate from the policy temporarily. The remuneration policy must be submitted to a vote by the GSM at least every four years or if any significant change occurs. The vote is only a recommendation and not binding.

Annual Remuneration Report

The members of the management board and the supervisory board must also prepare an annual remuneration report, which provides a comprehensive overview of the remuneration granted to members of the management board in the course of the previous financial year.

The report must be submitted to the GSM for a (non-binding) vote. For all joint stock corporations, the supervisory board will ensure that the total remuneration of the members of the

management board (salaries, shares in profits, expense reimbursements, insurance premiums, commissions, incentive-linked remuneration commitments and any other payments) are commensurate with the tasks and performance of each member of the management board, the situation of the company and the usual level of remuneration, and take measures to create incentives to promote behaviour supportive of the long-term development of the company. This will apply accordingly to pension payments, survivor's pensions and similar income.

Furthermore, the provisions under the Austrian Corporate Governance Code foresee that, in listed joint stock corporations, the remuneration must contain fixed and variable components, include non-financial criteria, and not entice persons to take unreasonable risks. Also, certain limitations regarding severance payments and stock option programmes or programmes for the preferential transfer of stocks apply.

4.11 Disclosure of Payments to Directors/Officers

The remuneration policy and the result of its vote, and the annual remuneration report must be published on the company's website. The remuneration report contains a breakdown of remuneration to the members of the management board, including the relation to the remuneration policy and long-term goals of the company, and further KPIs and details regarding such remuneration.

Furthermore, for listed joint stock corporations, provisions on the disclosure of payments to management board members are included in the Austrian Corporate Governance Code.

The total remuneration of the management board for a business year must be reported in the notes to the financial statements.

5. SHAREHOLDERS

5.1 Relationship Between Companies and Shareholders

Shareholder Rights and Obligations

A shareholder's position can be described as "membership" and characterised by certain rights and obligations. Besides this corporate relationship between a shareholder and the company, there may be other legal relations, such as under contract or in tort.

The rights of a shareholder can broadly be divided into governing rights and monetary rights. The former comprises, first and foremost, the voting right as well as information and control rights more generally. Monetary rights correspond to the right to dividends and liquidation proceeds.

The obligations of a shareholder encompass the obligation to pay up the share capital and the fiduciary duty towards the company. Fiduciary duties are not defined under statutory law but have evolved in case law. Shareholders must refrain from harming the company and consider the interests of the company and other shareholders.

Company Obligations

A corporation's relationship with its shareholders is characterised by the separation principle. This means that the company is a legal entity on its own, and its shareholders cannot be held liable for the company's obligations. A second fundamental principle is the precept of equal treatment of shareholders, which prescribes that shareholders can be treated differently only based on objective justification.

The corporate veil is pierced, and a shareholder can be liable to creditors if the company is severely undercapitalised, if the monetary spheres of the company and a shareholder are

blurred, or if a shareholder is running the company as if they were a managing director.

Listed companies are allowed to identify their shareholders through notification requirements of intermediaries (if any), unless a shareholder holds less than 0.5% of shares and voting rights.

5.2 Role of Shareholders in Company Management

The GSM of a joint stock corporation is the corporate body in which the shareholders of a joint stock corporation or an SE can exercise their rights, as well as the forum that enables the collective decision-making process among shareholders. It is not, however, a superior corporate body that can directly influence the management of the company.

Resolutions on changes to the articles and transformation measures, such as mergers or demergers, are generally passed by a 75% majority (based on the represented share capital). This should apply mutatis mutandis to management decisions that entail significant structural changes in the company.

The GSM is not competent to decide questions of the company's management, except if the managing directors or the supervisory board brings a matter to a GSM vote. The influence of the GSM on the company is limited to the appointment and recall of supervisory board members, who in turn appoint the managing directors. A minority of 10% (based on nominal share capital) can request the recall of a supervisory board member for cause by the court. The GSM can also vote on a loss of confidence in a managing director, which could give the supervisory board a right to recall the director for cause.

The general shareholders' assembly is the supreme corporate body of the limited liability company. Unlike a joint stock corporation, the general shareholders' assembly may give instructions to the managing directors. In practice, many resolutions are passed as circular resolutions in writing.

5.3 Shareholder Meetings

Joint Stock Corporation (and SE)

Convocation

At least once a year, a GSM must be held at the latest eight months after the end of the preceding financial year. In practice, the annual GSM takes place usually between the fourth and sixth month after the close of the financial year. The purpose of the annual GSM is to present the annual financial statements, a resolution on the appropriation of earnings, and the discharge of managing directors and supervisory board members. A minority of 10% of the share capital can reschedule the annual GSM if they disagree with certain sections of the annual financial statements.

An extraordinary GSM may be convened at any time by the management board, the supervisory board or a minority of shareholders owning 5% of the shares. The convocation of the annual GSM must be published at the latest on the 28th day before the meeting, while that of an extraordinary GSM must be published at the latest on the 21st day. The announcement convening the meeting must be published in the Austrian daily newspaper *Wiener Zeitung*.

The company's articles can lower the threshold of a minority entitled to convene a GSM, extend the term between convocation and meeting, and provide for different forms of the announcement. For listed companies, the announcement must also be published via an appropriate medium – publication via Thomson Reuters, Bloomberg, or Dow Jones Newswire is in any event sufficient. By the 21st day before the GSM, the proposals for resolutions of the management board and/or supervisory board must be provided at the

company's seat for inspection. Listed companies must also publish these documents, the convocation and a draft voting power of attorney on their website by that date.

Adding agenda items

A minority of 5% (based on nominal share capital) has the right to add items to the agenda of a GSM, supported by a resolution proposal and reasoning. The articles can lower this 5% threshold. The request must be sent to the company at the latest on the 21st day before an annual GSM or the 19th day before any other GSM.

Shareholder participation

The right of a shareholder to participate in the GSM of a listed company is determined by the holding of the share (in the case of bearer shares) or registration in the share ledger (registered shares), in each case by close of business of the tenth day before the GSM (cut-off date).

A shareholder's right to participate in the GSM of a non-listed company is determined by registration in the share ledger at the beginning of the GSM.

Every shareholder also has the right to be represented by a written power of attorney. In the case of a proxy assigned to the custodian bank, confirmation from the bank is sufficient. Anonymous participation via a "third-party owner" is not permitted. A managing director or supervisory board member of a listed company can only be authorised as a proxy if the power of attorney includes specific instructions on how to exercise the voting right in each case.

Distance meetings/voting

Implementing the (first) Shareholder Rights Directive, the articles of a company may permit a GSM to take place simultaneously at different locations within the country or abroad (satellite general meetings) or permit shareholders to take part via an acoustic and, if applicable, optical two-way communication line, and to vote electronically. Apart from electronic voting, the articles may also permit voting by mail. The invitation for the GSM must contain detailed information on the different forms of participation. Finally, the articles can provide that a GSM be broadcast to shareholders or, in the case of a listed company, be broadcast publicly.

As the COVID-19 Corporate Law Act and the rules on distance meetings included therein are set to expire, companies should analyse and potentially amend their articles to include provisions on distance meetings permanently.

Listed companies

In a listed company, a minority of 1% (based on nominal share capital) has the right to have its proposals for resolutions published on the company's website; the articles can further lower this threshold. The articles of a non-listed company can also foresee such a right to publication. Nevertheless, counterproposals to resolutions under the agenda items can still be put forward at the GSM. For elections to the supervisory board, the proposed candidates must be presented on the company's website at the latest on the fifth day before the GSM.

Procedure

The chairman of the supervisory board or the chairman's deputy chairs the GSM. The other members of the supervisory board and the managing directors should also participate in the meeting. After a vote, the chairman holds if a motion has been passed or rejected. The chairman also decides on the order by which different motions to an agenda item are brought to a vote and the method of counting the votes, in each case unless the articles provide otherwise.

Shareholders have the right to ask questions and submit motions for approval regarding all

items on the agenda at the GSM. If the managing directors answer inadequately or refuse to give answers, a resolution may become challengeable. Regarding the discharge of managing directors and supervisory board members from liability, a motion for a special audit may be requested. If such a motion is rejected, a minority of 10% can apply for a special audit with the competent court.

Quorums, profits and discharging directors, etc

Unless the articles set forth otherwise, the GSM has a quorum if at least one shareholder is present. The GSM decides by a simple majority of the votes cast. The law prohibits shares with more than one voting right. A joint stock corporation can, however, issue preferred shares, for which the voting rights are suspended as long as preferred dividends are paid out in full (including any subsequent payments). The articles may also limit the maximum voting rights that a single shareholder can exercise, regardless of the percentage of shares held. Lately, there is a trend towards returning to the "one share – one vote" principle.

At the annual GSM, the managing directors submit 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; hence, the management board and the supervisory board ultimately control the dividend policy. If the articles so provide, the GSM may resolve to carry forward part of the net profit to a new account.

The discharge of the managing directors and the members of the supervisory board is merely an expression of trust but does not release the board members from potential liability. The GSM further elects the members of the supervisory board and the auditor of the annual financial statements.

Proxies

Intermediaries of listed joint stock corporations are required to facilitate the exercise of shareholders' rights either by ensuring the shareholder's own exercise or the exercise by the intermediary as proxy.

Limited Liability Company

Convocation

The annual general shareholders' assembly must be held within the first eight months of a financial year for the preceding one to adopt the annual financial statements, resolve upon the appropriation of earnings, discharge the managing directors, and if any, supervisory board members. Such annual general shareholders' assembly is mostly replaced by circular resolution.

As the COVID-19 Corporate Law Act allowing for the general assembly to meet as a virtual assembly by way of two-way audio and video communication (qualified video conference) is set to expire, companies should analyse and potentially amend their articles of association to allow meetings to be held as qualified video conferences also going forward.

Competencies

Whereas the general shareholders' assembly has no right to represent the company vis-à-vis third parties, it can instruct the managing directors to act in a certain way. It also appoints and recalls managing directors, approves extraordinary transactions or structural measures of the company and changes to the articles. The articles can set forth a list of matters that require the prior consent of the general shareholders' assembly.

The general shareholders' assembly is convened by the managing directors, who must do so if the total assets of the company have fallen short of half of the company's nominal share capital, if

specific critical financial ratios are triggered or if requested by a minority of 10% of shareholders (based on nominal share capital). Also, the supervisory board, if there is one in place, can convene a general shareholders' assembly. The form of the convocation is typically set forth in the articles; if not, the shareholders must be invited by registered mail with at least seven days' notice. The invitation must contain the agenda for the meeting. Again, a minority of 10% can add items to the agenda.

Shares and quorum

Each EUR10 of nominal share capital grants one vote unless set forth otherwise in the articles. Representation by a written power of attorney is possible. In case of a conflict of interest (eg, a resolution on a transaction of the company with a shareholder), the voting right of a shareholder is excluded.

The general shareholders' assembly is quorate if at least 10% of the share capital is represented (unless set forth otherwise in the articles). There is no statutory rule on who chairs the general shareholders' assembly, so this can either be set out in the articles or decided ad hoc in the meeting. Resolutions are typically passed by a simple majority. Certain resolutions, such as changes to the articles or restructurings, require a 75% majority. A minority of 10% can further apply for a special audit with the competent court.

5.4 Shareholder Claims

Shareholders may, in general, have claims against the company only for dividends and proceeds from the decrease of share capital or liquidation.

Managing directors and supervisory board members are liable to the company for negligent and wilful actions or omissions that harm the company. Whether claims are enforced is decided by the GSM/shareholders' meeting. A joint stock corporation or an SE is represented by the supervisory board (or a special representative), a limited liability company by the managing directors or the supervisory board (or a special representative) when enforcing claims against members of corporate bodies. A minority of 10% of the share capital can initiate such enforcement in a company.

Shareholders could have a direct claim against the company, its managing directors or supervisory board members under tort law or in case of a violation of so-called protective laws (*Schutzgesetze*), which include certain disclosure obligations under capital market laws and criminal offences.

5.5 Disclosure by Shareholders in Publicly Traded Companies

Anyone acquiring or selling shares in a listed company must notify the Austrian regulator (Financial Market Authority), the stock exchange and the company within two trading days at the latest if they hit, exceed or fall below one of the following thresholds: 4%, 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 75%, 90%. Companies can additionally set 3% as a relevant threshold in their articles. The notice obligation applies to holders of derivatives and other financial instruments, too, if these instruments lead to a possible exercise of voting rights. A failure to notify leads to a suspension of voting rights.

Under the Public Takeover Act, bidders must disclose their considerations, intentions or decisions regarding a mandatory or voluntary public takeover.

Institutional investors and asset managers have to prepare and publish an engagement policy describing their engagement in companies they invest in. They can omit such policy but have to explain the omission publicly then. Institutional investors further have to publicly explain certain

parts of their investment strategy and details of the agreement with an asset manager (if any).

6. CORPORATE REPORTING AND OTHER DISCLOSURES

6.1 Financial Reporting

Companies must draw up annual financial statements of the previous year in accordance with Austrian GAAP within the first five months of a financial year. Such statements must be signed by all managing directors and generally include:

- the balance sheets;
- a profit and loss statement;
- notes to the annual accounts; and
- a management report.

Depending on the legal form and size of a company, certain reliefs regarding the notes and the management report apply.

Listed parent companies must also draw up consolidated annual financial statements in accordance with IFRS/IAS. Other parent companies can draw up statements following IFRS/IAS or otherwise under Austrian GAAP.

The drawing-up of financial statements is the responsibility of the managing directors. In joint stock corporations and SEs, the supervisory board has to audit the financial statements (also on a consolidated level, if applicable) and provide a written report to the GSM. By endorsing the statements, the supervisory board adopts them as final. In a limited liability company, the shareholders' meeting is responsible for adopting the financial statements.

Further to disclosure obligations relating to inside information and managers' dealings under the Market Abuse Regulation (MAR), the Stock Exchange Act requires listed companies to disclose the annual financial report (including the consolidated financial statements) by the latest four months after the close of the financial year. Listed companies also have to publish a half-year report within three months after the end of each period. They must further publish information on the granting of stock options to managing directors, supervisory board members or employees, as well as stock repurchase programmes.

6.2 Disclosure of Corporate Governance Arrangements

Listed companies must further publish a corporate governance report that states which corporate governance code they comply with, why and to what extent they deviate from it, or if they do not apply such a code, why not. Additionally, the report must include the composition of the management board, the supervisory board and its committees, measures taken to promote women in such bodies or management positions, and details of a diversity concept relating to the management board and supervisory board (if applicable) as well as the total remuneration of each managing director and the principles of the remuneration policy. The report must be drawn up within the first five months of the financial year.

Furthermore, listed companies must include specific details on corporate governance in the management report, including their capital structure, known voting or transfer restrictions, shareholdings in the company of at least 10%, special veto, control or nomination rights of shareholders, and poison pill arrangements.

Large companies and public-interest companies that are active in the extractive industry or the logging of primary forests must issue within the first five months of a financial year a report on payments made to governments.

Listed joint stock corporations have to publish the remuneration policy and the remuneration report on their website as well as certain related party transactions via an appropriate medium (Thomson Reuters, Bloomberg or Dow Jones Newswire).

6.3 Companies Registry Filings

The adopted annual financial statements must be filed with the companies register within nine months of the balance sheet date, at the latest. This also includes the corporate governance report, the report on payments made to governments, the auditor's opinion, the supervisory board's report and the resolution on the appropriation of earnings, each as applicable. Consolidated annual financial statements likewise must be filed. A large joint stock corporation must further publish the annual financial statements, including the auditor's opinion, in the Wiener Zeitung.

Small limited liability companies must only file the balance sheets and the notes, micro companies only the balance sheets. For both, certain simplifications apply regarding the structure and content of the filed balance sheets. For medium-sized limited liability companies and small and medium-sized joint stock corporations, certain simplifications also apply to the filed balance sheets.

7. AUDIT, RISK AND INTERNAL CONTROLS

7.1 Appointment of External Auditors

Companies' annual financial statements (also on a consolidated level, if applicable) must be audited prior to their adoption. Exemptions apply for small limited liability companies.

The auditor is appointed by the shareholders' meeting or GSM, respectively, during the financial year. If there is a supervisory board, it must propose a shortlist of auditors and agree on the engagement (including appropriate fees) with the appointed auditor. Otherwise, the managing directors conclude the engagement with the auditor. The managing directors, the supervisory board, a minority of shareholders representing at least 5% of votes or share capital or holding at least EUR350,000 or the auditors' regulator may apply to the competent court for the appointment of a different auditor for good cause.

Auditors cannot be appointed if they have a conflict of interest or are otherwise exempt under statutory law from accepting an appointment. The auditor can terminate the engagement only for cause; the company cannot terminate the engagement.

The auditor must issue a report on its audit and an opinion on the compliance of the financial statements with applicable laws and whether they present a true and fair view of the company's assets, liabilities and earnings under applicable GAAP. The opinion can be unqualified, qualified or negative. The auditor is liable to the company for negligence and wilful misconduct. For negligence, a statutory liability cap, staggered by the size of the company, applies.

7.2 Requirements for Directors Concerning Management Risk and Internal Controls

Managing directors must implement an internal control system based on the size, industry and specific situation of the company. An internal control system is understood as the methods and measures to safeguard the assets, ensure the accuracy and reliability of bookkeeping data and comply with corporate policies. For non-listed companies, there is no specific legal duty to implement a compliance management system or a risk management system that detects and

controls risks beyond those addressed in the internal control system.

Management should decide based on a cost-benefit analysis whether and to what extent to introduce such systems.

Listed companies must disclose in the management report material risks and uncertainties as well as the key features of the internal control and risk management system for the accounting process.

Schoenherr is a leading full-service law firm providing local and international companies with stellar advice that is straight to the point. With 15 offices and four country desks, the firm has a strong footprint in Central and Eastern Europe. The firm's lawyers are recognised leaders in their specialised areas and have a track record of getting deals done with a can-do, solution-oriented approach. Quality, flexibility, innovation and practical problem-solving in complex commercial mandates are at the core of Schoenherr's philosophy. Recent work highlights showcasing the team´s expertise include advising the board of Herba Chemosan on a highly complex management buy-out; ensuring the swift handling of all legal processes related to the establishment and corporate governance of COFAG, the state-run financing agency implemented to manage Austria´s COVID-19 relief fund; providing Takeaway.com with a comprehensive corporate governance strategy regarding the company´s Austrian operations; as well as advising Sanofi, a global leader in healthcare, on the acquisition of 100% of the shares in Origimm Biotechnology GmbH.

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