# The Corporate Governance Review

Fourth Edition

Editor
Willem J L Calkoen

Law Business Research

# The Corporate Governance Review

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# The Corporate Governance Review

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Fourth Edition

Editor
Willem J L Calkoen

Law Business Research Ltd

# THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

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# CONTENTS

**Editor's Preface** ........................................vii
*Willem J L Calkoen*

**Chapter 1** AUSTRALIA........................................1
*John Williamson-Noble and Tim Gordon*

**Chapter 2** AUSTRIA........................................13
*Wolfgang Thomas Graf*

**Chapter 3** BELGIUM........................................24
*Elke Janssens and Virginie Ciers*

**Chapter 4** CANADA........................................49
*Andrew MacDougall, Robert Yalden and Elizabeth Walker*

**Chapter 5** DENMARK........................................62
*Jacob Christensen, Søren Toft Bjerreskov and Nicholas William Boe Stenderup*

**Chapter 6** FINLAND........................................75
*Klaus Ilmonen, Micaela Thorström, Antti Kuha and Anniina Järvinen*

**Chapter 7** FRANCE........................................87
*Didier Martin*

**Chapter 8** GERMANY........................................102
*Carsten van de Sande*

**Chapter 9** GREECE........................................118
*Evy C Kyttari and Sofia Kizantidi*

**Chapter 10** GUATEMALA....129
*Rodolfo Alegría and Christian Michelangeli*

**Chapter 11** HONG KONG....139
*Lai Voon Keat, Victor Lee and Fiona Cheng*

**Chapter 12** INDIA....161
*Murali Ananthasivan and Lalit Kumar*

**Chapter 13** INDONESIA....172
*Wahyuni Bahar and Melanie Hadeli*

**Chapter 14** IRELAND....185
*Paul White*

**Chapter 15** ITALY....200
*Gregorio Gitti, Diego Riva, Camilla Ferrari and Luca Bernini*

**Chapter 16** JAPAN....214
*Mitsuhiro Harada and Tatsuya Nakayama*

**Chapter 17** LUXEMBOURG....227
*Margaretha Wilkenhuysen and Louisa Silcox*

**Chapter 18** NETHERLANDS....248
*Geert Raaijmakers and Marlies Stek*

**Chapter 19** PORTUGAL....273
*Francisco Brito e Abreu and Joana Torres Ereio*

**Chapter 20** ROMANIA....291
*Cristian Radu*

**Chapter 21** SPAIN....307
*Carlos Paredes and Rafael Núñez-Lagos*

**Chapter 22** SWEDEN ........................................ 319
*Hans Petersson and Emma Kratz*

**Chapter 23** SWITZERLAND ........................................ 334
*Rolf Watter and Katja Roth Pellanda*

**Chapter 24** TAIWAN ........................................ 351
*Stephen C Wu, Benjamin Y Li and Derrick C Yang*

**Chapter 25** TURKEY ........................................ 363
*Ümit Hergüner and Zeynep Ahu Sazci*

**Chapter 26** UNITED KINGDOM ........................................ 376
*Andy Ryde and Murray Cox*

**Chapter 27** UNITED STATES ........................................ 389
*Adam O Emmerich, William Savitt, Sabastian V Niles and S Iliana Ongun*

**Chapter 28** UNITED STATES: DELAWARE ........................................ 403
*Ellisa O Habbart and Lisa R Stark*

**Appendix 1** ABOUT THE AUTHORS ........................................ 415

**Appendix 2** CONTRIBUTING LAW FIRMS' CONTACT DETAILS ... 435

# EDITOR'S PREFACE

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

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

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

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

Governments, the European Commission and the SEC are all pressing for more formal inflexible legislative acts, especially in the area of remuneration. Acts set minimum standards, while codes of best practice set aspirational standards.

More international investors, voting advisory associations and shareholder activists want to be involved in dialogue with boards about strategy, succession and income. Indeed, wise boards have 'selected engagements' with stewardship shareholders to create trust. What more can they do to show all stakeholders that they are improving their enterprises other than through setting a better 'tone from the top'? Should they put big signs on the buildings emphasising integrity, stewardship and respect?

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

This all implies that executive and non-executive directors should work harder and more as a team on policy, strategy and entrepreneurship. It remains a fact that more money is lost through lax directorship than through mistakes. On the other hand, corporate risk management is an essential part of directors' responsibilities, and sets the tone from the top.

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

My aim as editor has been to achieve a high quality of content so that *The Corporate Governance Review* will be seen, in time, as an essential reference work in our field.

To meet the all-important content quality objective, it was a condition *sine qua non* to attract as contributors colleagues who are among the recognised leaders in the field of corporate governance law from each jurisdiction.

I thank all the contributors who helped with this project. I hope that this book will give the reader food for thought; you always learn about your own law by reading about the laws of others.

Further editions of this work will obviously benefit from the thoughts and suggestions of our readers. We will be extremely grateful to receive comments and proposals on how we might improve the next edition.

**Willem J L Calkoen**
NautaDutilh
Rotterdam
March 2014

## Chapter 2

# AUSTRIA

*Wolfgang Thomas Graf* [1]

### I OVERVIEW OF GOVERNANCE REGIME

In Austria, the vast majority of all listed companies are incorporated in the form of a stock corporation; few are incorporated in the form of a societas europaea (SE). The corporate governance of Austrian stock corporations is determined by both statutory law and non-binding best practice rules. The statutory laws most relevant for the corporate governance of Austrian stock corporations are:

*a* the Stock Corporation Act, which determines the – largely mandatory – framework for the organisation of a stock corporation, duties of the corporate bodies, the management board, the supervisory board and shareholders' meeting, as well as the shareholders;

*b* the Takeover Act, which provides for rules on both mandatory and voluntary takeover offers and restrictions for defensive measures;

*c* the Securities Exchange Act, which, *inter alia*, contains disclosure provisions regarding non-public information with a potential impact on the price of a listed company's share, as well as directors' dealings, and which prohibits insider trading;

*d* the Commercial Code, which, *inter alia*, determines accounting rules applicable to Austrian companies; and

*e* the Labour Constitution Act granting employees co-determination rights in the supervisory board.

The Austrian Corporate Governance Code (the Code) supplements this statutory legal framework. It contains a collection of best practice rules and non-binding recommendations for the corporate governance of stock corporations.

1 Wolfgang Thomas Graf is a partner at Graf Patsch Taucher Rechtsanwälte.

The Code is only mandatory for listed stock corporations or SEs that have committed themselves to complying with the Code; however, commitment to the Code is a prerequisite for entry to the prime market of the Vienna Stock Exchange.

There are three categories of provisions in the Austrian Corporate Governance Code:

*a* 'L' provisions correspond to mandatory legal provisions;

*b* 'C' provisions ('comply or explain') require that the management board and the supervisory board declare whether and to what extent their company complies with the corresponding provision of the Corporate Governance Code and, where it does not, disclose the fact of non-compliance and explain the reasons on an annual basis; and

*c* 'R' provisions are mere recommendations of best practice; it is not required to disclose or explain non-compliance.

Since its first publication in October 2002, the Austrian Corporate Governance Code has gained a growing influence and has been widely accepted: 75 per cent of all domestic listed companies have issued declarations to comply in 2012. Compliance with 91.7 per cent of all C provisions has been established. Full compliance, however, is rather rare: only three out of 42 ATX companies, and one prime market company comply with all 43 C provisions.

In accordance with its preamble, which provides for an annual review and evaluation of the Code, the Austrian Corporate Governance Code has been revised several times, most recently in July 2012. The latest amendments intend to improve the transparency of the management board's compensation. Recent trends comprise the development of the diversity rule, new rules on better cooperation between supervisory boards and auditors, and an increase in the length of the cooling-off period.

## II CORPORATE LEADERSHIP

### i Board structure and practices

The Austrian Stock Corporation Act provides for a mandatory two-tiered board structure for stock corporations, consisting of the management board and the supervisory board. SEs may choose a one- or two-tier board structure.

The management board of an Austrian stock corporation consists of one or more members. If there are two or more members, the chairman of the management board has a casting vote, unless the articles of association determine otherwise. For certain businesses (e.g., banks or insurance companies), at least two board members are required by law.

***Management board***

Members of the management board are appointed by the supervisory board. The Corporate Governance Code requires that, when appointing management board members, the supervisory board has to make sure that a profile of qualification is established and complied with and that management board members have not been convicted of a crime by a final judgment. Unlike in the German Corporate Governance Code, there is no provision aiming to promote diversity or appropriate representation of women on the management board. Members of the management board may not

be appointed for a period exceeding five years. The appointment may be renewed, provided that the term of each renewal does not exceed five years. It is common practice to reappoint management board members for a new term of office a few months prior to the original end of the term. Austrian scholars are of the opinion that this practice does not violate the law provided that the ordinary time periods for preparing job rotations are complied with; a period of one year is argued to constitute an absolute limit.

The supervisory board may dismiss members of the management board for good cause only. Good cause is in particular deemed to exist in the event of a material breach of duty, or – without fault – a management board member's inability to properly carry out his or her duties (e.g., because of long-lasting illness or a habitual lack of required skills or knowledge) or in cases where the shareholders' meeting has voted to withdraw confidence, provided that such a vote has not been adopted for apparently inappropriate reasons.

***Supervisory board***

The supervisory board must consist of at least three members. The maximum number of supervisory board members permitted by law depends on the registered share capital of the stock corporation; the number increases from seven members for stock corporations with a registered share capital of up to €350,000 to an absolute maximum of 20 members for stock corporations with a registered share capital of more than €3.5 million. A Corporate Governance Code C-Rule provides for a maximum of 10 supervisory board members (counting capital representatives only).

Members of the supervisory board are appointed by the shareholders' meeting. In practice, the term of office of supervisory board members lasts for about five years. Renewed appointments are permissible. The Stock Corporation Act states that the shareholders' meeting has to consider diversity, appropriate age structure and internationality as well as appropriate representation of women on the supervisory board. Further, board members must not have been convicted of a crime by a final judgment. This requirement has been inserted in the Stock Corporation Act because of a corresponding comply or explain rule of the Corporate Governance Code, and shows the Code's influence on legislation.

Pursuant to the Austrian Labour Constitution Act, the works council is entitled to delegate employee representatives to the supervisory board. The basic rule provides for one-third to be employee representatives (i.e., one employee representative for two capital representatives). However, if the actual number of capital representatives is uneven, the works council may delegate one additional employee representative (e.g., having six capital representatives results in three employee representatives, having seven capital representatives results in four employee representatives). Another exception applies where the supervisory board consists of three capital representatives only; the works council may then delegate two representatives instead of one. The articles of association may provide certain shareholders (or holders of certain shares, respectively) with the right to delegate members of the supervisory board up to one-third of the members of the supervisory board. Unless stated otherwise in the articles of association, supervisory board members may be removed from office during their term of appointment by a shareholders' resolution with a 75 per cent majority.

In Austria, there have been discussions about the qualification of supervisory board members and occasionally complaints about a certain lack of professionalism. By the same token, supervisory board remunerations are traditionally rather low in Austria. Pursuant to the Code, supervisory board members shall be both personally and professionally qualified for their position.

### ii Directors

*Management board*

The management board legally represents the stock corporation in relation to third parties and manages the company's business. The Stock Corporation Act sets out the general rule that – unless specified otherwise in the articles of association – several management board members are entitled to jointly represent the company. In practice, in most stock corporations management board members are either individually entitled to represent the stock corporation or two members jointly. In relation to the stock corporation, management board members must comply with restrictions set forth in the articles of association or in shareholders' resolutions; in relation to third parties, however, restrictions to the representation right are invalid.

The management board is not subject to instructions from the supervisory board or the shareholders' meeting but manages the stock corporation independently. Certain transactions (e.g., sale and acquisition of shares, sale and acquisition of real estate, granting stock options to employees) or decisions (e.g., determination of business principles, setting or giving up business or production branches, granting of power of procuration) require the consent of the supervisory board. Further, the shareholders may determine in the articles of association that certain transactions require the consent of the supervisory board.

Certain transactions (e.g., acquisition of the corporation's own shares, issuance of new shares, issuance of participation bonds or convertible bonds) and decisions (e.g., mergers, spin-offs or dissolution) require the consent of the shareholders' meeting to be valid. Further, the management board may decide to ask the shareholders' meeting for instructions on certain transactions.

The management board members are obliged to apply the care of a prudent and diligent businessperson in managing the corporation. Failure to comply with this duty of care results in the personal liability of the respective board members. Management board members are liable even for slight negligence; however, there is no strict liability. Comparable to the business judgement rule, management board members do have discretion to assume risks within business-management standards on the one hand and the economic situation of the corporation on the other hand. The level of a management board member's duty of care may vary depending on the internal allocation of duties. Management board members are subject to a statutory non-competition clause. The supervisory board may grant exceptions, both on an individual basis or in general.

*Supervisory board*

The supervisory board is responsible for supervising and controlling the management of the stock corporation's business as executed by the management board. To be able to do so, the supervisory board is entitled to review the corporation's books and records and

may, at any time, request that the management board report to it about the corporation's affairs. Even one member of the supervisory board may request such reports; however, the reports have to be addressed to the entire supervisory board.

Like management board members, supervisory board members are obliged to apply the care of a prudent and diligent businessperson. This duty of care applies to all members, also the employee representatives. Besides supervision of the management board, the supervisory board is responsible for appointing and dismissing management board members, and preventing the stock corporation from sustaining damages.

On account of their fiduciary duties, supervisory board members are not allowed to take business opportunities that are of relevance to the stock corporation. More general, supervisory board members are prohibited from taking advantage of their position to the detriment of the stock corporation.

***Delegation of board responsibilities***

Pursuant to the regime of the Austrian Stock Corporation Act, members of the management board collectively manage the business of the stock corporation and are collectively responsible for their actions. However, the articles of association, or the supervisory board, or even the management board itself may establish by-laws for purposes of delegating responsibilities within the management board. The Corporate Governance Code contains a C-Rule suggesting the creation of such by-laws. In practice, responsibility for the management of certain departments (e.g., tax, legal, finance or IT) is delegated to individual members of the management board. Despite such delegation of board responsibilities, the Austrian Supreme Court still holds that all board members remain responsible and are obliged to obtain information about developments and activities in other departments and to act in the event of deficits. Certain tasks remain the collective responsibility of the management board (e.g., basic decisions on business policy or the obligation to call a shareholders' meeting if the corporation's own capital is equal to or lower than the corporation's registered share capital).

Members of the supervisory board are entitled to delegate powers. For listed companies, the Financial Market Authority's (FMA) Regulation on Compliance for Issuers requires that the supervisory board separates units of organisation to prevent circulation of insider information.

***Separation of roles of the chairs of the management and supervisory boards***

Provided that the management board consists of more than one member, the supervisory board may appoint a chair of the management board; the Corporate Governance Code contains a C-Rule on the appointment of a chair of the management board. In Austria, the chair (CEO) is traditionally given the title of a 'general director'. The chair of the management board is granted a decisive vote on board meetings, unless the articles of association determine otherwise. The chair of the management board carries internal tasks like preparation, convocation and documentation of board meetings. However, the chair of the management board is neither entitled to give instructions to other management board members nor obliged to supervise other board members in excess of the general responsibility of all board members to do so (i.e., to obtain information about developments and activities in other departments and to act if there are deficits).

The members of the supervisory board are obliged to appoint a chair of the supervisory board and at least one vice chair. The chair may be a supervisory board member elected by the shareholders or an employee representative. Austrian scholars often describe the chair of the supervisory board as a *primus inter pares*. The chair of the supervisory board chairs the shareholders' meetings and is entitled to demand a report from the management board even without the other supervisory board member's support. Similar to the CEO, the chair of the supervisory board carries certain administrative duties (e.g., preparation and convocation of board meetings, including agenda and resolutions, or the organisation of an information system).

***Remuneration of the management board***

When determining the compensation for management board members, the supervisory board has to make sure that the total compensation is appropriate both (1) for the tasks of a specific board member and (2) with regard to the situation of the stock corporation. The term 'compensation' within the meaning of the relevant provision of the Austrian Stock Corporation Act is broad and includes pensions, cars, apartments and all other benefits. The Compliance Code provides for a fixed and a variable component; variable remuneration must be based on long-term and also non-financial criteria, and shall not be an incentive leading to the assumption of inappropriate risks. Further, the corporation should be entitled to claim variable payments back if it turns out that these payments were made on the basis of apparently false data.

If stock options are granted to management board members, the criteria must be long-term, measurable and sustainable. The vesting period must not be less than three years. The same principles are also applicable to the remuneration of key employees.

The stock corporation's annual reports have to include the total salary of the management board and the number and distribution of stock options. The corporate governance report in addition states the proportion of fixed and variable remuneration and the remuneration of board members on an individual basis. In a currently pending case, it has transpired that the stock option programme of Telekom Austria had been manipulated to the detriment of the corporation and to the benefit of the management board and certain key employees. The triggering event of the stock option plan was the stock price on a certain date. At the very last moment, the stock price rallied up so that the stock option was actually triggered. Investigations have led to the existence of a major order that was responsible for manipulating the price.

The supervisory board has to make sure that management board members are not granted redundancy payments if a contract is terminated with cause and that redundancy payments do not exceed two years' salary if a contract is terminated without cause.

***Remuneration of the supervisory board***

The remuneration of the supervisory board is determined either in the corporation's articles of association or by the shareholders' meeting. Remuneration must be in accordance with (1) the tasks of the supervisory board members and (2) the situation of the stock corporation. The remuneration payments are published in the annual corporate governance report on an individual basis. The basic principle is that supervisory board members should not be granted stock options; nevertheless, if there are stock options, the shareholders' meeting is competent to decide on all details of such option programmes.

***Management board conflicts of interest***

Members of the management board have to decide skilfully and without consideration of their own interests or those of dominant shareholders. In the case of a conflict of interest, management board members are obliged to inform both the other members of the management board and the supervisory board. All transactions between members of the management board (including close persons or entities) and the stock corporation need to be made under arms'-length principles, meet industry standards and be authorised by the supervisory board. Without the supervisory board's approval, members of the management board must neither operate another business, nor become a supervisory board member of another company, nor make business in the stock corporation's branch of business. Even with supervisory board approval, the total positions in non-group supervisory boards must not exceed four; chairing a supervisory board counts for two positions in this regard.

Regarding insider trading, the Stock Exchange Act requires that management board members (as well as other employees with access to relevant information) inform the FMA about transactions with securities of the stock corporation or affiliated companies within five business days. To prevent insider trading, listed stock corporations must enact a compliance code for issuers with internal guidelines for handling sensitive information.

***Supervisory board conflicts of interest***

Supervisory board members must not accept a management or supervisory position in a company competing with the stock corporation. Whenever a conflict of interest arises, the chairman of the supervisory board has to be informed; if the conflict involves the chairman, the vice chair has to be informed. Unless it is within the ordinary course of business, stock corporations must not grant loans to supervisory board members. Any agreement between a member of the supervisory board and the stock corporation requires the consent of the supervisory board; the same rule applies to agreements with companies where a supervisory board member has substantial economic interests. The stock corporation's corporate governance report has to contain information about the subject matter and compensation involved in such agreements.

Pursuant to the Corporate Governance Code, members of the management board are prohibited from holding more than four supervisory board positions in non-group corporations; chairing a supervisory board counts for two positions in this regard. Members of the management board may not be appointed as supervisory board members during their term. In 2012, a cooling-off period has been introduced in the Stock Corporation Act, according to which members of the management board may not be appointed as supervisory board members for a period of two years after the end of their term in the management board unless a majority of more than 25 per cent of the shareholders has proposed the candidate.

Members of the supervisory board are prohibited from holding more than eight supervisory board positions; chairing a supervisory board counts for two. Further, supervisory board members who are also board members in another stock company are prohibited from holding more than four supervisory board positions in non-group corporations; chairing a supervisory board counts for two. Supervisory board members must not be on the management board of the same stock corporation or one of its subsidiaries. Further, the majority of supervisory board members (capital representatives)

need to be independent of the corporation and its management board. A supervisory board member is deemed to be 'independent' under the Code if there is no personal or business relation to the corporation or its management board that causes a material conflict of interest and that could therefore influence the behaviour of said supervisory board member. Annex 1 to the Code gives guidelines for the prevention of such material conflicts of interest: A supervisory board member should not

- *a* have been a member of the management board (or senior executive) of the company or a subsidiary in the last five years;
- *b* have entertained a business relationship with the company or a subsidiary to an extent that is important to the supervisory board member (group companies are excluded);
- *c* have acted as auditor in the last three years;
- *d* be member of a management board in a company where a 'supervised' management board member is a supervisory board member;
- *e* serve in the supervisory board for more than 15 years (exceptions apply to major shareholders and their representatives); or
- *f* be a close family member of a management board member.

***Committees***

The Corporate Governance Code suggests that the supervisory board establishes qualified committees to assess complex issues more efficiently. For listed companies, the establishment of an audit committee is mandatory; such an audit committee has to supervise the financial accounting of the stock corporation, its internal control system, risk management, the work of the auditors and issues relating to the financial statements (e.g., proposals for dividend payments, and annual reports). The Corporate Governance Code explicitly provides for the possibility of executive sessions (i.e., meetings between the auditors and members of the audit committee without the attendance of the management board). Other – merely suggested – committees under the Corporate Governance Code include a nomination and a compensation committee. If the supervisory board has more than six members, nomination and compensation committees should be established.

***Board and company practice in takeovers (takeover defences, share issuance and repurchase, etc.)***

Under the Austrian Takeover Act, both the management and supervisory board of a target company are subject to principles of objectivity and must not take any measures that could prevent the shareholders from taking a free and duly informed decision about an offer. With the only exception being obtaining competing offers (from 'white knights'), for all measures that could prevent the success of the offer, the management and the supervisory boards of a target company require the consent of the shareholders' meeting.

The management and the supervisory boards are obliged to publish a reasoned statement regarding the offer. Such a statement has to contain both boards' assessment of the consideration offered by the bidder, the expected consequences of a successful takeover for the company, its employees (in particular the terms and conditions of employment and working conditions), the company's production and other sites, creditors, strategic goals pursued by the bidder and information on whether the members of the management board and the supervisory board intend to accept the offer. If the

management and supervisory boards deem a recommendation to be inappropriate, they are obliged to state arguments for both acceptance and refusal of the offer.

## III DISCLOSURE

### i Companies register

Austrian stock corporations as well as limited liability companies are registered with the register of companies kept by the competent trade court. The register is available to the public and contains, *inter alia*, the articles of association and the balance sheets.

### ii Corporate governance report

Listed companies have to draw up a corporate governance report with a corporate governance code, explanations where and why the company's corporate governance code deviates from the Code's C-Rules, if any, as well as information about the board members (including total remuneration of each member of the management board) and information on committees (composition and working procedure). The auditors verify whether a corporate governance report has been drawn up, the supervisory board reviews the report in general and the Vienna Stock Exchange reviews it against prime market rules.

### iii Insider information

To prevent insider trading, listed companies are also obliged to publish without undue delay, any information directly relating to the issuer (*ad hoc*) that is not publicly known if such information could have a material impact on the market price of the relevant securities.

### iv Disclosure of shareholdings in listed companies

Any person whose shareholdings in shares of a company with its corporate seat in Austria admitted to trading on the organised market on a stock exchange of a Member State of the European Union reach, exceed or fall below the thresholds of 20 per cent, 33 per cent or 50 per cent of the voting rights in such a company, by way of an acquisition, a disposal or otherwise, is obligated to disclose such a circumstance to the FMA.

## IV CORPORATE RESPONSIBILITY

The concepts of corporate responsibility and corporate compliance have gained importance in Austria over recent years. Corporate scandals regarding corruption and violations of antitrust or privacy laws have led to criminal proceedings against well-known former management board members, and have increased public awareness. Compliance codes and compliance officers have gained both importance and influence in daily corporate life and the importance of the 'tone from the top' principle is emphasised. Companies have established whistle-blowing hotlines; however, no standard application has yet been adopted by the Austrian Data Protection Authority. As a consequence, notifications of whistle-blowing systems must still be made individually to the Data Protection Authority. Because such systems typically involve the processing of sensitive

data, their implementation and operation generally require the prior permission of the Data Protection Authority.

## V SHAREHOLDERS

As a general rule, all shares in Austrian stock corporations provide for equal rights, including equal voting rights, rights to receive dividends and information rights. The Stock Corporation Act prohibits the creation of shares with multiple or disproportionate voting rights (no golden shares). The articles of association may, however, provide for limitations on shareholder's voting rights by way of maximum voting rights or staggered voting rights. Further, with the approval of the shareholders' meeting, a stock corporation may issue non-voting preferred shares in a nominal amount of up to one third of its registered share capital. Unlike Germany, where minority shareholders often exercise a certain influence in shareholders' meetings, Austria has no tradition of shareholder activist groups. Nevertheless, the Austrian Shareholder Association (IFA) is becoming more active in the representation of shareholders (e.g., in shareholders' meetings, in filing complaints or issuing opinions on proposed legislation).

The shareholders of a stock corporation have no direct influence on the management board. They have no right to issue instructions to the management board or to otherwise direct the management of the corporation. The influence of shareholders is limited to electing members of the supervisory board, who in turn appoint the members of the management board. However, a minority of 5 per cent of the registered share capital of a stock corporation is entitled to demand the convocation of a shareholders' meeting or request that a certain matter is put on the agenda of a shareholders' meeting. The minority may also request information and file petitions regarding all issues of the agenda of a shareholders' meeting; this does not comprise the right to demand that the management board circulate statements of dissenting shareholders.

Both controlling and minority shareholders are subject to a fiduciary duty deriving from the articles of association. Under this duty, shareholders in particular are prohibited from causing harm to the corporation. Shareholders' resolutions breaching fiduciary duties may be contested and may give raise to damage claims against the stock corporation and its shareholders. The stock corporation has to claim damages from shareholders if (1) a minority of 10 per cent so demands and (2) the claims are not obviously without merit. Basically, any shareholder who participated in a shareholders' meeting and objected to a certain resolution adopted at such a meeting is entitled to file an action with the court against the shareholders' resolution and demand to have it declared void.

Certain decisions are reserved to the shareholders' meeting by statutory law, such as the appointment of members of the supervisory board, the allocation of distributable profits, the appointment of the auditor, the amendment of the articles of association, measures to increase or reduce the share capital or obligations to transfer assets of the company. In addition, certain decisions of the management board are subject to approval by the shareholders' meeting. Pursuant to the *Holzmüller* doctrine, developed by the German Federal Supreme Court's landmark decision, the management board is obliged to obtain the approval of the shareholders' meeting where the proposed transaction is of outstanding importance and could substantially affect the shareholders' rights. In

Austria, it is currently disputed whether a delisting would require a resolution by the shareholders' meeting. In Germany, it is held that neither delisting nor downgrading (i.e., the change from trading on the regulated market to a qualified segment of the open market) affects the constitutional rights of the shareholders.

## VI OUTLOOK

There is an ongoing debate about establishing a mandatory quota for the representation of women in management and supervisory boards. While the latest amendments in the Stock Corporation Act have led to the implementation of the diversity rule for elections of the supervisory board, there is no such rule yet with regard to the appointment of management board members. With the whole data protection regime currently being under revision, we also expect new developments in respect of existing conflicts involving corporate compliance and employee data protection.

'Say on pay' principles have not been implemented in the Austrian legal regime yet. While the German Stock Corporation Act has already been amended and now provides at least for an advisory role for the shareholders' meeting with regard to the remuneration of the management board, no such proposals have been initiated in Austria. More emphasis is also expected on social corporate governance and corporate responsibility. Companies' handling of environmental issues, social and employee matters, anti-corruption and compliance with fundamental human rights are all expected to come under scrutiny.

## Appendix 1

# ABOUT THE AUTHORS

**WOLFGANG THOMAS GRAF**
*Graf Patsch Taucher Rechtsanwälte*
Wolfgang Graf studied law at the University of Vienna and Penn State University and was an Erasmus scholar at the Université catholique de Louvain, in Louvain-la-Neuve.

After receiving his doctorate in law and his LLM in US law, he joined CHSH in 1998. In 2004, Wolfgang was a co-founder and became a partner at Graf Patsch Taucher.

Wolfgang Graf advises domestic and international clients mainly on Austrian corporate legal issues and mergers and acquisitions. He is a lecturer at the Vienna University of Technology (TU) and at the University of Applied Sciences Wiener Neustadt, and vice president of the Institute for Forensic Analysis.

Wolfgang is admitted to the Bar in Austria and in the state of New York.

**GRAF PATSCH TAUCHER RECHTSANWÄLTE**
Brucknerstrasse 2/4
1040 Vienna
Austria
Tel: +43 1 535 48 20
Fax: +43 1 535 48 20 44
wolfgang.graf@gpra.at
www.gpra.at