



european corporate governance institute

Directors' Remuneration in Listed Companies

AUSTRIA*

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* The information and opinions included in this document are not intended to provide legal advice, and should not be relied on or treated as a substitute for specific advice concerning individual situations. The law, regulation and best practices are stated as they stood at 30 June 2003.

Questionnaire

Answers to this questionnaire should be given from the perspective of provisions included in national laws, regulations and exchange rules, and of best practices as recommended by either official reports or corporate governance codes.

1. General

1.1 Please indicate, as a general reference, the laws, case law, regulations, exchange rules and best practices concerning directors' remuneration in your country with respect to listed companies. Please indicate where these provisions (such as, for example, exchange rules) apply only to domestically-incorporated companies.

- Stock Corporation Act 1965 (*Aktiengesetz – AktG*) published in the Federal Gazette 98/1965 and available on <http://www.ris.bka.gv.at>.
- Capital Markets Act 1991 (*Kapitalmarktgesetz – KMG*) published in the Federal Gazette 625/1991 and available on <http://www.wienerboerse.at>.
- Stock Exchange Act 1989 (*Börsegesetz – BörseG*) published in the Federal Gazette 555/1989 and available on <http://www.wienerboerse.at>.
- Commercial Code 1897 (*Handelsgesetzbuch – HGB*) published in the Federal Gazette Part I 114/1997 and available on <http://www.ris.bka.gv.at/bundesrecht>.
- Codetermination Act 1974 (*Arbeitsverfassungsgesetz – ArbVG*) published in the Federal Gazette 22/1974 and available on <http://www.ris.bka.gv.at/bundesrecht>.
- Decree by the Financial Authority on Compliance of Issuers (*Emittenten-Compliance-Verordnung - ECV*), published in the *Amtsblatt für Finanzverwaltung - AÖFV* Nr. 210/2001 and available on <http://www.fma.gv.at/>.
- Decree by the Ministry of Finance on The Disclosure of Purchase and Selling of own shares (*Verordnung des Bundesministers für Finanzen über den Inhalt und die Form der Veröffentlichungen im Zusammenhang mit dem Rückwerb und/oder der Veräußerung eigener Aktien sowie der Einräumung von Aktienoptionen - Veröffentlichungsverordnung*) published in the Federal Gazette Part II 112/2002 and available on <http://www.fma.gv.at>.
- Austrian Code of Corporate Governance (*Österreichischer Corporate Governance Kodex*), September 2002 available on <http://www.wienerboerse.at/>. The Code applies only to domestically incorporated companies as it provides in its foreword that “the Austrian Code of Corporate Governance provides Austrian corporations with a framework for the management and control of enterprises” and that it “primarily applies to Austrian stock listed companies”.

However, the Code can only be applied if the single company is ready to accept the rules, it does express by way of self declaration to accept and to obey to the rules. There is no legal obligation to express this declaration.

1.2 As to best practices, please specify whether they are described in either a private (voluntary or non-statutory) code or other official report, and whether a “comply or explain” principle is applicable to compliance with the relevant provisions by listed companies. Where the “comply or explain” principle applies, please indicate, where such evidence is available, whether companies generally comply with best practices.

The best practices are described in the Corporate Governance Code, an act of self-regulation of the Austrian business. The voluntary character of the Code is confirmed in its preface where it is stated that “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.”

As to the “comply or explain” principle the Code (Foreword) states that 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 (i.e. “strongly” invited) 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 (e.g. auditor, lawyer or consultant, but not the legal auditor responsible to testify the accounts or the Capital Market Authority) on a regular and voluntary basis, and to report the findings to the public. The public declaration does not have a mandatory content. Until the 1st of July only eighteen companies have declared to comply with the Code in general and one company made a declaration in the general meeting; eleven companies out of eighteen explained different deviations from 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 (Preface).

The Code comprises different categories of rules:

- Legal Requirement (L): This rule refers to mandatory legal requirements. Certain legal provisions apply only to companies listed on the stock exchange in Austria. These rules are to be interpreted as a “comply or explain” 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 in order to be in compliance with the Code.
- Recommendation (R): The nature of this rule is a recommendation; non-compliance with this rule requires neither disclosure nor explanation.

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 (CG Code 58).

The management board shall be responsible for reporting on implementation and compliance with the Code of Corporate Governance at the enterprise. 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 there from (CG Code 59).

1.3 Please describe in summary: the institutional structure for adopting executive remuneration rules or best practice codes; and any major proposals for reform concerning directors’ remuneration.

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 [www.corporate-governance.at] 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. The working group was made up of 34 members and chaired by Dr. Richard Schenz. As a rule the Code will be reviewed once a year taking relevant national and international developments into consideration, and will be adapted if required (Foreword).

2. Disclosure

2.1 Are listed companies required to publish a remuneration report, indicating the details of the compensation paid to the members of the Board of Directors? How often must it be published and where is it retrievable?

There are no specific requirements.

2.2 Must these reports be submitted, or are recommended to be, to a Securities Market Regulator or to a public authority responsible for collecting these documents?

There are no specific requirements.

2.3 What information on directors' remuneration, individually and collectively, and on the remuneration committee, must be included, or is recommended to be included as best practice, in the financial reports? Please include in your answer any specific requirements which apply to particular elements of remuneration, such as stock options, bonuses, and termination payments.

According to the law the annual report shall contain the total remuneration of the management board's members as a whole and of the supervisory board's members as a whole (section 239 Commercial Code). According to the Corporate Governance Code (CG Code 31) the compensation of the management board is to be reported separately for each member, but only two issuers have accepted this clause of the Code (OMV and Böler Uddeholm). The compensation comprises salary, profit participation, reimbursement of expenses, insurance premiums, commissions and additional benefits of any kind. 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 (CG Code 30). If members of the management board receive a specific remuneration from a related company as employees or legal representatives the amount will have to be specifically indicated in the annual report. The remuneration report shall even contain the golden handshake, the retirement pay and similar benefits of past directors.

As to the stock options the annual report shall indicate for members of the management board and the supervisory board, employees and senior managers the number and distribution of options granted and related shares; the essence of the contracts, in particular the exercise price or how such price is to be computed and the respective estimated values at the time they are issued; the transferability of the options; the periods in which the options can be granted and exercised and the period of lock up. Further information shall be disclosed as to the number, the distribution and the exercise price of the exercised options during the period under review (CG Code 29; section 239 Commercial Code).

2.4 Is timely disclosure required with respect to stock options, their vesting, exercise, and the sale of the relevant shares to third parties?

There are no specific requirements.

2.5 What are the rules on disclosure of share transactions executed by the company's insiders (such as directors, officers, auditors, etc)?

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 (section 91a Stock Exchange Act; CG Code 19). However, according to the law, there is no obligation to disclose these facts also to the public; only the Financial Authority has to be informed. Only according to the Corporate Governance Code the management board shall disclose without delay any ad hoc report received pursuant to section 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 (CG Code 69).

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 (CG Code 20).

All transactions between the company or a group company and the members of the management board or any person or company 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 (CG Code 24).

2.6 What information on directors' remuneration must be included in public offer prospectuses and listing particulars?

According to the Capital Markets Act (Schemes A and B, Chapter 3 n. 17-18) the public offer prospectus shall contain individualized information on the remuneration of each member of the management and the supervisory board. The fixed income is separated from the variable components of the salary; in particular stock options have to be disclosed and described separately. The same information shall be comprised in the listing particulars (Scheme A, Chapter 6.2a Stock Exchange Act).

3. Remuneration of The Board of Directors

3.1 Who fixes the board of directors' remuneration? What are the relevant procedures? (In two-tier systems, please refer to the supervisory board.)

The remuneration of the members of the supervisory board is fixed by the general meeting or in the articles of association (section 98 Stock Corporation Act; CG Code 50), regardless whether the remuneration is a fixed salary or includes variable elements. If the compensation is fixed in the articles of association it can be decreased by the general meeting with a simple majority. The compensation of the members of the first supervisory board can be fixed only by the general meeting and such resolution may be adopted only in the shareholders' meeting resolving on ratification of the acts of the members of the first supervisory board (section 98 Stock Corporation Act).

According to section 159 Stock Corporation Act the general meeting may adopt a resolution on a contingent capital increase also to grant rights to members of the supervisory board (as well as to employees and senior management) to new shares. At least 14 days before the general meeting the management board shall inform the shareholders at any rate on the principles and the related performance requested; the number and distribution of the options granted and the related shares; the essence of the contracts, in particular the exercise price or the criteria adopted to calculate it; the transferability of the options; the periods in which the options can be granted and exercised and the period of lock up.

The same report must be submitted if the underlying for the stock options are own shares of the company or even shares held by a third person but which are dedicated for the stock-option-program (section 98 Stock Corporation Act).

3.2 Are there provisions and/or practices as to the amount of the remuneration and its distribution (for example, as to whether distribution should be proportionate) among board members? What types of remuneration are allowed?

The compensation of supervisory board members shall be commensurate with the responsibilities and scope of work of the members as well as with the economic situation of the enterprise (section 98 Stock Corporation Act; CG Code 50). The remuneration does not need to be at the same level for all members. Those members who are appointed by the representatives of the employees do not receive any remuneration (section 110 Par 3 sentence 1 of the Codetermination Act).

3.3 Are personal loans to the company's directors and officers allowed?

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 (CG Code 47).

On the other hand, personal loans are allowed to members of the management board pursuant to a resolution of the supervisory board. Such consent may be granted only for specific credit transactions or kinds of credit transactions, and for not more than three months in advance. The resolution on such consent shall make provision as to the payment of interest on, and repayment of, any loan (section 80 Stock Corporation Act).

4. Executive Directors' Remuneration

4.1 Who fixes the executive directors' remuneration? What are the relevant procedures? Are shareholders required to approve directors' remuneration, the remuneration policy, or the remuneration report (see question 2) on an annual or other basis? (In two-tier systems, please refer to the management board.)

The remuneration of the members of the management board is fixed by the supervisory board which shall guarantee that the compensation is proportional to the scope of the member's tasks and the economic situation of the company. Compensation consists of a fixed salary and a performance-linked component (section 78 Stock Corporation Act, CG Code 27). The shareholder meeting is required to approve directors' remuneration (see question 4.4).

4.2 Is the board required, or recommended as best practice, to create a remuneration committee?

The board is not required to create a specific remuneration committee. The Code (CG Code 39) generally provides that 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. It is then specified that the supervisory board shall set up an accounting committee (audit committee) irrespective of statutory regulations and responsible for the accounting and auditing issues of the company and of the group (40); a strategy committee, which shall prepare decisions of fundamental significance in cooperation with the management board, and if necessary also consult with experts, and present these decisions to the entire supervisory board (42); and a human resources committee, also responsible for the remuneration of the management board (CG Code 43).

If yes, please specify:

- (i) the committee's composition (if independent directors should be appointed to this committee, please give the relevant definition and indicate whether any special procedures apply to the appointment of independent non-executive directors)**

The chairperson of human resources 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. The Code (note 3) provides that the rights of co-determination of employees' representatives shall apply to all committees of the supervisory board, but the only committee that may be set up without employees' representatives is the committee responsible for the employment contracts with the management board members.

- (ii) the committee's competences and which company body it reports to**

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 compensation. Moreover, the human resources committee shall be responsible for reaching decisions on any sideline business of management board members.

- (iii) how the committee operates**

It is generally provided (CG Code 39) that the 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.

4.3 Which types of remuneration are permitted?

According to section 78 Stock Corporation Act the aggregate remuneration of any member of the management board comprises salary, profit participation, reimbursement of expenses, insurance premiums, commissions and additional benefits of any kind. Furthermore the Code provides that 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 (CG Code 27).

In answering, please consider each of the following:

- (a) bonuses**
There are no specific requirements.
- (b) stock options, including discounted stock options**
- (c) stock grants**
Yes. See question 4.4.**stock grants**
Although there are no specific requirements the Code (27) provides that compensation shall consist of fixed salary and not specified performance-linked components.
- (c) stock grants**
Although there are no specific requirements the Code (27) provides that compensation shall consist of fixed salary and not specified performance-linked components.
- (d) profit sharing**
Yes. Members of the management board may be granted for their services a right to participate in profits. Such participation shall consist of a share in the company's annual profit (section 77 Stock Corporation Act; see also section 78 Stock Corporation Act).
- (e) benefits in kind**
Yes (benefits of any kind). See section 78 Stock Corporation Act.

4.4 Are there specific rules, including shareholder approval requirements, as to these different types of remuneration?

Stock options: If a stock option scheme is proposed, the parameters of comparison to 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 (CG Code 28).

Section 159 Stock Corporation Act provides that the general meeting may adopt a resolution on a contingent capital increase also to grant rights to members of the management board to new shares. The supervisory board shall then inform the general meeting at least on the principles and the performance that shall be achieved; the number and distribution of the options granted and of the related shares; the essence of the contracts, in particular the exercise price or how such price is to be computed; the transferability of the options; the periods in which the options can be granted and exercised and the period of lock up.

In case of a contingent capital increase to be distributed among members of the management board (as well as members of the supervisory board, employees or senior management) the par value of the share capital can not be more than 20%. On the other hand, if the options are assigned to the management board, employees or senior management the general meeting will then be allowed to fix a total amount.

Besides, section 160 Stock Corporation Act provides that in case of a contingent capital increase the general meeting (majority of not less than three fourths of the share capital represented at the passing of the resolution, although the articles may provide for a larger capital majority and additional requirements) determines the purpose of the contingent capital increase, the persons entitled to subscribe and the issue price on the basis on which such price is to be computed.

If own shares are used for the stock option program, the general assembly will not be competent to decide upon the stock-option program. However, the report described above must be at least disclosed before the supervisory board decides.

4.5 Are there any restrictions on how payments are made?

There are no specific requirements.

4.6 Are there any specific requirements for termination payments made on loss of office, whether through dismissal, retirement, on a takeover, or otherwise?

There are no specific requirements. Contracts signed up by the management board's members are so called free services contracts (*Freie Dienstverträge*) and generally neither the labour law nor collective agreements are applicable to them. Management board's members are even explicitly excluded by law from the scope of general agreements. The Employees' Act (*Angestelltengesetz*) is only applicable in order to interpret contract clauses when they are not clear or infringe basic principles of contract law.

4.7 Are there any specific requirements concerning directors' service contracts with respect to, for example, their duration and disclosure?

The members of the management board shall be appointed by the supervisory board for a period not exceeding five years. The maximum period of the contract is also 5 years. If the duration of the contract is longer than five years, is indefinite or not specified the appointment will be automatically of five years. The appointment may be renewed only with a written approval of the supervisory board's chairman (section 75 Stock Corporation Act).

5. Non-executive Directors' Remuneration

5.1 Are non-executive directors separately paid for their participation in committees of the board of directors? Do any restrictions apply to the payment of non-executive directors' *via* stock options?

Often the chairman of the board is granted the double of the amount of the other members. Increasingly additional work of members in different committees will be paid separately – the law does permit such different remunerations.

As to the payment of non-executive directors' *via* stock options section 159 Stock Corporation Act expressly includes members of the supervisory board among those to whom rights to new shares can be granted in case of a contingent capital increase (see question 3.1).

According to section 65 (1) number 4 Stock Corporation Act own shares of the company are also available for a stock option program in favour of non executive directors.

5.2 May a company make payments to non-executive directors, additional to their directors' fees, for services, such as legal or brokerage services, outside the usual scope of directors' duties?

There are no special rules in the Stock Corporation Act. However, such contracts are only permitted outside the common duties of the board members. Only the Code includes now some rules: 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 (CG Code 49).